Neutral Citation Number: [2014] EWHC 3499 (Admin)

Case No: CO/1377/2014 & CO/13423/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2014

Before:

THE HONOURABLE MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN (on the application of NICHOLAS PERRY)	**Claimant**
- and -	
LONDON BOROUGH OF HACKNEY	**Defendant**
- and -	
(1) NEWMARK PROPERTIES LTD **(2) SAINSBURY'S SUPERMARKETS LTD**	**Interested Parties**

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- -

Philip Coppel QC, Alex Goodman and Richard Clarke (instructed by **Richard Buxton**) for the **Claimant**
William Upton and Emmaline Lambert (instructed by **London Borough of Hackney Legal Services**) for the **Defendant**
Reuben Taylor QC (instructed by **Berwin Leighton Paisner**) for the **First Interested Party**

Hearing dates: 14-16 October 2014

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Approved Judgment

Mrs Justice Patterson:

Introduction

1. These are claims for judicial review of two planning permissions granted by the London Borough of Hackney, the defendant, dated 8 August 2013 and 14 February 2014 respectively. Each planning permission was granted in the following terms, namely, for:

> "Demolition of buildings on land at Wilmer Place and the rear parts of 193-201 Stoke Newington High Street, with retention of front Stoke Newington High Street façade, in connection with associated planning application for redevelopment to provide a retail unit at ground floor level with 53 units above."

2. The claimant has lived in Stoke Newington since 2001. He has been an active participant in both planning applications as a co-ordinator of the "Stokey Local" campaign which has opposed recent development proposals at Wilmer Place.

3. The first interested party is the applicant for planning permission. The second interested party has taken no part in the proceedings. In the rest of this judgement when I refer to the interested party it is to the first interested party.

4. The proposed development is on a 0.51 hectare site within the district centre of Stoke Newington. The application proposals involve the partial demolition of the buildings on the site and its redevelopment with a 4,142 sq. m. food store on the ground floor with fifty-three residential units above. Nine of those residential units are to be affordable dwellings.

5. On each occasion the planning application was accompanied by an application for conservation area consent.

6. The claimant seeks orders quashing each of the planning permissions and conservation area consents. For ease of reference I will refer to the planning permission dated 8 August 2013 as JR1 and that dated the 14 February 2014 as JR2.

Issues

7. There are 6 main issues. They are:

   i) In both applications was there a proper consideration of the viability appraisal with regard to affordable housing in the development?

   ii) In both applications was there was a proper assessment of the impact of the development on heritage assets?

   iii) In JR1 only, did the defendant fail to adopt and publish on the planning register a screening opinion in accordance with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, the Environmental Impact Assessment Directive and obligations under the EU Treaty?

iv) In JR2 only, did the defendant act unlawfully in failing to provide the claimant with the proposed section 106 obligation to enable the public to comment upon?

v) In JR2 only, did the defendant adopt an erroneous approach to the first grant planning permission in that it failed to direct members' attention in JR2 to the claimant's grounds of challenge in JR1?

vi) In both applications, did the defendant act unlawfully in that it gave inadequate reasons for the way that it proceeded and/or act irrationally?

8. On 17 December 2013 Collins J granted permission on all grounds in JR1.

9. On 23 May 2014 I granted permission in JR2 on all grounds but refused the claimant's application for disclosure of documents relating to viability issues. That judgment is at [2014] EWHC 1721. I do not repeat its contents here. In addition, I gave case management directions which included the linking of the two claims so that they were heard together.

10. On 19 September 2014 an oral application for permission to appeal the disclosure of viability information aspect was refused by the Court of Appeal. Their judgement is to be found at [2014] EWCA Civ 1372.

Factual background

11. Newmark Properties Limited (IP) first applied for planning permission on land at Wilmer Place and the rear parts of 193-201 Stoke Newington High Street on 9 July 2012 (2012/2228). That was for a larger scheme involving the demolition of buildings on land at Wilmer Place and the rear parts of 193-201 Stoke Newington High Street with a retention of the front of Stoke Newington High Street façade, the construction of a mixed-use development comprising of a 4,142 sq. m. retail unit with 68 residential units above, 6 disabled car parking spaces, cycle stores and refuse stores.

12. On 6 March 2013 the council prepared a screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and concluded that the proposed development (which by then had been subject to amendment so that 54 residential units were proposed) was not considered likely to have significant effects on the environment by virtue of its nature, size or location.

13. The defendant's planning officer prepared a report which recommended approval of the application. On 3 April 2013 members of the planning subcommittee rejected that recommendation and refused the application for the following three reasons:

i) The proposal, by reason of its siting, 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 the surrounding heritage assets, which harm would not be outweighed by any associated public benefits from the development.

ii) The proposal, by reason of its siting, design and massing would result in substantial adverse impacts upon natural habitats and biodiversity within

Abney Park Cemetery, which harm would not be outweighed by any associated public benefits from the development.

iii) The proposal would fail to provide an adequate proportion of family sized units and would not provide a sufficient mix of smaller and larger units to fully meet housing need in the borough.

14. On 7 May 2013 the IP submitted its second application (2013/1583). That was for a mixed-use development comprising 4,142 sq. m. with fifty-three residential units above, six disabled car parking spaces, cycle stores and refuse stores. Nine of the units were to be provided as affordable housing (representing 17% of the total residential units). Revisions were designed to overcome the council's reasons for refusal in relation to the first planning application. The revised scheme reduced the overall volume of building and increased the distance from the boundary of the Abney Park Cemetery and varied the mix of the housing units.

15. No environmental impact assessment (EIA) was submitted with the application. No screening opinion was sought from the defendant.

16. On 31 July 2013 an officer's report was presented to members of the planning subcommittee with a recommendation to grant planning permission for the applications. The subcommittee resolved to grant planning permission for the application subject to a section 106 agreement and conditions. On 8 August 2013 planning permission was granted. That forms the subject matter of JR1.

17. On 25 September 2013 the IP made its third application for planning permission (application 2013/3186).

18. The third application was the subject of a separate officer report which recommended a conditional grant of planning permission. That was considered by the planning subcommittee on 11 December 2013. The sub-committee resolved that, subject to the completion of a satisfactory section 106 agreement, planning permission should be granted. As part of the officer's report there was a recommendation that there should be a mechanism for the further review of financial viability of the scheme if the planning permission was not implemented within twelve months of its grant.

19. The council's planning subcommittee resolved to grant planning permission which was duly issued on 14 February 2014, after the completion of the section 106 agreement, and which forms the subject matter of JR2.

Ground One: Was there a proper consideration of the viability appraisal which led to the defendant accepting 17% of affordable housing?

20. This ground applies to both planning permissions granted by the defendant. It has been developed during the course of the proceedings to consist of, what are described by the claimant, as seven sub-points. First, I deal with the policy background.

Policy background

21. The development plan for the purposes of this ground consists of the London Plan, adopted 2011, and the Hackney Core Strategy adopted 2010.

22. In the London Plan policy 3.8 deals with housing choice. It prescribes that in the Local Development Framework (LDF) preparation and in planning decisions boroughs should ensure that developments offer a range of housing choices and, in meeting those, provide affordable family housing as a strategic priority in LDF policies.

23. Policy 3.12 is entitled 'Negotiating affordable housing on individual private residential and mixed use schemes'. Paragraph B of the policy reads:

> "Negotiations on sites should take account of their individual circumstances including development viability, the availability of public subsidy, the implications of phased development including provisions for reappraising the viability of schemes prior to implementation (contingent obligations) and other scheme requirements."

24. The supporting text enjoins boroughs to evaluate development appraisals rigorously, drawing on the GLA Development Control Toolkit and other independent assessments which take account of the individual circumstances of a site, the availability of public subsidy and other scheme requirements.

25. In the Hackney Core Strategy policy 20 deals with affordable housing. That policy reads, where relevant:

> "Affordable housing should be sought on all developments comprising ten residential units or more. New housing should seek to meet a borough-wide affordable housing target of 50% of all units subject to site characteristics, location and overall scheme viability. The Greater London authorities' affordable housing toolkit assessment or a similar scheme appraisal model should be used in presenting the viability of a scheme."

Factual background

26. In JR1 a financial viability report (FVA) was submitted by Turley Associates, who were agents for the interested party on 7 May 2013. It was submitted with the planning application and application for Conservation Area consent. The letter of 7 May said that the FVA was submitted separately in light of its commercially sensitive material. It was to be treated as confidential information.

27. In the officer report that went to the planning subcommittee on 31 July 2013 in JR1 the section entitled 'Housing Tenure' dealt with the issue of affordable housing. The relevant paragraphs read:

> "6.5.12. As less than 50% affordable housing is proposed a 'GLA Three Dragons' viability appraisal is required to be submitted to accord with London Plan policy 3.12 and Hackney Core Strategy policy 20. This appraisal has been submitted along with additional explanatory information with regard to sales values, build costs and information on the existing use value of the site.

> 6.5.13. The appraisal and accompanying information have been reviewed by external consultants appointed by Property Services surveyors. The appraisal shows that provision of affordable housing is constrained by the reduced amount of residential floorspace as a result of the site's location in proximity to a number of heritage assets, as well as lack of grant funding for delivery of affordable housing. As such the level of affordable housing proposed is the maximum amount that can be reasonably achieved on the site.
>
> 6.5.14. It should also be noted that a greater amount of affordable housing has been submitted in comparison to the previously refused scheme on this site (ref: 2009/1264, see history section). In addition the amount of affordable housing has been fully justified in terms of viability. As such officers are of the view that the proposals would overcome reason 3 of this previously refused scheme."

28. The overall conclusion to the report, at paragraph 7.1, included the following:

> "The proposed housing provision would help to meet housing need in the borough and would make a contribution towards provision of much needed affordable housing."

29. The minutes of the meeting, at paragraph 5.11, read:

> "Discussion took place surrounding the level of affordable housing being proposed and it was explained that although the core strategy specifies a guide of 50% affordable units, the reduction in grant funding from the government had made this difficult to achieve in many cases. It was advised that each application should be considered on its own merits and given the complexity of the site, it was considered that this was the maximum amount of affordable housing that could be achieved and was in accordance with policy."

30. The defendant had instructed Jones Lang LaSalle (JLL), a firm of chartered surveyors, to carry out an independent appraisal of that submitted on behalf of the applicants.

31. The claimant did not see a copy of the FVA or the JLL review of it prior to the grant of planning permission.

32. The claimant addressed the committee on the 31 July and, according to the minutes, made no reference to the affordable housing provision within the application. On the first planning application the claimant had sent an email to the defendant in which he noted the FVA was not on the website. He asked whether the applicants had provided a model. In reply the planning officer said:

> "I am afraid the financial viability appraisal has been submitted in confidence, as it contains confidential information with regard to commercial interest. As such these appraisals are

> exempt from the Freedom of Information Act and are not put on the website. I appreciate it is not ideal from the perspective of a member of the public wanting to look into the scheme but it is the standard approach which councils take."

