

Hackney Council
Planning and Regulatory Services
2 Hillman Street
London E8 1FB

Attn: John Allen, Assistant Director (Planning
Regulatory Services) (by email and post)

copy: Ben Burgerman (Legal Services)

Your ref: 2013/1583 and 2013/3187

Our ref: PYY1-001/RB/CB

Email: [REDACTED] &
[REDACTED]

14 March 2014

Dear Sirs

**Proposed claim for judicial review, development of land at Wilmer Place, 193-201
Stoke Newington High Street**

1. This is a pre-action protocol letter under the Judicial Review Pre-Action Protocol in support of an application to apply for judicial review to quash the decisions issued on 14 February 2014 in relation to the above under your references 2013/3186 and 2013/3187.

Claimant

2. The Claimant is Mr Nicholas Perry of [REDACTED] London N16 [REDACTED]. As you know, he is a local resident and the claimant in active judicial review proceedings (claim number CO/13423/2013) against the decision of the Council to grant permission to an identical application on 8 August 2013 (reference 2013/1583 and 1584).

The decision under challenge

3. The decision notices dated 14 February 2014 granting planning permission and conservation area consent for demolition and development at the above address, as described in the decision notices under the above references.

Order sought

4. The following orders will be sought from the Court:
 - a. An order linking this claim to claim CO/13423/2013;
 - b. An order quashing the said decision notices; and

- c. Costs.

The issue

5. The background to the claim is familiar to the Council. The application site is 0.511 ha in size and currently comprises of a three story building subdivided into a number of business unit, surrounded by a car park. The site also includes a group of four terraced buildings dating from the Victorian period fronting Stoke Newington High Street. The application site falls within the Stoke Newington Conservation Area and is adjoined by Abney Park Cemetery, a registered park and garden of special historic and scientific interest which is designated as a Local Nature Reserve and Area of Conservation Importance.
6. An application for planning permission and conservation area consent (2012/2228 and 2012/2229) was submitted to the Council on 9 July 2012 for the erection of a 5 storey building involving ground floor retail use and 54 residential units above. The application was refused, following consideration by the planning subcommittee on 16 April 2013 as:
 - a. The proposal, by reason of its sitting, design and massing would fail to respond to the local character of the site and result in substantial harm to the character and setting of surrounding heritage assets, in particular the Stoke Newington Conversation Area, Abney Park Cemetery and gates. This harm would not be outweighed by associated public benefits from the development;
 - b. The proposal by reason of its sitting, design and massing would result in substantial adverse impacts upon natural habitats and biodiversity within Abney Park Cemetery;
 - c. The proposal failed to provide an adequate proportion of family sized units.
7. A similar application for redevelopment (2013/1583, 2013/1584), involving the construction of a 5 storey building with ground floor retail use and 53 residential units was received by the Council on 15 May 2013. Despite the considerable similarity with the previous application, and widespread opposition from the local community, planning consent was granted 8 August 2013. The decision to grant planning permission is currently subject to judicial review proceedings by the Claimant, for which permission has been granted and a substantive hearing listed for 19 May 2014. A copy of the Grounds of Claim is attached to this pre-action letter for convenience.
8. The current application, identical to 2013/1583, once again despite widespread opposition from the local community, was granted planning consent on 14 February 2014. The Claimant considers that the decision is unlawful as:
 - a. The decision was taken in a procedurally unfair manner (Ground 1);
 - b. The decision proceeded upon errors of fact and law and was otherwise perverse (Ground 2);

Ground 1: procedural unfairness

9. The Council's development plan policy 20 states:

“Affordable housing will be sought on all developments comprising 10 residential units or more. New housing should seek to meet a borough wide target of 50% of all units subject to site characteristics, location and overall scheme viability. The Greater London Authority's Affordable Housing Toolkit Assessment or a similar scheme appraisal model should be used in presenting the viability of a scheme.”

10. The current development offers 17% of the housing as affordable. The developer sought to justify this shortfall on the basis that any higher offering would result in the development ceasing to be viable. The developer sought to rely on the viability information previously supplied to the Council for application 2012/2228, namely a report titled GL Hearn Financial Viability Assessment, dated May 2013¹, which had been reviewed by council officials and external surveyors when granting permission for the previous application.²
11. As the discussion at the Planning Sub-Committee on 11 December 2013 demonstrates, whether this aspect of the application was non-compliant with development plan policy 20 was a key issue in deciding the application. The minutes of the Committee record that the offering is “*disappointingly low*”³, indeed significantly below not just the 50% requirement but also the offering typically achieved within Hackney in recent years (which is over 35%)⁴.
12. The basis for the applications purported compliance with policy 20 is contained in the Officer Report at paragraph 6.9.13, which states that:

“The appraisal shows that provision of affordable housing is constrained by the site constraints such as proximity to a number of heritage assets, which limits the scale of development that can be accommodated on site. When taking into account the existing use value of the site, build costs and associated professional fees for the development, alongside potential sales values from residential units and rental yield from the proposed retail unit, the amount of affordable housing proposed is the maximum amount that can be reasonably achieved on the site.”