33. The claimant made no separate request to see the FVA prior to the grant of planning permission in JR1.

34. On 25 September 2013 the third planning application (now JR2) was submitted. Again, a FVA was submitted. In a covering letter of that date, Turley Associates said that the contents of the FVA were confidential.

35. On 30 October 2013 the defendant forwarded to the claimant a redacted version of the GL Hearn (GLH) May 2013 FVA in response to a Freedom of Information Act request that the claimant had made. The email from the defendant said that it was not the Council's procedure to disclose viability appraisals and reports commissioned by the Local Planning Authority to assess them as they contained highly commercially sensitive information. As such exemptions under section 41 (information provided in confidence) and section 43 (commercial interests) applied. To disclose the information would undermine the basis upon which it was provided. However, the defendant had approached the IP who had agreed to issue a redacted version of the FVA.

36. The claimant then emailed the defendant on that date requesting, under the Environmental Information Regulations 2004, appendices to the May 2013 FVA and reminding the defendant that he had asked for all of the applicants' statements and those commissioned by the defendant.

37. As no response was received to that email, on 6 November 2013, Mr Perry indicated that he was commencing a formal appeal under the Environmental Information Regulations 2004.

38. The officer report of 11 December 2013 on JR2 dealt with the issue of affordable housing in greater detail. The report on this aspect reads:

> "6.9.12. As less than 50% affordable housing is proposed a 'GLA Three Dragons' viability appraisal is required to be submitted to accord with London Plan policy 3.12 and Hackney Core Strategy policy 20. This appraisal has been submitted along with additional explanatory information with regard to sales values, build costs and information on the existing use value of the site.
>
> 6.9.13. The appraisal and accompanying information have been reviewed by external consultants appointed by Property Services surveyors. The appraisal shows that provision of affordable housing is constrained by the site constraints such as a 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.
>
> 6.9.14. It should be noted that the Core Strategy 50% affordable housing target was developed at a time when grant funding was available from the Homes and Communities Agency to deliver affordable housing. When such funding was available the Council's Affordable Housing Viability Study which forms part of the evidence base for the Core Strategy noted that 50% affordable housing would be achievable in a high number of scenarios. When grant funding is not available then the 50% affordable target is only achievable in a limited number of scenarios, usually involving sites with low existing use values.
>
> 6.9.15. Both London Plan and Core Strategy policies therefore recognise that the 50% target is an aspiration and not a minimum standard, and lower proportions may be acceptable. This needs to be assessed on a site specific basis taking into account scheme viability. It should also be noted that a greater amount of affordable housing has been submitted in comparison to the previously refused scheme on this site (ref: 2009/1264, see history section). In addition the amount of affordable housing has been fully justified in terms of viability. As such the Planning Service consider that the proposed affordable housing provision complies with Core Strategy Policy 20, London Plan policy 3.12 and emerging DMLP policy 21.
>
> 6.9.14. However specialist advice from external consultants notes that the submitted comparable sales values for the area are low and the property market is increasing in strength. As such it is recommended that if the development is not implemented within a 12 month period then the development should be subject to a further viability review. A further head of term within the S106 is therefore recommended in this regard."

39. The minutes of the meeting record, in paragraphs 6.11-6.13, discussion on this aspect:

> "6.11. Discussion took place regarding the viability of the scheme and the level of affordable housing being provided. The Head of Property Strategy & Projects stated that the Council had sought external advice on the viability assessment submitted by the applicants, which had been tested and reviewed on three occasions. It was concluded that the viability assessment was acceptable and a review mechanism was in place to monitor the level of affordable units in the

> future. It was confirmed that the 'three dragons' test to address outcomes and costs was a recognised tool.
>
> 6.12. In response to concerns raised regarding the level of affordable housing, the Programme & Investment Officer advised that the 50% target for affordable housing is a borough-wide one and that while the level of affordable housing delivered in Hackney has been in excess of the London average (35% in past years) the new funding regime for affordable housing, together with welfare reforms and the economic climate, has seen the level of affordable housing on developer led planning applications considerably reduced.
>
> 6.13. While the level of affordable housing on Wilmer Place is disappointingly low, the viability has been scrutinised by out external viability consultants (Jones Lang LaSalle). As such, the development will be subject to a viability review (to capture any increase in value) if there has been no start of site within 12 months. There was, therefore, the potential for a higher percentage of affordable housing to be provided, which would be sought on-site. The scheme nevertheless provides a good policy compliant tenure and bed size mix (including family housing) to be managed by one of our preferred Registered Providers, ONE Housing."

40. The claimant has produced a transcript of the planning sub-committee's discussion taken from the video recording of the meeting. That is consistent with the Minutes.

(i) A councillor's common law rights of access to documents and (ii) Whether there was any basis under the law of confidentiality to withhold access to them

Claimant's submissions

41. The claimant contends that the council members of the sub-committee had a common law right to see both the FVA submitted by GLH and the independent appraisal by JLL. The right of the sub-committee to be informed has to be met regardless of any claimed confidentiality. It was unlawful to prevent members from inspecting the full information. The claimant relies upon the cases of *R v Southwold Corporation ex p Wrightson* [1907] 97 LT 431, *R v Hampstead Borough Council ex p Woodward* [1917] 116 LT 213, *R v Lancashire County Council ex p Hook* [1980] QB 603 and *R v Birmingham City Council ex p O* [1983] 1 AC 578.

42. The defendant's notion that the documents were confidential so that they did not need to be disclosed to members represented an elementary misunderstanding of the law of confidentiality. It was not a misuse nor unconscionable for a defendant to examine and use all of the information in the FVA and its review as part of the discharge of the defendant's statutory functions. A person could not seek to influence an authority in making a decision but at the same time not allow members of that authority to see the documents. Provided the use was in good faith, disclosure to another party was not a breach of confidence. The claimant relied upon the case of *Smith Kline & French*

Laboratories v AG [1990] 1 AC 64 and, in particular, the judgment of Lord Templeman at 103A when he said:

> "In my opinion the first and only question which requires to be answered on this appeal is whether English law prohibits the licensing authority from having recourse to the confidential information provided by the appellants in the course of their application for a product licence relating to cimetidine for the purpose of considering whether to grant or reject an application by Generics or Harris or anyone else for a product licence in respect of cimetidine."

And, at 103H-104B:

> "My Lords, I am satisfied that it is the right and duty of the licensing authority to make use of all the information supplied by any applicant for a product licence which assists the licensing authority in considering whether to grant or reject any other application, or which assists the licensing authority in performing any of its other functions under the Act of 1968. The use of such information should not harm the appellants and even were it to do so, this is the price which the appellants must pay for cooperating in the regime designed by Parliament for the protection of the public and for the protection of the appellants and all manufacturers of medicinal products from the dangers inherent in the introduction and reproduction of modern drugs."

43. The claimant contends that applies to the instant case. When the agents for the interested party submitted the FVA, regardless of the claimed confidence, the defendant was then able to use it for the purposes of its decision making. Without the disclosure of the full contents of the report, the sub-committee was in a position where it could not fulfil its statutory duty. As a result, either it abdicated its responsibility as an informed decision maker or the officers arrogated the decision to themselves. In the words of Sedley LJ in *R (on the application of National Association of Health Stores & another) v Department of Health* [2005] EWCA Civ 154 at [37]:

> "The serious practical implication of the argument is that, contrary to what the decided English cases take for granted, ministers need know nothing before reaching a decision so long as those advising them know the facts. This is the law according to Sir Humphrey Appleby. It would covertly transmute the adviser into the decision-maker. And by doing so it would incidentally deprive the adviser of an important shield against criticism where the decision turns out to have been a mistake."

Defendant's and interested party's submissions

44. The defendant submits that the case of *Smith Kline* is to be seen in its own context. The case was dealing with the licensing of drugs under the Medicines Act against a background of a relevant EU directive. It was not a general statement of the common law. The claimant's submissions are too broad. It was important to have regard to the basis upon which the information was submitted. Here, it was used by officers and reviewed also by an independent consultant. Members had all the necessary and relevant information to enable them to reach their decision, which was whether planning permission should be granted.

45. The real question was whether the material was capable of being confidential. The approach to that question was considered by Toulson LJ (as he then was) in *Napier v Pressdram* [2010] 1 WR 934 at [42] when he said, for a duty of confidentiality to be owed (other than under a contract or statute), "the information in question must be of a nature and obtained in circumstances that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential."

46. The information submitted in the FVA would clearly be seen by the reasonable man as confidential. There is further support for that submission in the approach taken in the RICS guidance note on financial viability in planning. The position is supported also in the judgment of Ouseley J in *R (on the application of Bedford) v London Borough of Islington & Arsenal Football Club* [2002] EWHC 2044 at [81] when he referred to the viability report prepared by DTZ in the case before him and said, "it is perfectly obvious that it was assessed as confidential on a reasonable basis."

47. The interested party has supported the submissions made by the defendant.

Discussion and conclusion

48. The first question is whether the information submitted was confidential. In my judgment it clearly was.

49. The GLH reports contains assumptions about build costs, sales costs and residual values. They are clearly matters of the utmost commercial sensitivity. The report was submitted on the basis that its contents would be treated confidentially. Any reasonable person apprised of the facts would consider that was a genuine basis for the GLH report to remain, in those key areas, out of the public domain. The scope of the duty of confidentiality may vary from one case to another according to the circumstance in which, and the purpose for which, the material was obtained. But, in the circumstances here, where the information was provided and received on the reasonable basis that it would be treated confidentially and concerned matters of commercial sensitivity I have no doubt that it should be so treated.

50. I am reinforced in that conclusion, first, by the decision of Ouseley J in *Bedford* (supra) in similar circumstances. I deal with that decision in greater detail below. Secondly, by the development plan. Policy 20 acknowledges that the target of 50% affordable housing is subject to site characteristics, location and overall viability. The viability exercise is to be carried out using the GLA Affordable Housing Toolkit Assessment. That exercise was followed here. Such an assessment is said to be confidential. Thirdly, the guidance note produced by the RICS on financial viability.

The claimant contends that the guidance note is based upon a misunderstanding of the legal position. For reasons set out I disagree.

51. The case of *Smith Kline* (supra) has to be seen in its own context. It is dealing with an entirely different statutory scheme where the purpose was to protect the public from the dangers inherent in the introduction and reproduction of drugs and to treat the applications for product licenses equally and fairly. It was dealing with the rights and duties of a licensing authority in those circumstances. It was not purporting to deal with anything of broader application.

52. As to the common law rights of councillors, they do have rights to access information supplied. The claimant relied on four authorities. In my judgment they do not assist him.

53. First, in *R v Southwold Corporation* [1907] 97 LT 431 Lord Alvaston CJ made it clear that it was a decision on its particular facts. He continued, "I quite agree that a councillor has no right to a roaming commission to go and examine books or documents of a corporation because he is a councillor." It was not a case which involved confidential documentation.

54. Second, the case of *R v Hampstead Borough Council ex p Woodward* [1917] 116 LT 213 concerned a councillor who had applied to the court for an order directing the council to produce certain documents to him. The decision was that there was an exception to the common law and statutory right of production and that arose when the court concluded that the object of obtaining production of the documents was with some indirect motive or purpose.

55. Here, there has been no application by any councillor to see the documents. It is said by the claimant that is consequential upon officers' misunderstanding of the legal position and giving wrong advice to the councillors. I have already found that the officers acted lawfully and reasonably in concluding that the reports were confidential. As a result, there was no automatic right, as the claimant contends, for councillors to have access to the full information. What the case of *Hampstead* demonstrates is that if there is an application to see documents there can be exceptions to the common law right of access. Although there has been no application here for access to documentation by any councillor, had there been, the case is not authority for an unrestricted entitlement to see council documents.

56. In *R v Lancashire County Council ex p Hook* (supra) a councillor had requested to see council documents. It was a request which was on the basis that he reasonably needed to see them to be able to perform his duties. He had been refused access by the police authority who were the proper body to decide in the exercise of its discretion whether it was reasonable to disclose them. Dunn LJ, with whom Waller LJ agreed, said at 627C, "so he is only entitled to such production of the report as to enable him to properly carry out his duties as a member of the committee." On that occasion sight of the documents was not necessary for the member to be able to carry out his duties.

57. *R v Birmingham City Council ex p O* concerned an application by a councillor not on the social services committee but on the housing committee to see the files of the social services department as she had formed the view that prospective adopters may not be suitable as adoptive parents. The court held that she was entitled to have

access to all written material in the possession of the local authority provided she had good reason for such access: see Lord Brightman at 593E.

58. That case was considered and followed in *R v Hackney London Borough Council ex p Gamper* [1985] 3 All ER 275. In his judgment Lloyd LJ said at 281j:

> "Mr Gamper cannot perform his duties properly or effectively as a member of the council, or the public services committee, or as chairman of Shoreditch Housing Committee, without having access to the agenda, minutes and other documents of the DLO sub-committees. There may be, I know not, documents which are so confidential that they cannot be disclosed without passages in those documents being covered up or deleted. But that cannot affect the general principle."

59. It follows that although there is a common law right to have access to documents it is not without limitation. First, a councillor has to have a good reason to see the documents that they request to see. Secondly, in making the documents available to the councillor there is nothing incompatible with the principle of access if parts of the documents are redacted if circumstances so require.

60. The claimant contends further that it is an essential ingredient of the action for breach of confidence that confidential information has been, or is threatened to be, misused. In the third edition of 'Confidentiality' by Toulson and Phipps it is said that what constitutes misuse will depend on the circumstances of the case and the scope of the duty owed. Misuse may typically take the form of disclosure to another, but it need not do so. It is a term sufficiently broad to include any form of abuse. Whether one uses the term misuse or abuse if a court concludes that unfair advantage has been taken of information received in confidence there would be a breach of the broad equitable principle.

61. It is notable that in *R v Department of Health ex p Source Infomatics Ltd* [2001] QB 424 at [31] Simon Brown LJ applied a test of whether a reasonable person's conscience would be troubled by the proposed use of the relevant information. For the reasons of commercial sensitivity that I have set out I have no doubt that a reasonable person's conscience would be troubled by the disclosure of the information in the reports of GLH and JLL to members and to the public, including Mr Perry.

62. The next question is whether the withholding of the confidential information from the members was an arrogation of powers by the officer or in going along with it whether the members were abdicating their responsibility as informed members of the planning sub-committee.

63. The answer to that question is assisted by *R (on the application of National Association Health Stores & another) v Department of Health* [2005] EWCA Civ 154 when in dealing with the ministerial position Sedley LJ held at paragraph 62:

> "Given the constitutional position as this court now holds it to be, a minister who reserves a decision to himself – and equally a civil servant who is authorised by him to take a decision –

> must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. This is not the same as a requirement that he must know everything that is relevant. Here, for example, much that was highly relevant was appropriately sifted by the Commission in formulating its advice and then distilled within the department in order to make a submission to the minister which would tell him what it was relevant (not simply expedient or politic) for him to know. What it was relevant for the minister to know was enough to enable him to make an informed judgment. This centrally included the Commission's advice and the reasons for it. It also included the fact of Professor Ernst's opposition and the essential reasons for it. All this he had."

64. At a local government level the members are in an analogous position to the minister in the *NAHS* case. The members of the planning sub-committee knew that there had been a FVA carried out by GLH for the developers on both applications which had been carried out in accordance with the methodology set out in the development plan. They knew also that on each occasion the viability appraisal had been reviewed independently by JLL on behalf of the defendant. In addition, they knew that both reports and their review had been scrutinised by their officers. The upshot of that exercise was that members were advised that what had been submitted was acceptable. Members did not have to accept that advice and/or they could have sought further advice if they were dissatisfied that the information that they were presented with was insufficient to enable them to reach a decision on the acceptability of the amount of affordable housing offered. They were in a position to judge whether they felt they had sufficient information to enable them to carry out their decision making exercise.

65. A viability assessment is a technical exercise involving knowledge of land values, development costs and residual valuation. It was entirely reasonable to delegate that exercise to chartered surveyors on the part of the applicant and for their work to be independently appraised by similarly experienced chartered surveyors on the part of the defendant. The further safeguard for the members was that their own officers carried out a further review.

66. The claimant has submitted notes of the planning sub-committee on 11 December 2013. The section on viability shows that the chair did question how matters had proceeded, as follows:

> "Viability
>
> **Chair**: Viability, Peter (Edwards) can you tell us what is your role in assessing viability, you're employee of the council and this is the sort of thing you do all the time.
>
> **Peter Edwards (Head of Property Strategy & Projects)**: Yes, I'm a chartered surveyor and so will assess the viability on applications. In this particular case, given the scale of the application, we sought external advice, and we tend to put these

> out if they are major applications. In this case its been contested and reviewed three times, we also then reviewed the external consultants' advice and they contest the inputs in terms of sale values and the cost of the scheme, all that goes into the assessment. That's how we came to the conclusion that what the applicants are proposing is acceptable. Having said that, we acknowledge that with prices rising we need to have a review mechanism, so that's what the external agencies have recommended, and we will go with that.
>
> **Chair**: In terms of us as councillors seeing this documentation, we don't normally see this – [I think I've only seen one] – and that is because of commercial confidentiality?
>
> **Edwards**: That's right.
>
> **Chair**: And that is what normal ordinary councils do?
>
> **Edwards**: Yes.
>
> **Chair**: Does any council let the councillors and indeed the public see the figures?
>
> **Edwards**: The advice that we give and the advice that we seek externally is provided to the case officer and not outside.
>
> …
>
> **Stephen Kersley (Programme & Investment Officer)**: …We very much share concern at what we consider to be a low provision of affordable housing, it is 17% and we were promised it would be higher, however, as Peter has explained, this development went to an external viability cost consultant Jones Lang LaSalle, who looked as this independently and they considered the figures and they thought, on the figures provided, that 17% was what could be achieved, but recognising that prices in Hackney increase far higher than other London boroughs they have said that clearly it is likely prices will rise. And because of that, if the development doesn't start onsite, and that doesn't mean clearing buildings it means starting with this actual development, if that doesn't start within 12 months the viability has to be redone within six weeks of the scheme starting. So, in effect that will capture more affordable housing that can come forward. It is our hope and assumption that that will be the case, but I would stress that we would be seeking that affordable housing on site and we would not wish that to be an offsite contribution."

67. The transcribed notes are entirely consistent with the minutes of the meeting.

68. Together, the Minutes and notes, demonstrate that officers had sifted the information submitted to council members to take account of the applicant's request for confidentiality. There is nothing wrong in that approach. Indeed, given the demands on a busy council member's time and the technical nature of the appraisals it was an entirely sensible step to take. A council member has not got the time to be investigating all the detail in financial assessments if that were to be presented to him. Members are entitled to rely on their officers in such a situation to act responsibly and to provide them with sufficient information to be able to determine a main issue, namely, whether the amount of affordable housing on offer was adequate. As Sullivan J (as he then was) said in *R v Mendip District Council ex p Fabre (2000) 80 P & CR 500*, "Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

69. In my judgment, there was no abdication of decision making on the part of the members or arrogation of decision making on the part of officers. What transpired illustrates the efficient way that modern local government operates in dealing with technical matters. Clearly the amount of sifting of material to place before members will be case-sensitive but it would be wholly unrealistic to expect members to be able to absorb all technical advice received on a significant planning application before being able to make their decision on whether to grant planning permission. The range and volume of material would be vast. The burdens on members would be enormous. Further, such an approach would be inimical to effective and efficient decision making process in modern local government. The officers acted entirely lawfully and responsibly in the way that they filtered the information to be provided to members.

70. When the members took the decision they knew that the applicant's claims had been tested and reviewed by an appropriately qualified and independent firm of chartered surveyors as well as by their officers. They knew also that the claimant and Stokey Local were challenging the adequacy of the affordable housing provision. They heard the claimant saying that the redacted version of the FVA which he had received was written in a language that was incomprehensible if one was not a chartered surveyor. The claimant was suggesting that members refuse the planning application or say they wanted a higher level of inspection. Members, therefore, had a choice, whether to go along with officer advice, seek further information or to accede to the claimant's submissions which were unsubstantiated by evidence. On each occasion, in my judgment, members had sufficient to enable them to be able to make an informed judgment. In the case of JR2 there was the further safeguard of a provision within the section 106 that enabled a review of the viability exercise if the development had not started within twelve months of the grant of permission.

(iii) A councillor's statutory rights under the Local Government Act 1972 to see documents

Claimant's submissions

71. The claimant submits that there is a freestanding right on the part of members under section 100F of the Local Government Act 1972, additional to their common law rights, which enables members to see a FVA and its review. The exemption provided in schedule 12A paragraph 3 for information relating to financial or business affairs of any particular person is qualified by subsection 2A of section 100F which was

substituted by the Local Government (Access to Information) Variation Order 2006 and came into effect on 1 March 2006. That means that the exemption does not apply. Consequently councillors had an unassailable right to see all FVAs and their reviews.

72. Further, by virtue of paragraph 10 of schedule 12A information within paragraph 3 of the schedule is exempt, "if and so long as, in circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." There was no decision taken here that that was the case, and in any event the public interest was such as to require its disclosure. There was the ability under section 100A to exclude the public under subsection 2 so that there was no breach of the obligation of confidence.

Defendant and Interested Party's submissions

73. The defendant and the interested party both submit that the documents are exempt under the LGA 1972 which provides a structured way to deal with sensitive information. The relevant statutory provisions are discussed in the case of *Bedford* which, although it predates the amendments in 2006, is still highly pertinent.