13. Although the Claimant wished to challenge the viability assessment put forward by the developer, he was unable to do so due to key information being withheld from public scrutiny. The Claimant’s attempts to obtain this information include:
 - a. For the first application, a request for the appraisal was turned down by the case officer on 9 August 2012 on grounds of commercial confidentiality;
 - b. Requesting the applicant viability statement and the Council-commissions reports on 4 October 2013;
 - c. By return, the planning officer said he could not release the information and advised the Claimant to make a formal FOI request, which the Claimant did;
 - d. The Claimant pursued the information on 24 & 30 October 2013 by email and was furnished with the redacted summary of the applicant’s assessment on 30 October 2013.
 - e. The Claimant sought to clarify if the redacted statement was all that was to be released, and asked again for the missing information by return in an email to the Head of Development Management and others on 30 October 2013.
 - f. That request remains unanswered despite being pursued on 6 November 2013 and via a formal internal appeal on 13 February 2014 that laid out this history in detail.
14. As above, the Claimant was provided on 30 October 2013 with a heavily redacted ‘Financial Viability Assessment’ in response to his request on 4 October 2013, in which every figure is redacted (adopted rates for private sales, rental yields, market rent

¹ The Report states that the development appraisal was undertaken using an ‘Argus (Circle) Developer’, said to be ‘an industry standard development appraisal package’: GN Hearn Report paragraph 3.35.

² Officer Report paragraphs 6.9.12-6.9.16.

³ Minutes of the meeting of the Planning Sub-Committee on 11 Dec 2013 at paragraph 6.13.

⁴ Transcript of Committee meeting of 11 Dec 2013, answer of Kersley to a question from the Chair. Also Minutes (ibid) paragraph 6.12

figures, build costs etc.). Without any figures the Claimant is unable to meaningfully engage as to whether the Council Officer is correct to assert that build costs and associated professional fees for the development, alongside potential sales values from residential units and rental yield from the proposed retail unit demonstrate that the amount of affordable housing proposed is the maximum amount that can be reasonably achieved on the site. Nor has the Claimant been provided with the Council commissioned assessment by Jones Lang LaSalle of the applicant's assessment, and so is similarly unable to assess whether the review applied adequate scrutiny to the applicant's claims.

15. Preventing the Claimant's effective participation in this crucial part of the planning process was both contrary to the common law duty of procedural fairness which applies to the determination of planning applications (see, for example, the comments of Woolf J in R v Monmouth District Council ex parte Jones [1985] 53 P&CR 108 at 115) and could not be justified on its own terms: the redactions have not been justified other than by a generic appeal to commercial confidentiality and 'usual practice'⁵. Indeed, it appears to the Claimant that some of the redacted figures, rather than being highly sensitive commercial information, may have been based upon some form of standardised assumptions (for example, % rental yields) which would presumably not carry any possible suggestion of confidentiality.
16. It does not fall to the developer to dictate which aspects of the application should be subjected to public scrutiny and which should not, and by failing to either publish the viability appraisal and review (as the Council would be entitled to do, see, for example, the analysis in Bristol City Council v IC (Environmental Information Regulations 2004) [2010] UKFTT EA 2010 0012 (GRC)⁶) or determine that the developer could not rely on information withheld from publication without adequate justification, the Council has acted in a manner which is procedurally unfair. Further, transparency is accorded particular importance in environmental decision making (R. (on the application of Halebank PC) v Halton BC [2012] EWHC 1889 (Admin), this being a development which it is not disputed will have an adverse heritage and ecology impact).

Ground 2: perversity/irrationality/ inadequately reasoned

17. The decision to grant planning permission, informed by the officer's report, is perverse and/or irrational and/or inadequately reasoned.
18. First, the entire approach for determining the application proceeded upon an incorrect premise. Whilst the Officer's Report correctly advised at paragraph 6.17.9 that the "*application should be determined on its merits*" and that "*the previous grant of planning permission should not be regarded as binding*" the Officer continued that: "*However, if a different conclusion were to be reached on the planning merits from that reached previously it would have to be justified.*"
19. By adopting this approach the Council's Decision in effect adopts the reasoning and conclusions for previously granting permission. For the reasons fully set out in the attached Grounds of Claim, those reasons and conclusions were erroneous, proceeding upon a number of errors of law including (1) breach of the EIA Regulations (2) failure to take account of development plan policy and other relevant considerations and (3)

⁵ See the discussion between the Chair and Edwards on viability in the transcript of the Planning Sub-Committee meeting of 11 December 2013: **Chair**: In terms of us councillors seeing this documentation, we don't normally see this...and this is because of commercial confidentiality? **Edwards**: That's right. **Chair**: And that is what normal ordinary councils do? **Edwards**: Yes."