74. The case of *R (on the application of English) v East Staffordshire Borough Council* [2010] EWHC 2744 postdates the statutory amendments and comes to the same conclusion as in *Bedford*. The key point is that under the statutory scheme the documents would still be exempt and ones to which the claimant could be refused access.

75. Section 100F still preserves the exemption for information relating to financial and business affairs, "to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract: section 100F(2A)." The information provided was for the purpose of negotiating terms of a section 106 agreement and, therefore, the information would be exempt.

Discussions and conclusions

76. Section 100F of the Local Government Act provides:

> "(1) Any document which is in the possession or under the control of a principal council and contains material relating to any business to be transacted at a meeting of the council or a committee or sub-committee of the council shall, subject to subsections (2) to (2C) below, be open to inspection by any member of the council.
>
> (2) In relation to a principal council in England, subsection (1) above does not require the document to be open to inspection if it appears to the proper officer that it discloses exempt information.
>
> (2A) But subsection (1) above does require (despite subsection (2) above) the document to be open to inspection if the

> information is information of a description for the time being falling within—
>
> > (a) paragraph 3 of Schedule 12A to this Act (except to the extent that the information relates to any terms proposed or to be proposed by or to the authority in the course of negotiations for a contract), …"

Those provisions maintain the exemption from inspection by council members in relation to financial and business affairs of any particular person if that information relates to any terms proposed or to be proposed by or to any authority in the course of negotiations for a contract. The information provided in the FVA was to establish the number and nature of affordable housing units that the interested party could provide within the proposed development. The delivery of those units would then be secured in the section 106 agreement which was to be entered into by the interested party and defendant. The content of the FVA and its review was, therefore, highly relevant to terms to be included within a section 106 agreement. The documents provided the basis for negotiations that would lead to a conclusion of terms on affordable housing within that agreement.

77. The claimant submits that circumstances here do not mean that the information "relates to" any terms to be proposed within any contract. A narrow interpretation should be given to the words as in *Durant v Financial Service Authority* [2003] EWCA Civ 1746. I reject that submission. The words have to be seen in their own statutory context. The fact that a narrow interpretation was given in the context of the Data Protection Act 1998 dealing with access to personal data is of no assistance in construing the Local Government Act dealing with local government administration. In this context the statutory provisions are dealing with two very different worlds.

78. In the context of the relevant amendments to the Local Government Act 1972, in my judgment, it is right to give the words "relates to" a broad meaning. The object of section 100F(2A) is to give the parties freedom to negotiate, without restriction, terms of a contract. To allow the information contained within the FVA and its review into the public domain would frustrate that statutory purpose. Accordingly, the exemption for financial business affairs remains in the circumstances of this case.

79. The claimant contends that because there was no decision on balancing the public interest under paragraph 10 of schedule 12A the defendant's reliance on the exemption is otiose. That is a wholly unrealistic submission. It is self-evident from the way the defendant treated the documents that its view was that the public interest in maintaining the exemption outweighed the public interest in disclosing it. Paragraph 10 of schedule 12A does not require a formal decision to that effect.

80. Whilst there was the ability under section 100A to exclude the public from a meeting of the planning sub-committee to avoid the disclosure of information and avoid a breach of confidence that was wholly unnecessary in the circumstances where the detail of the information was not to be disclosed to members of the planning sub-committee.

(iv) The rights of the claimant to see documents and (v) Whether his inability to do so caused unfairness in the decision making process

Submissions of the Parties

81. The claimant submits that he was entitled to see and inspect the documents under section 100B(1) of the Local Government Act as background reports.

82. The claimant submits further that he also had an entitlement under section 100D(5) of the Local Government Act to see the background papers relied upon in preparing the reports to committee. The FVAs and their reviews were part of the background papers. The starting point is that the claimant is entitled to inspect them at the council offices.

83. There is an issue between the claimant and the defendant and interested party about the exemption provided in section 100D(4)(a). That, however, is contingent upon a proper officer taking a view as to the maintenance of the public interest against disclosure. There is nothing to indicate that the officer directed his mind to that. Without that officer decision the exemption is incapable of coming into play.

84. The supply of a redacted FVA rather than the documents which the claimant sought meant that the claimant's ability to fully participate in the decision making process was unfairly impaired. He was, therefore, treated unfairly. He was prevented from carrying out any testing of the FVA.

85. The defendant and interested party deny that the claimant was treated unfairly and contend that he had no right to access the documents.

Discussion and conclusions

86. The claimant did not contend with any force during argument his claimed right to access to the documents under section 100B. That was sensible. Section 100B provides for access to the agenda for a meeting and copies of any report for that meeting to be open to inspection by members of the public at least five days before the meeting. That was clearly the case here. Whilst the claimant may not be content with the content of the officer reports on each planning application he has no complaint about not having received them.

87. Section 100D of the LGA deals with inspection of background papers. It requires that a proper officer of the council prepare a copy of the list of background papers which have been relied upon to a material extent in preparing the committee report.

88. Subsection (4) continues:

> "Nothing in this section –
>
> (a) requires any document which discloses exempt information to be included in the list referred to in subsection (1) above; or
>
> (b) without prejudice to the generality of subsection (2) of section 100A above, requires or authorises the inclusion in

> the list of any document which, if open to inspection by the public, would disclose confidential information in breach of the obligation of confidence within the meaning of that subsection."

89. From what I have set out above it is clear that in my judgment the FVA and its reviews were exempt information. Paragraph 4(a) does not require those documents to, therefore, be included in the list of background documents. It follows that there is nothing in that part of this ground.

90. The issue of common law fairness was dealt with by Ouseley J in the case of *Bedford*. That dealt with similar circumstances in which the claimant was wanting to see a FVA prepared by DTZ, chartered surveyors. The refusal to disclose the document to the objectors was said to be unfair. Having set out that the question of what is fair depends on the context and circumstances, Ouseley J noted that the councillors were not better off than the objectors as, they too, did not have the DTZ report because it contained references to Arsenal FC's confidential business plan. He then continued:

> "99. Moreover, fairness in the planning process is not confined to a consideration of the interests of the objectors. It also needs to respect the confidentiality of the applicant because it is to its figures rather than to DTZ's general appraisal that the claimants' point is addressed. It has the gist of the appraisal. It is this actual appraisal, and within that Arsenal FC's figures, that the claimants want. This is emphasised by their constant references to a £50 million funding gap drawn from an e-mail in which that is referred to. But it would be unfair to Arsenal FC for the Local Planning Authority to be made to reveal what was handed to its advisers in confidence in the clear expectation that it would have a very carefully restricted circulation.
>
> 100. A planning authority needs to be able to examine matters in a confidential manner with applicants, as was done here, and for that purpose to use independent consultants to whom disclosure of the relevant information is made in confidence. This is the same process that the GLA went through. If a local planning authority cannot do that, it will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing and other legitimate benefits related to the value of the development and its funding. The public interest would be harmed.
>
> 101. It is quite clear that the information is confidential and disclosure of it would be in breach of confidence. There is nothing unfair in the non-disclosure of that document, with the gist of the DTZ appraisal being available.
>
> 102. Finally, I consider that s.100D(4)(a) provides for a local planning authority to be able to comply with its duties of

> openness without a breach of confidence. A specific statutory provision provides for non-disclosure of this document and is applicable in this context. Even if (which I doubt) there is scope for a common law duty of fairness to supplant rather than supplement that regime, that regime is a very powerful indicator as to the content of the common law duty of fairness. There is nothing arguably procedurally unfair here in the non-disclosure of that document."

91. Those words are of direct application here. The members were given the gist of the FVA and the review as were the objectors. It must be recalled that fairness in the planning process is not one way. It must apply to all participants. A local authority, acting in the public interest, must not be hampered in its negotiations for a section 106 agreement by having to disclose the contents of its own independent report on the submitted FVA. To make disclosure an absolute requirement would hamper negotiations and may hinder the obtaining of benefits within the agreement and thus the delivery of the public interest.

92. The claimant contends they were not given "the gist of the appraisal". What constituted the gist was considered in *R (on the application of English) v East Staffordshire Borough Council and National Football Centre Ltd* [2010] JLP 586.

93. Although the case was a judgment on an oral renewal hearing for permission the court heard detailed argument. Again, a central point was whether a financial report containing highly sensitive information provided to the council on a confidential basis should be disclosed to any third party. Flaux J, having set out references to Ouseley J's judgment in *Bedford* continued on the topic of the gist of the appraisal as follows:

> "It is fairly clear no more than that the conclusion had been that the residential development would fill a substantial proportion of the identified funding gap and that that conclusion had been independently verified. In my judgment the position is no different here."

Flaux J went on to consider the suggestion that the claimant and his advisors should have been told that the residential development there proposed could fill as much as 85% of the funding gap to enable them to run some additional and indeed opposite argument to the one that they were running. That was rejected on the basis that it was a submission to the effect that "if only I had seen all the confidential information, there are arguments I could have run" which had been rejected by Ouseley J in *Bedford*. Flaux J did not consider there was anything in the claimant's contentions that non-disclosure of the financial report and the DVE review were unfair.

94. The same position applies in the circumstances of this case. Mr Perry had the same information as the councillors, he had the gist of the FVA and its review, he had a redacted version of the FVA for JR1, albeit after the grant of that planning permission, but it provided, without the figures, the arguments that were put by GLH. The claimant was able to participate fully in the planning process which, as his own notes disclose, he did. Accordingly, it cannot be said that there was any unfairness in the process operated by the defendant.

95. It follows that there has been no breach of any statutory duty to the public, including the claimant. Likewise there has been no breach of any common law duty to the public.

(vi) Irrationality/unreasonableness

96. The claimant complains also that the decision on the part of the defendant was irrational and inadequately reasoned.

97. Mr Coppel QC, for the claimant, accepted that these grounds were parasitic on the earlier arguments.

98. Given that I have found that the defendant acted lawfully and reasonably these grounds add nothing to the challenge. The reasoning of the defendant can be adequately inferred from the officer reports.

99. I should add, for the sake of completeness, that the claimant in his statement of facts and grounds did contend that the defendant had misunderstood Core Strategy policy 20. That was not pursued in oral argument by the claimant, other than to contend that if the affordable housing was off target to the extent as was the case here that there needed to be compelling matters in the scheme viability to persuade members that what was on offer was policy compliant.

100. There is no basis for such an interpretation of policy 20. The policy imposes a target of 50% affordable housing across the borough in new development which at all times is subject to site characteristics, location and overall viability. That means that there can be variations from the target according to the three factors mentioned within the policy itself. Each factor will be site and development sensitive. Their combination will lead to a judgement of what level of affordable housing is appropriate on each site. The degree of variation from the target will depend in each case on the interplay between the three factors. If the consequence is that a low amount of affordable housing is the outcome that is as a result of the application of the policy itself. There is nothing to indicate in those circumstances that such an outcome can only be justified by compelling matters in the scheme viability assessment. Provided the GLA Affordable Housing Toolkit Assessment or similar scheme appraisal model is used that is all that is required to be policy compliant. That is precisely what happened here. The defendant's approach to and understanding of the policy was entirely justified.