⁶ See too the approach of the Information Commission in Decision FER0461281, 16 July 2013 and FER0449366, 27 September 2012.

procedural unfairness. By adopting those conclusions and requiring specific justification to depart from them, those same errors infect the current Decision and for the same reasons it cannot stand. The correct approach would have been to consider the application on its own terms, which the Council has failed to do.

20. In addition, the decision proceeds upon a number of factual and legal errors which vitiate the conclusions reached.
21. Regarding the impact of the development on heritage, Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning decisions should be made in accordance with the development plan unless material considerations indicate otherwise. Sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provide that:

“66(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

72(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.”

22. The effect of these provisions is that adverse heritage impacts are not one consideration among many, but factors of special statutory status to be accorded due weight (East Northamptonshire DC v SoS for Communities and Local Government [2013] EWHC 473 (Admin) at [39]; Forest of Dean DC v Secretary of State for Communities and Local Government [2013] EWHC 4052 (Admin) paragraph 38; North Norfolk District Council v Secretary of State for Communities and Local Government [2014] EWHC 279 (Admin) paragraph 82). It is against that statutory and policy background that the decision must be assessed. So too, it is against that statutory background that paragraph 134 of the NPPF must be understood:

“134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.”

23. The NPPF is not seeking in this paragraph to rebalance what is required by the statutory duties in respect of heritage assets, nor in any way overriding the effect of section 38(6) (nor could it). It is merely stating what is inherent in any planning judgment: that the benefits must be weighed against the harm. Indeed, paragraph 137 NPPF requires local planning authorities to look for opportunities for new development to enhance the significance of conservation areas.

24. As the site falls within a conservation area, Core Strategy Policy 25 (Historic Environment), an important development plan policy, required that:

“All development should make a positive contribution to the character of Hackney’s historic and built environment. This includes identifying, conserving and enhancing the historic significance of the borough’s designated heritage assets, their setting and where appropriate the wider historic environment.”

25. Policy 7.8D of the London Plan similarly requires that *“Development affecting heritage assets and their setting should conserve their significance, by being sympathetic to their form, scale, materials and detail.”*
26. The Council’s emerging Site Allocations LP states in respect of the site that any redevelopment will need to preserve and enhance the character and appearance of the Conservation Area and respect the heritage of the cemetery. The Stoke Newington Conservation Area Appraisal of 2004 states that in future new development should be kept as far away as possible from the walls of the Cemetery to preserve the setting of the cemetery.
27. As the Officer’s Report recognises, the scheme will adversely impact upon heritage assets and, for that, reason, conflict with the Development Plan⁷. In considering whether to grant planning permission, in light of the statutory duties outlined above and the requirements of the development plan, the Council decision proceeds upon a number of serious errors. Whilst the Officer Report recognises (paragraphs 6.11.21 and 7) the conflict with Core Strategy 25 and London Plan 7.8 and so with the development plan, the Report and subsequently the Council fail to consider and properly reason whether *“other material considerations”* outweigh the harm caused. After recognising the conflict, the Officer Report concludes that: *“However other material considerations including heritage based benefits of the proposal would outweigh the limited harm caused.”* Both the Council and English Heritage having found that the development will adversely impact on heritage, that harm cannot be outweighed by heritage based benefits. If it could, there would be not harm to outweigh. Nor are the other material considerations which supposedly tip the balance discussed or analysed. Further, the analysis of the Officer Report and the Council fails to have special regard, or to properly set out that special regard, to the desirability of preserving the listed buildings and/or the special character of the local area as required.
28. Further, the decision proceeded on the basis of a number of irrational and erroneous premises.
29. First, the evidence of English Heritage, in its letter of 7 June 2013, is that although changes to the proposed development *“reduce the harm to the settings of the heritage assets... we remain of the view that the substantial scale of the proposed new building means that the harm we have previously set out cannot be completely mitigated.”* The Officer’s Report presents this view as a concession that *“the proposals would now result in less than substantial harm to adjacent heritage assets”*⁸. That is not a legitimate reading of English Heritage’s views and the Council has proceeded upon a mistaken basis in treating it as such. This was an important error, because it seems to have been the basis of the Council’s subsequent approach to the questions it posed itself pursuant to NPPF and development plan policy.
30. Second, the approach recommend by the Officers and adopted by the Planning Sub-Committee proceeds upon an error of law. Paragraph 6.11.21 of the Officer Report recognises that Core Policy 25 and London Plan Policy 7.8 *“do not provide for a balance to be struck where less than substantial harm is caused to a heritage asset”*. The Officer Report concludes from this that the policies *“are not consistent with the NPPF and the weight accorded to the conflict with these policies should accordingly be reduced as advised by paragraph 215 NPPF.”*⁹

⁷ Officer Report paragraph 7.1 and 7.2.