(vii) Did the claimant have a free standing right under the Environmental Information Regulations?

Submissions

101. In the statement of facts and grounds and in oral argument the claimant contended that there was a breach of the Environmental Information Regulations 2004. The regulations enabled a defendant to disclose information relating to financial viability in redacted or unredacted form.

102. Here, the claimant had asked on 9 August 2012 for the FVA and had been refused. He had initiated an internal review which upheld the initial decision. He is now in the process of an appeal to the Information Commissioner.

103. The claimant had also asked in the pre-action protocol letter on JR1 for a copy of the FVA review. As set out a redacted version of it was sent in response to the request but no copy redacted or otherwise of the review.

104. There was a further request for the FVA in JR2 by email dated 4 October 2013.

105. The defendant contends that the Environmental Information Regulations issue is separate and is being pursued under a separate statutory regime. It is not an appropriate ground for judicial review of a planning decision.

Discussion and Conclusions

106. The claimant has pursued and is pursuing his complaint through the alternative remedy of appeal to the Information Commissioner. That has still to be heard. That is an alternative remedy which is available to the claimant. By reason of that this is not an appropriate ground for judicial review in this case.

Ground Two: Did the defendant err in its approach to heritage assets?

Submissions

107. The claimant contends that the defendant has failed to apply the appropriate statutory tests when considering each application. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 requires that a local planning authority must have "special regard" to the desirability of preserving a listed building or its setting or any features of special architectural historic interest that it possesses. Similarly, a local planning authority must pay "special attention" to the desirability of preserving or enhancing the character or appearance of a conservation area: section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

108. The statutory provisions require a local planning authority to "accord considerable importance and weight" to the desirability of preserving the setting of listed buildings as against other material considerations: *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 and *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2013] EWHC 4052.

109. That was an approach which the planning officer failed to follow in considering both JR1 and JR2. He considered the heritage assets together with the other material considerations. He did not refer or give effect to policy 7.8D of the London Plan, nor Hackney's Core Strategy policy 25, nor the Stoke Newington Conservation Area Appraisal nor the Emerging Site Allocations Plan. Instead, the planning officer proceeded as if the sole policy, against which heritage assets should be measured was the NPPF and paragraph 134 thereof. That approach totally ignored paragraph 132 and failed to understand that there needed to be a clear and convincing justification if permission was to be granted to a proposal which harmed heritage assets.

110. Simply listing the harm without any analysis was insufficient. What the officer had done was to split the harm so that he weighed the heritage harm against all of the benefits instead of weighing all of the harm against all of the benefits. He fell into the same error in JR2. The officer failed to provide adequate reasons for his conclusions.

111. The defendant submits that special attention is also required to be given to the enhancement of the conservation area. The officer report in both JR1 and JR2 adopts the proper approach in applying policy and the statutory test.

112. The interested party submits that officer's reports are to be read as if to a knowledgeable of all readership: *R v Mendip District Council ex p Fabre* [2000] 80 P&CR 500 and one with substantial and local knowledge. As Baroness Hale said in *R (on the application of Morge) v Hampshire County Council* [2011] 1 WLR 268 at [36 A-B]:

> "Democratically elected bodies go about their decision making in a different way from the courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job and not the court's, to weigh the competing public and private interests involved."

113. What matters is the substance in the report. The defendant concluded that there would be harm but that it would be less than substantial. That led to the need to balance the harm that would be caused against benefits to the public interest arising from the development.

Discussion and conclusions

Legal framework

114. Section 66 of the Planning (Listed Building and Conservation Areas) Act 1990 imposes a general duty as respect listed buildings in exercise of planning functions. Subsection (1) provides:

> "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."

115. Section 72 provides the general duty as respect conservation areas in exercise of planning functions. Subsection (1) provides:

> "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."

116. In *East Northamptonshire* (supra) Sullivan LJ reviewed the requirements of section 66(1). He said at [26]:

> "In this case, the requirement to give "considerable importance and weight" to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that s.70(1), which confers the power to grant planning permission, has effect subject to, inter alia, ss.66 and 72 of the Listed Buildings Act. Section 70(2) requires the decision-maker to have regard to "material considerations" when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the s.66(1) duty."

In [28] he said:

> "It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE 9.4 and HE 10.1 should ignore the overarching statutory duty imposed by s.66(1), which properly understood (see *Bath*, *South Somerset* and *Heatherington*) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed."

117. That was a challenge to an inspector's decision letter dated 12 March 2012 prior to the issue of the NPPF.

118. In *Forest of Dean District Council v the Secretary of State for Communities and Local Government* [2013] EWHC 4052 Lindblom J considered a challenge to an inspector's decision letter determining an appeal which considered the duty under section 66 of the Listed Buildings Act after the NPPF was published. He said:

> "54. Section 66(1) did not oblige the inspector to reject the Appeal B proposal because he found it would cause some harm

> to the setting of the listed buildings. The duty is directed to "the desirability of preserving" the setting of listed buildings. One sees there the basic purpose of the "special regard" duty. It does not rule out acceptable change. It gives the decision-maker an extra task to perform, which is to judge whether the change proposed is acceptable. But it does not prescribe the outcome. It does not dictate the refusal of planning permission if the proposed development is found likely to alter or even to harm the setting of a listed building. Gauging the likely effects on the setting will always be part of a broader planning assessment, though a very important part. The result of that exercise will depend on the facts and circumstances of the case in hand. The change proposed in or to the setting of the listed building may not be great. The likely harm may be slight. If there are benefits in the proposal they may be powerful enough to justify the likely effects on the setting despite the desirability of its being preserved. Such questions will be for the decision-maker to judge when having "special regard" to the statutory aim. This is in no sense to diminish the duty in section 66(1), or to re-write the case law to which I have referred. It is merely to recognize that performing the duty is an aspect of planning decision-making in a relevant case, but not the only one.
>
> …
>
> 61. The inspector saw the need to establish whether any "demonstrable harm" had been or would be caused to the setting (ibid.). He recognized that he had to approach this question having regard to the significance of the listed buildings and their setting and the way in which the development proposed would either enhance or detract from that significance and one's ability to appreciate it. His reference to "demonstrable harm", as I read it, meant harm that could be objectively demonstrated rather than merely asserted. And I do not accept that this represents any dilution of the section 66(1) duty or of the policy in section 12 of the NPPF. The inspector was not equating "demonstrable harm" either to "substantial harm" in paragraph 133 or to "less than substantial harm" in paragraph 134. He was not overriding or eliding the distinction between those two levels of harm. He was not posing for himself the wrong test, or asking himself the wrong question. He was not lowering the threshold of acceptability for proposals affecting the setting of a listed building. He did not do any of those things either in paragraph 62 or elsewhere in his decision letter."

119. That approach was followed by Robin Purchas QC sitting as a Deputy High Court Judge in *North Norfolk District Council v Secretary of State for Communities and Local Government* [2014] EWHC 279 at [66] and [82]:

> "66. I would respectfully agree with Mr Justice Lindblom that, taken as a whole, the advice in the NPPF is consistent with that approach, having regard in particular to paragraphs 131 and 132 where it advises that great weight should be given to the conservation of a designated heritage asset and that clear and convincing justification should be required for any harm or loss. It is correct that Section 66(1) applies the presumptive desirability directly to the setting of a listed building, while in the NPPF the advice is directed to the significance of the asset itself. For present purposes that distinction is not of any significance. However it remains essential that in applying the subsequent advice in paragraph 134, which is expressed in terms of a balance rather than expressly referring to issues of weight and significance, the approach of the decision maker is consistent with the statutory obligation under Section 66(1). Thus the question should not be addressed as a simple balancing exercise but whether there is justification for overriding the presumption in favour of preservation.
>
> …
>
> 82. But the question remains whether in substance he did have that special regard to the desirability of preserving the settings of the heritage assets as part of the consideration that led to his decision, notwithstanding that, as I find, in approaching that question he did not expressly have regard to the statutory requirement as such. In approaching that question I remind myself of the helpful guidance in *Garner* that it is not necessary for the decision maker to pass through a particular series of legal hoops to comply with Section 66(1) nor, I would add, does he have to recite any particular mantra or form of words to demonstrate that he has done so. However, adopting the formulation of Mr Justice Ouseley approved by the Court of Appeal in *Garner*, that does not mean that the decision maker can 'treat the desirability of preserving the setting of a listed building as a mere material consideration to which (he) can simply attach the weight (he) sees fit in (his) judgement. The statutory language goes beyond that and treats the preservation of the setting of a listed building as presumptively desirable. So, if a development would harm the setting of a listed building, there has to be something of sufficient strength in the merits of the development to outweigh that harm. The language of presumption against permission or strong countervailing reasons for its grant is appropriate. It is an obvious consequence of the statutory language rather than an illegitimate substitute for it.'"

120. For the reasons set out I respectfully agree that: (1) the NPPF taken as a whole is consistent with the statutory duty in section 66(1) and 72(1) of the Listed Buildings Act; and (2) that the question to be addressed by a decision maker is not a simple

balancing exercise but is one which is mindful of and applies the need to have "special regard" or "special attention" to the heritage assets whether under section 66(1) or 72(1). The requirement under section 70(2) of the TCPA to have regard to material considerations when granting planning permission is expressly subject to the section 66(1) and section 72(1) duty.

Policy Framework

121. Policy 7.8D of the London Plan provides, "development affecting heritage assets and their settings should conserve their significance by being sympathetic to their form, scale, materials and architectural detail."

122. Policy 25 of Hackney's Core Strategy provides historic environment:

> "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."

123. The Stoke Newington Conservation Area Appraisal states:

> "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…"

124. Hackney's Emerging Site Allocations Local Plan states in relation to the site that "any redevelopment will need to preserve and enhance the character and appearance of the conservation area and respect the heritage and biodiversity value of the cemetery."

The officer reports

125. In the report dated 31 July 2013 under the section headed 'Conservation and Design' the officer described the urban design impacts of the new development in paragraph 6.7.3 and the existing character in 6.7.4:

> "6.7.3. Urban design impacts of new development: The site is located in a sensitive location in the heart of the Stoke Newington Conservation Area and is adjoined by a group of Grade II listed buildings dating from the Georgian period to the south at nos 187 to 191 Stoke Newington High Street. Abney Park Cemetery, a Grade II Listed Historic Park and Garden, adjoins the site to the west and north. The Cemetery Gates at the Stoke Newington High Street entrance are listed at Grade II.
>
> 6.7.4. The existing buildings and landscaping on the site detract from the character and appearance of the conservation area. The existing light industrial building is utilitarian in appearance and is visible above the listed cemetery in views from the north east. The site surrounding the light industrial building is

> predominantly hard landscaped as a car park, with floodlighting, which impacts on the setting of Abney Park cemetery."