⁸ Officer Report paragraph 6.11.19.

⁹ Paragraphs 214 and 215 NPPF provide that:

214. *For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework*

31. This approach is mistaken. As discussed above, read in light of the statutory duties, there is no conflict between Core Policy 25 and London Plan Policy 7.8 and paragraphs 124-137 NPPF (see, similarly, Forest of Dean DC v Secretary of State for Communities and Local Government [2013] EWHC 4052 (Admin) paragraph 48). Because of this mistake, the Council has erroneously treated those policies as being of reduced weight. Further, the objectives of Core Policy 25 and London Plan Policy 7.8 closely mirroring the statutory framework imposed by the s66 and 72 of the 2004 Act, the Council has likewise failed to correctly apply those statutory duties.
32. Alternatively, in the event there is any inconsistency between those policies and the NPPF, the NPPF does not obscure the force of the statutory primacy for the development plan where that is reinforced by the Listed Buildings/Conservation Area duties.
33. Third, the Officer Report and Council placed undue and mistaken weight on the NPPF reference to substantial harm. Paragraph 134 on its own terms allows development consent to be refused where less than substantial harm is caused, *a fortiori* when read together with the relevant statutory duties. The Council, however, appear to have proceeded upon the mistaken assumption that planning permission could not be refused on the basis of a less than substantial impact upon heritage assets:
- “Chair:** *Your summary of that is that’s less than substantial harm and in terms of the material planning policies we would not be able to sustain a refusal if we wanted to?*
- Ashby:** *In my view, it is less than substantial harm. English Heritage came to that view independently...If it was substantial harm I would recommend refusal.”*
34. In addition to the above, the Council’s decision to grant planning permission was irrational in the circumstances of the application. It was accepted that the proposal was harmful to heritage assets, would have an adverse ecology impact¹⁰ and fell considerably short of the affordable housing target (and the usual level of affordable housing typically achieved) and was therefore not in accordance with the development plan. The figures upon which the applicant’s viability assessment was based had not been made available to the councillors or to the public for scrutiny, nor had the Council’s review. Additionally, the application was near identical to an application the Council had previously refused and continued to be subject to overwhelming local objections. When these matters are taken together, the Council’s conclusion that the benefits of the application justified departing from the development plan was irrational.
35. Alternatively, for the same reasons, the decision was inadequately reasoned. The Officer’s Report, which it is a reasonable inference persuaded the members (R. v Mendip District Council ex parte Fabre (2000) 80 P. & C.R. 500 at 511) wholly fails to engage with the above matters or justify the conclusions reached on the main issues.
36. For these reasons, the decision is unlawful and should be quashed.

215. *In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).*

¹⁰ Clare Wilmer (Ecology Consultant) informed the Committee that “I don’t think myself or the applicant’s ecologist has denied there’s going to be some impact on the ecology.”

Action that the defendant is expected to take

37. Agree to submit to the quashing of the grant of permission upon the bringing of judicial review proceedings and to payment of the claimant's costs.

Overlap between this claim and CO/13423/2013

38. The planning consent subject to challenge by this claim is identical to that challenged in case CO/13424/2013. In the event the Council does not agree to submit to the quashing of the grant of permission, the Claimant intends to apply to have claims linked and heard together on 19 May 2014. This proposal avoids the needless duplication of work and cost. If the claim is to be resisted, the Council will kindly confirm whether it consents to this course of action.

39. The Claimant has the benefit of a protective costs order in the first claim for judicial review. The Claimant would, in this judicial review, be entitled to a protective costs order pursuant to CPR 45.41 and 45.43. Given that these two claims will be linked, the Claimant will seek an order that there should be a single cap relating to both claims.

Interested parties

40. Newmark Properties Ltd, and Sainsbury's Supermarkets Ltd. We are copying this letter to Berwin Leighton Paisner who are representing Newmark, and to Turley Associates who are representing Sainsbury's.

Legal Advisors

41. Richard Buxton Environmental and Public Law, 19B Victoria Street, Cambridge, CB1 1JP, Attn: Richard Buxton [REDACTED] and Carolyn Beckwyth [REDACTED].

Documents sought

42. Please provide a non-redacted copy of the viability appraisal(s) in relation to this and the earlier grant of planning permission and non-redacted copy of the review(s) of that viability appraisal and any other documentation related to the assessment of viability.

Proposed reply date

43. The Claimant requests that any reply be sent by Wednesday 26 March 2014.

Yours faithfully

Richard Buxton

cc by email and post Berwin Leighton Paisner (Vicky Fowler)
Turley Associates (Will Kumar)