Under heritage impacts the report says:

> "6.7.9. Heritage Impacts: The overall design approach and scale of development is considered to respond to the significant design constraints of the site. The retention of the façades of 193-201 Stoke Newington High Street means that only limited glimpses of the development will be possible from Stoke Newington High Street.
>
> 6.7.10. The taller elements of the development will be recessed behind and away from no. 187-191 Stoke Newington High Street in views from the High Street. As such is not considered to detract from the setting of these adjacent listed buildings as well nos. 218-220 Stoke Newington High Street on the opposite side of the high street to the east. In addition it is also not considered that the amalgamation of a number of shopfronts which will still read as separate shop frontages, as part of the same retail unit fronting Stoke Newington High Street would not detract from the character of the conservation area, given the variety and number of shopfronts within the district centre.
>
> 6.7.11. The previous application (ref: 2012/2228, see history section) was refused due to concerns with regard to the impact of the development upon surrounding heritage assets, in particular Abney Park Cemetery and gates. The current proposals have a similar relationship with the cemetery gates in views from the north of the site, as a backdrop to the grade II listed cemetery gates. However the setting back of the west elevation of the building would reduce its impact in views from within the cemetery from west.
>
> 6.7.12. Concerns with regard to the proximity of the development with Abney Park Cemetery were also a significant issue with regard to the previously refused scheme. The Stoke Newington Conservation Area Appraisal guidance requiring development to be set back from the boundary with the cemetery, and be carefully sited and designed so as to preserve its existing character is noted in this regard.
>
> 6.7.13. The current proposals include a number of small, incremental changes in comparison to the refused scheme that collectively represent a sizable reduction in volume and slightly increase the distance from the cemetery boundary to the proposed development. These include: the proposed western boundary of the development at ground floor will be set back approximately 1m further than the previously refused scheme (a total setback of approximately 2m from the cemetery

> boundary); the lower two floors of the north wing are set back by 1.2 metres; the first and second floors to the south wing set back by 3.2 metres; and the third and fourth floors of the south wing set back by 2m.
>
> 6.7.14. The cumulative impact of the reduction of the above massing will contribute to a further reduction of the perception of the development having an adverse impact on the setting of the Park. These changes, in addition to the changes to previously refused scheme to reduce its height are now considered to result in a minor adverse, but 'less than substantial' harm to the setting of the adjacent cemetery, as defined by NPPF paragraph 134. It should be noted that English Heritage, in their response to the proposals also consider that the proposals would now result in 'less than substantial' harm to adjacent heritage assets.
>
> 6.7.15. Paragraph 134 of the NPPF states that '*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*'. In this case heritage related public benefits of the proposal would comprise the restoration of the unlisted terrace fronting Stoke Newington High Street, the improvement to the perimeter boundary treatment to parts of Abney Park Cemetery, a contribution to be made to the ongoing management of Abney Park Cemetery and the removal of the existing poor quality building that currently detracts from the appearance of the area. These benefits are considered to outweigh the 'less than substantial' harm to adjacent heritage assets."

126. In paragraph 7.2 as part of the conclusions the report says, "the proposed design is considered to represent an appropriate design approach for the site. The revisions to the scheme in comparison to the previously refused scheme will ensure that it would not detract unduly from surrounding heritage assets and would not result in undue harm to biodiversity or protected species."

127. The second officer report of 11 December 2013 is fuller in its discussion on conservation and design.

128. In paragraph 6.11.4 the relevant development plan policies are set out and include London Plan policy 7.8, Hackney Core Strategy policy 25 and Emerging policy 28.

129. Paragraph 6.11.5 sets out section 72 of the Listed Buildings Act. Paragraph 6.11.6 then deals with the Stoke Newington Conservation Area Character Appraisal and acknowledges that the proposals are not wholly compliant with the development plan.

130. The report goes on to repeat the detracting elements of the existing environment as set out in the first report and then proceeds to deal with the design approach and use of

materials. It continues to outline how the design approach and scale of development have responded to the significant heritage based constraints of the site.

131. The report noted that the retention of the façades of 193-201 Stoke Newington High Street meant that only limited glimpses of the development were possible from Stoke Newington High Street (paragraph 6.11.12). The taller elements of the development were recessed behind and away from the High Street such that they were not considered to detract from the setting of the adjacent listed buildings (paragraph 6.11.13).

132. Paragraph 6.11.14 reads:

> "6.11.14. The previous application (ref: 2012/2228, see history section) was refused due to concerns with regard to the impact of the development upon surrounding heritage assets, in particular Abney Park Cemetery and gates. The current proposals have a similar relationship with the cemetery gates in views from the north of the site, as a backdrop to the grade II listed cemetery gates. However, this northern façade has been redesigned to present a calmer backdrop to the cemetery. In addition the setting back of the west elevation of the building reduces its impact in views from within the cemetery from the west. Officers consider that whilst the relationship to the gates is similar, the redesign ensures that the setting of the cemetery and the gates is not harmed and that the character is preserved."

133. The report then went through the various small and incremental changes that had been made to the scheme and concluded in 6.11.18:

> "6.11.18. The cumulative impact of the reduction of the above massing will contribute to a further reduction of the perception of the development having an adverse impact on the setting of the Park. These changes, in addition to the changes to the previously refused scheme to reduce its height result cumulatively in a significantly improved scheme."

It then reached its conclusions in paragraphs 6.11.19-6.11.22:

> "6.11.19. When taking into account the Development Plan and the statutory duties, it is acknowledged that there is some harm to the setting of the adjacent cemetery. The proposal has also been assessed against the NPPF and it is considered that the proposal results in a minor adverse harm, that is, it results in 'less than substantial' harm to the setting of the adjacent cemetery, as defined by NPPF paragraph 134. It should be noted that English Heritage, in its response to the proposals also consider that the proposals would now result in 'less than substantial' harm to adjacent heritage assets.
>
> 6.11.20. Paragraph 134 of the NPPF states that '*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*'. In this case heritage related public benefits of the proposal would comprise the restoration of the unlisted terrace fronting Stoke Newington High Street, the improvement to the perimeter boundary treatment to parts of Abney Park Cemetery, a contribution to be made to the ongoing management of Abney Park Cemetery and the removal of the existing poor quality building that currently detracts from the appearance of the area.
>
> 6.11.21. However, the proposals are contrary to London Plan policy 7.8, Hackney Core Strategy Policy 25 and DMLP policy 28 because they give rise to some harm. These policies do not provide for a balance to be struck where less than substantial harm is caused to a heritage asset. As a result they 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 of the NPPF.
>
> 6.11.22. In any event, the material considerations set out in paragraph 6.11.19 above would need to be weighed against this, as set out in paragraph 134 of the NPPF. Notwithstanding the Council's requirement to have special regard to the desirability of preserving and enhancing heritage assets, it is considered that the benefits of the proposals outlined in paragraph 6.11.20 when considered alongside other planning benefits of the development in terms of additional housing, new retail floorspace and increased employment would outweigh the limited harm caused by the proposals."

134. In the overall conclusion the report says, at paragraph 7.2:

> "The proposed design is considered to represent an appropriate design for the site. The revisions to the scheme in comparison to the previously refused scheme would help to mitigate impacts upon surrounding heritage assets. It is accepted that some minor harm would result which is contrary to Core Strategy 25 and London Plan 7.8. However other material considerations including heritage based benefits of the proposal would outweigh the limited harm caused…"

135. English Heritage had provided advice to the council which was the same on both applications and was set out earlier in the report at paragraph 4.3.9 and 4.3.10:

> "4.3.9. We note that the current proposals represent a significant and welcome reduction in the overall volume of the building, and also improve the boundary treatment between the new building and Abney Park Cemetery. Whilst we welcome these changes and acknowledge that they reduce the harm to the settings of the heritage assets we previously consulted on,

> 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.
>
> 4.3.10. We would therefore advise the Council to consider the proposals in accordance with paragraphs 132, 134 and 137 of the NPPF, weighing the harmful impacts against the public benefits that the proposals would deliver. In this case we acknowledge that public benefit would result from the restoration of the unlisted terrace fronting Stoke Newington High Street, the improvement of the perimeter boundary treatment to parts of Abney Park Cemetery, a contribution made to the ongoing management of Abney Park Cemetery and finally the removal of a poor quality building that currently detracts from the character of the Conservation Area. Should the Council be minded to grant planning permission for the proposals we would urge you to consider entering into a S106 agreement or similar for enhancements to the historic fabric and future management of Abney Park Cemetery."

136. Section 12 of the NPPF deals with government policy on heritage assets. The relevant paragraphs read:

> "131. In determining planning applications, local planning authorities should take account of:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
>
> - the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
>
> - the desirability of new development making a positive contribution to local character and distinctiveness.
>
> 132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II listed buildings, grade I and II registered parks and

> gardens, and World Heritage Sites, should be wholly exceptional.
>
> …
>
> 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."

137. The report on JR1 does not specifically set out the content of section 66 and 72 of the Listed Buildings Act. The claimant accepts that the objectives of Core Strategy policy 25 and London Plan policy 7.8 give expression to the statutory obligations imposed by section 66 and section 72 of the Listed Buildings Act. The policies are both listed in section 5 of the report where relevant policies are set out. The author was clearly mindful of their relevance and, in the circumstances, it would be unfair to criticise the defendant for not slavishly rehearsing the statutory provisions.

138. The report goes on to consider that, as a matter of judgment, the proposal was harmful to the setting of the adjacent park and cemetery but that was evaluated at less than substantial harm. That was consistent with the judgment of English Heritage but is a classic example of planning judgment.

139. The report then went on to consider the circumstances envisaged in paragraph 134 of the NPPF where when harm from a development was less than substantial to a designated heritage asset that had to be weighed against the public benefits of the proposal including securing its optimum viable use. The remainder of paragraph 6.7.15 carries out that exercise paying special attention to improvements that would be within the heart of the Stoke Newington Conservation Area. It was an evaluation of the heritage equation weighing harm on the one hand against the benefit to the adjacent heritage asset on the other. Having carried out that exercise the overall conclusion was that the heritage harm was outweighed by the heritage benefits. The officer was clearly applying the approach in section 66(1) and section 72(1) and was giving special regard and special attention to the heritage assets. That was to come to an overall judgment as to the weight to be given to the heritage factor when carrying out the separate, but ultimate, balancing act of all material considerations as to whether planning permission should be forthcoming. As the overall judgment was one of some benefit from the proposal there was no requirement to consider whether there were strong countervailing factors that warranted the grant of planning permission.

140. That overall exercise was carried out within section 7 of the report entitled Conclusions. That is not, as the claimant submitted, a summary of what had gone on before. It is the overall conclusion of the officer having considered all the various material considerations including those that were statutory. As part of that exercise the defendant balanced the various material considerations in a way that was a matter of classic planning judgment. It cannot be said that the defendant acted irrationally in doing so. In my judgment on a fair reading of the report as a whole the defendant discharged its statutory duties as required under section 66 and section 72 of the Listed Buildings Act.

141. In the second report of 11 December 2013 in JR2 the heritage issue was considered afresh and in greater detail. The relevant policies are mentioned, as are the statutory duties and it was acknowledged that there was some harm to the setting of the adjacent cemetery as there had been in JR1.

142. The heritage related public benefits were then set out in paragraph 6.11.20 of the report. It was acknowledged in 6.11.21 that because there was some harm the proposals were contrary to elements of the development plan.

143. The final paragraph in the section, 6.11.22, is not a model of clarity. Nevertheless, the defendant clearly set out its requirement to have special regard to the desirability of preserving and enhancing the heritage assets and considered that the public heritage benefits outweighed the limited harm caused. That conclusion is repeated in paragraph 7.2 of the overall conclusions. As the identified harm was less than substantial to the heritage asset it was a matter of judgment as to whether the public heritage benefits overcame that. When that was put into the overall balance as it was in section 7 it is clear that the planning judgment, again, was that the material considerations including the heritage based benefits overcame the limited harm caused. That was a conclusion that the officer was entitled to come to in making his recommendation to the members in the light of all of the evidence about the development proposal. In so doing he did not elide the status of the heritage assets with that of other material considerations as is evident from the special attention given to them earlier in section 6.

144. The process that was followed was one that was fair, reasoned and entirely rational for all the reasons set out above. This ground fails.

Ground Three: Did the defendant err in its approach to the screening opinion on the first grant of planning permission? (JR1 only)

Factual background

145. Application 2012/2228 – the first planning application – was made on 9 July 2012. A request for an EIA screening opinion was received by the defendant on 13 July 2012.

146. A screening opinion was provided by the council on 6 March 2013. It describes the proposed development and continues,

> "**Proposal:** Demolition of existing buildings and western boundary wall at Wilmer Place and part demolition (façade retention) of 193-201 Stoke Newington High Street and redevelopment to provide a food store at ground floor with 68 residential units above.
>
> **Application Site Address:** 193-201 Stoke Newington High Street, London N16 0LH
>
> I refer to your letter of 9th July 2012 seeking Hackney Council's screening opinion of the above proposed development.

> The Council has considered the Proposed Development and is of the opinion that it constitutes 'Schedule 2' development falling within the description at section 10(b) "Infrastructure projects" of Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.
>
> Having taken into account the requirements of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, the Council is of the opinion that the Proposed Development is not considered likely to have significant effects on the environment by virtue of its nature, size or location.
>
> **Decision**
>
> Accordingly, the Proposed Development does not constitute an EIA development for which an Environmental Impact Assessment/Environmental Statement would be required to accompany any planning application submitted.
>
> In accordance with the planning practice adopted by the London Borough of Hackney, I can confirm that a copy of this screening opinion will be made available at the place where the planning register is kept."

147. There is no document which expands the screening opinion.

148. There was no further request for a screening opinion in the second planning application (JR1).

Submissions

149. The claimant contends that a screening opinion is of fundamental importance to the planning system: *Burridge v Breckland District Council* [2013] EWCA Civ 228 at [40, 47, 51 and 58]. The starting point is that the failure to adopt a screening opinion where one is required necessarily results in the quashing of the grant of planning permission: *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 at [31].

150. The claimant submits that the defendant is in breach of the EIA regulations by failing to adopt a screening opinion in JR1 and, in breach of regulation 4(7), for failing to provide any reasons. There is no screening opinion on the planning application and, even if the document relied upon by the defendant as a screening opinion in the first planning application can be re-used, it is not a valid screening opinion. The document dated 6 March 2013 does not set out any reasons for its decision.

151. The defendant and interested party contend that the defendant adopted a screening opinion. The defendant was of the view that the development in question was the subject of a screening opinion on the first application and, therefore, a further screening opinion was not required (in accordance with regulation 7(b)).

152. The development proposed related to the same site, proposed the same amount of retail floor space, proposed a lesser number of residential units then those covered by the screening opinion and was lower in height by one storey than the first planning application which had been refused. It was not unreasonable or irrational for the defendant in those circumstances to conclude that, as the development in question was smaller in volume and had been the subject of a screening opinion which had not been challenged only four months earlier that the reduced scale of development would lead to reduced environmental impacts or, at the very least, ones that were no worse.

153. Members were made aware of the situation in the committee report on JR1.

154. The express duty on the defendant to provide reasons for any negative decision has to be read in the light of the case law which emphasises the provisional nature of screening and which suggests that reasons need not be elaborate: see *R (Mellor) v Secretary of State for Communities and Local Government* [2010] Env LR 2.

155. Further, the reasoning in the letter requesting a screening opinion can be inferred into the reasoning within the screening opinion itself; see *R (Berky) v Newport City Council* [2012] EWCA Civ 378.

156. The screening opinion from the defendant dated 6 March 2013 expressly referred to the letter of request on behalf of the applicant dated 9 July 2012. As a result it plainly incorporated the reasons in that letter. Those reasons were sufficient and it was adequate to refer to the letter of request in the circumstances. It is a reasonable inference for the court to draw that the council adopted the reasoning in the requesting letter.

157. The letter of 9 July 2012 was placed later on the planning register.

Discussion and Conclusions

158. I deal first with the legal framework for screening opinions.

159. The obligation to screen developments to assess whether they should be subject to environmental impact assessment derives from Council Directive 85/337/EEC as amended by Council Directive 97/11/EC and Directive 2009/31/EC. That regime is now implemented by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

160. If the proposal is likely to have significant effects on the environment, then the effects should be analysed before planning permission is granted. To determine whether a proposal is likely to have significant effects on the environment information is either provided by or sought from the applicant.

161. Under regulation 5(1) of the EIA Regulations a person who is minded to carry out development may request the relevant planning authority to adopt "a screening opinion." That phrase is defined in regulation 2 to mean "a written statement of the opinion of the relevant planning authority as to whether development is EIA development."

162. Under regulation 2(1) EIA development is development of a kind described in schedule 1 or of a kind described in schedule 2 which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

163. Under regulation 3(4) a local planning authority must not grant planning permission for EIA development unless it has first considered the environmental information which is required in regulation 2(1) to include the "environmental statement". The local planning authority must state in its decision that it has done so.

164. Regulation 4(7) provides:

> "Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph 3(a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion."

165. Regulation 5(5) provides:

> "An authority shall adopt a screening opinion within three weeks beginning with the date of receipt of a request being made pursuant to paragraph (1) or such longer period as may be agreed in writing with the person making the request."

166. Regulation 7 provides as follows:

> "Where it appears to the relevant local planning authority that–
>
> (a) an application which is before them for determination is a Schedule 1 or Schedule 2 application; and
>
> (b) the development in question has not been the subject of a screening opinion or screening direction; and
>
> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,
>
> paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1)."

167. Under regulation 23 the screening opinion with a statement of reasons must be placed on the planning register maintained under section 69 of the Town and Country Planning Act 1990 (TCPA). Every planning register must be available for inspection by the public at all reasonable hours.

168. Screening opinions are an initial assessment rather than a detailed report and a forensic analysis is not required: see *Zeb v Birmingham City Council* [2009] EWHC 3597 at [31]. The decision whether a development is EIA development is a matter of fact and degree. Whether or not a development is or is not likely to have significant

environmental effects is subject to review on *Wednesbury* grounds only: see *R (Jones) v Mansfield District Council* [2003] EWCA Civ 1408.

169. The screening decision is for the local authority and not entrusted to the court:

> "A detailed knowledge of the locality and expertise in assessing the environmental effects of different kinds of development are both essential in answering that question, which is pre-eminently a matter of judgement and degree rather than a question of fact. Unlike the local planning authority, the court does not possess such knowledge and expertise." *R (Malster) v Ipswich Borough Council* [2001] EWHC 711 per Sullivan J (as he then was) at 61.

170. The court may interfere if there is a serious error in the information on which the opinion was based: see *R (The Friends of Basildon Golf Course) v Basildon District Council* [2010] EWCA Civ 1432 at [55 and 70].

171. The effect of regulation 7 was analysed in *R (CBRE Lionbrook (General Partners) Limited) v Rugby Borough Council* [2014] EWHC 646 at [46-50]. The concept of a development having been "subject to a screening opinion" was broad enough to include a previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal did not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through. This was classically a matter of judgment for "the relevant planning authority".

172. On 10 May 2011 Turley Associates had written to the defendant requesting a screening opinion in relation to the proposed redevelopment of land at Wilmer Place to provide a food store at ground level with B class floor space and up to fifty residential units above. The letter described the development in greater detail and its location close to the heritage assets. It outlined requirements under the directive and then analysed under eleven headings why, in their view, what was proposed was not EIA development.

173. On 31 May 2011 the defendant replied that having taken into account criteria under schedule 3 of the 1999 Regulations the development was not considered likely to have significant effects on the environment by virtue of its nature, scale or location.

174. A second screening opinion was sought in a letter dated 9 July 2012, again from Turley Associates. That described the development as before but stated that there would be sixty-eight residential units. The letter then went through in greater detail than the first letter of 10 May 2011 the characteristics of the development, location of the development and a further fourteen heads under which the development could be analysed. It reached the same conclusion that what was proposed was not EIA development.

175. The screening opinion issued was that of 6 March 2013 which is set out above. That was on the first planning application that was refused on 3 April 2013.

176. In JR1 no screening opinion was sought. The report on that application sets out at paragraph 3.6:

> "Environmental Impact Assessment Screening Opinion issued advising that no EIA was required in March 2013 (ref: 2012/2627). This related to demolition of the existing buildings and western boundary wall at Wilmer Place and part demolition (façade retention) of 193-201 Stoke Newington High Street and redevelopment to provide a foodstore at ground floor with 68 residential units above."

177. The defendant and interested party contend that as the development proposed was on the same site, proposed the same amount of retail floor space, and proposed a lesser number of residential units that it was within the range considered by the screening opinion. As a result it was entirely reasonable to conclude that the nature and extent of the changes to the amended proposal did not give rise to a realistic prospect of a different outcome to that which had been the subject of the screening opinion in March 2013. As such there is no breach of regulation 7 or regulation 5(5) or 4(7) or 23. I agree and for the reasons that they advance. There is no logical basis for contending that the outcome on any application for a screening opinion had any realistic prospect of being different.

178. The claimant then contends that, in fact, the March 2013 screening opinion is defective because there are no reasons on its face. As Moore-Bick LJ explained at [28] in *R (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, "the difficulty is that one does not know and cannot safely infer reasoning from the face of a screening opinion." In that case there was some limited statement from the council as to why it had reached its decision. The Court of Appeal quashed the grant of planning permission.

179. The Court of Appeal considered the issue of a screening opinion further in the case of *R (on the application of Berky) v Newport City Council* [2012] EWCA Civ 378. There, the council in its response to a request for a screening opinion said:

> "1. I refer to your correspondence dated 17th December 2009 regarding the above.
>
> 2. This represents a formal screening opinion in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 in relation to the above works.
>
> 3. As an urban development project, the proposal falls to be screened for Environmental Impact Assessment purposes on the basis that it exceeds the thresholds contained in Schedule 2 section 10b of the above Regulations and those of Circular 11/99.
>
> 4. Having consulted relevant parties in relation to your request and having considered the information provided in your correspondence and Schedule 3 of the Regulations, I am of the

> opinion that in accordance with the Town and County Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 an Environment Statement is not required."

180. It was later confirmed by the planning officer that the consultation responses in that case were placed on the planning register. Carnwath LJ (as he then was) said in [22]:

> "I confess to finding this whole discussion somewhat sterile. The issue at this stage is not the validity of the screening opinion as such, but whether a flawed screening opinion led to failure to conduct an EIA, and, accordingly, undermined the legality of the planning process. The screening letter could and should have been more fully reasoned, and I find it difficult to understand why the opportunity was not taken to fill the gap more clearly in the planning officer's witness statement. However, I agree with the judge that the only reasonable interpretation is that the officer broadly accepted the reasoning of GVA Grimley's letter. I am unconvinced that there was any serious doubt about this among those interested."

181. He was able to conclude that although the screening letter could and should have been more fully reasoned the only reasonable interpretation was that the officer broadly accepted the reasoning of the letter requesting the opinion. That was in the context of a screening opinion the terms of which were described as "terse" and which was being considered under the 1999 EIA Regulations.

182. In the instant case, in my judgment, the terms of the screening opinion do not comply with the requirements of regulation 4(7). There is a bare reference to the requesting letter. Other than a recital of the legal requirements and a statement of the conclusion there is no underlying reasoning. There is nothing to enable the court to infer that the reasoning in the requesting letter was adopted by the defendant in whole, in part or at all. That does not constitute "full reasons".

183. Of course, there may have been perfectly valid reasons for concluding that the development was not EIA development. It is notable that in JR2 perfectly cogent reasons are set out at some length. That screening opinion has not been challenged. However, in JR1 there is a complete silence of reasoning, other than a most general reference to the nature, size and location of the development. There is nothing which, in my judgement, can amount to the full reasons required for reaching the decision that the proposed development was not EIA development. That is not to say that reasons for reaching a decision that an EIA is not required need to be set out at any great length. Regulation 4(7), in my judgement, does not require that. The reasons can be succinctly stated but they need to relate to the main criteria under schedule 3 of the Regulations and be formulated so that they can properly be referred to as full reasons.

184. The question then is what is the significance of the failure to have an appropriate screening opinion here?

185. The claimant contends that the planning permission must be quashed. The defendant and interested party contend that that is not so and the court should exercise its

discretion not to quash the permission given the position in JR2 where a full screening opinion was given and has not been the subject of any legal challenge.

186. The grant of the second planning permission was subject to a valid screening opinion that the development was not EIA development. The claimant cannot say, therefore, that he was deprived of the opportunity to participate in an EIA process.

187. In *Walton v Scottish Ministers* [2012] UKSC 44 Lord Carnwath said, when dealing with a similar position, at [139]:

> "Where the court is satisfied that the applicant has been able to in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach has cause no substantial prejudice, I see nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arises from a European rather than a domestic source."

188. In *R (on the application of Catt) v Brighton and Hove City Council* [2013] EWHC 977 Lindblom J dealt with a similar situation as follows:

> "144. But the decisive point in my view is that the 2011 project was not EIA development. The August 2011 permission was issued after a defective screening process, but was followed in October 2011 by a process whose outcome was the same. The conclusion was that EIA was not required, which is what the City Council had found before granting planning permission. And that conclusion was correct. The August 2011 permission was not rendered lawful by the subsequent screening process. But neither the claimant himself nor anyone else was deprived of an opportunity they ought to have had to participate in an EIA process – in contrast to what happened in *Berkeley*. No one has suffered any substantial injustice. The claimant will suffer no real prejudice at this stage if the August 2011 planning permission is not quashed. Against that, it is true, the City Council would suffer no substantial prejudice if relief were granted. But is there any point in granting what would now be, both for the claimant and in the public interest, a futile remedy? I think not."

189. In the present case the claimant has not been deprived of any opportunity to participate in an EIA process. No-one has suffered any substantial prejudice. The claimant submits that it is not known whether there is any prejudice because any screening opinion now would have to be based on information which is now known to the defendant including that brought to their attention by the claimant. I reject that submission. It totally ignores the fact that there has been a valid screening opinion in JR2. Further, there is no evidence which is before the court to suggest that what is being proposed is, in reality, EIA development. In those circumstances it would be entirely sterile and contrary to the public interest to quash the planning permission in JR1 on this ground. I exercise my discretion and refuse to do so.

190. Accordingly this ground fails.

Ground Four: Did the planning officer misdirect the planning subcommittee on the first grant of planning permission in JR2? (JR2 only)

Submissions

191. The claimant submits that the defendant was required to consider the first decision in the knowledge of the flaws that were alleged in JR1. Members should have been informed with greater detail and particularity of the grounds of challenge. The officer approach elevated the earlier decision to a status that it did not have.

Discussions and conclusions

192. The officer report of 11 December 2013 advised the committee in paragraph 6.17.9:

> "Members are advised that this application should be determined on its merits. The previous grant of planning permission for this scheme should not be regarded as binding. However, if a different conclusion were to be reached on the planning merits from that reached previously it would have to be justified."

193. That advice was reiterated orally.

194. The planning sub-committee, which was differently constituted to that in JR1 with many members coming to the decision afresh, was told explicitly:

i) That JR2 was to be determined on its merits;

ii) That the previous grant in JR1 should not be regarded as binding; and

iii) That the matter had to be considered afresh.

195. It is clear from the minutes of the discussion of the application that members were all too well aware that a judicial review application was pending. That fact is also clear from the notes produced by the claimant himself.

196. It is clear that the members were told that the officers had appraised the application again afresh. They were told also that if they disagreed with their earlier conclusions then they would have to express reasons for so doing. That is entirely correct advice given that the case of *North Wiltshire District Council v Secretary of State for the Environment* [1993] 65 P&CR 137 emphasises that consistency in decision making is expected and, if not to be the case, then reasons for taking a different view have to be expressed.

197. The criticisms made by the claimant in JR1 were, in general terms, repeated in his oral presentation to committee. The members were, therefore, aware of the nature of the claimant's concerns.

198. It follows that the members were correctly advised by the officers when considering JR2 about how to approach their exercise and that it had to be afresh. They were also

aware of the fact of JR1 and reminded about it not only by the officers but by objectors who made oral representations at the committee meeting.

199. There was no need for the officers to go through each and every one of the grounds of the judicial review. The planning permission subject to JR1 remained valid unless and until quashed by the court. There is nothing in this ground.

Ground Five: Was the claimant treated unfairly by not having access to the Section 106 Agreement in JR2?

Submissions

200. The claimant contends that he was subject to further unfairness when he was denied the opportunity to be able to comment on the section 106. He enquired on several occasions as to its wherewithal. However, it went onto the public register only after the grant of planning permission. That prevented the claimant and others from having the opportunity to inspect and comment upon it. That was of particular importance given the twelve month review period in relation to affordable housing.

Discussions and conclusions

201. The claimant was sent a copy of the section 106 agreement on 19 February 2014. That was after the grant of planning permission. The defendant accepts that it should have been on the register earlier. However, the proposed heads of terms to be contained within a section 106 agreement were clearly set out in the report of 11 December 2013. They stated:

> "1) The owner shall be required to enter into agreement under Section 278 of the Highways Act, to reinstate and improve the footway adjacent to the boundary of the site, and include if required, any access to the Highway, provision of cycle parking facilities for 22 cycles, measures for street furniture relocation, carriageway markings, access and visibility safety requirements, footways reinstatement and upgrade to paying in accordance with the councils design guide, unavoidable works required to be undertaken by Statutory Services will not be included in LBH Estimate or Payment.
>
> 2) Active programme for recruiting and retaining adult improvers and as a minimum take on at least one adult improver per £5 million of construction contract value and provide the Council with written information documenting that programme within seven days of a written request from the Council.
>
> 3) Commitment to the Council's local labour and construction initiatives.
>
> 4) Commitment to achieve a minimum of 30% of employment for the retail unit to be provided using the Council's local

recruitment service (ways into work initiative), including across a spread of recruitment opportunities.

5) Considerate Contractor Scheme – the applicant to carry out all works in keeping with the National Considerate Contractor Scheme.

6) Retail unit to achieve a minimum of BREEAM 'Excellent' and residential units to achieve Code for Sustainable Homes Level 4.

7) Development to accord with requirements of Energy Strategy and that the CHP is capable of connection to a wider network.

8) Payment by the landowner/developer of all the Council's legal and other relevant fees, disbursements and Value Added Tax in respect of the proposed negotiations and completion of the proposed Section 106 Agreement prior to completion of the agreement.

9) Occupiers of new residential units to be ineligible from applying for residents parking permits.

10) Green travel plan including £2500 contribution towards monitoring costs.

11) Education contribution of £73,716.

12) Library contribution of £8980.

13) Open space / Play space contribution of £2662.

14) Affordable housing: 6 affordable rent units (1x1, 3x2, 1x3 and 1x4 beds) and 3 intermediate units (2x1, 1x2 beds).

15) Financial contribution of £180,000 towards public realm improvements within Wilmer Place and Stoke Newington High Street, including improvements to bus stops (inclusive of the cost of the S278 works).

16) Financial contribution of "125,000 towards Abney Park Cemetery.

17) Financial contribution of £50,000 towards Stoke Newington town centre management initiatives.

18) S106 monitoring costs of £17,365.27.

19) Viability review mechanism should the development not be commenced within 12 months."

202. Whilst those matters needed to be translated into phrasing appropriate for inclusion in a legal agreement, the full extent of what was intended within the section 106 agreement was quite clear. There was nothing which prevented the claimant making observations on any of the proposed heads of terms including that on the proposed twelve month review period.

203. In those circumstances it is impossible for the claimant to say that he has suffered any substantial prejudice as a result of the procedural omission on the part of the defendant. This ground fails.

Ground Six: Were the decisions irrational/unreasonable?

204. The claimant accepts that this ground is parasitic upon the other substantive grounds but maintains that overall the decisions were irrational and/or unreasonable.

Discussion and Conclusions

205. I have found that none of the other grounds have any substance. It follows that there can be no basis for this ground succeeding.

206. I have taken into account all other shades of argument raised by the claimant in reaching the decision that I have. On a full and fair reading of the reports it is perfectly clear how the councillors came to the conclusions that they did. This ground fails also on both bases.

Overall Conclusion

207. Accordingly, I dismiss both claims for judicial review. I invite submissions as to the final order and costs.