Neutral Citation Number: [2020] EWHC 1509 (Admin)

Case No: CO/3741/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2020

Before :

MR JUSTICE DOVE

- -

The Queen on the application of

Holborn Studios Limited	**Claimant**
- and -	
London Borough of Hackney	**Defendant**
-and-	
GHL (Eagle Wharf Road) Limited	**Interested Party**

- -

- -

Richard Harwood QC (instructed by **Harrison Grant**) for the **Claimant**
Andrew Fraser-Urquhart QC (instructed by **The London Borough of Hackney**) for the **Defendant**

Hearing dates: 17th March 2020

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove:

Introduction

1. The claimant is the leaseholder of 49-50 Eagle Wharf Road where they run one of the largest photographic studio complexes in Europe. Other media enterprises are licensed to use parts of the building on the site. The interested party have aspirations to redevelop the site for employment and residential purposes. An application for planning permission was initially made on 17 July 2015, and when permission was granted for that application on 19 December 2016 it was the subject of an applications for judicial review by the claimant and a local resident. Those applications for judicial review was granted, leading to the quashing of the planning permission following the judgment of Mr John Howell QC reported as *R (Holborn Studios) v London Borough of Hackney* [2017] EWHC 2823; [2018] PTSR 997. In the present case by the time the matter was heard the interested party (identified above for the sake of completeness) had withdrawn from the proceedings.

2. The interested party made a fresh planning application on the site which was validated on 10 October 2017, describing the proposed development in the following terms:

> "Partial demolition of existing buildings, retention of 3 storey building and former industrial chimney and redevelopment of the site to provide a mixed use scheme comprising blocks of 2 to 7 storeys and accommodating 5644 sq. m, of commercial floorspace at basement, ground, part first, second, third, fourth and fifth floor level, 50 residential units at part first, part second, third, fourth, fifth and sixth floor levels (23 X 1 bed, 17 X 2 bed, 8 X 3 bed, 2 X 4 bed) as well as 127 sq. m. café floorspace (A3) at ground floor level, landscaped communal gardens, pedestrian link route to the Regents Canal and other associated works."

3. The detail relating to the consideration of the planning application is set out below so far as relevant to this judgment. Planning permission was granted for the proposed development on 9 August 2019. The claimant challenges the granting of that planning permission by way of this application for judicial review which is brought on three grounds. Ground one is a sequence of legal contentions related to the information provided in respect of the viability assessment for the proposed development which informed the contributions which were sought from the interested party, in particular in relation to affordable housing. It is said by the claimant that the defendant's approach to this issue failed to comply with national planning policy in relation to the provision of information in respect of viability assessments; that the defendant's approach was in breach of a legitimate expectation in respect of the disclosure of viability information and, finally, that as a matter of law the viability information provided was in breach of the defendant's duties in relation to the publication of background papers to the committee report. Ground two is the allegation that the defendant's guidance for the members of its planning committee were unlawful in so far as they precluded members from reading lobbying material submitted to them by consultees and required that instead this material was passed to officers unread.

Ground three is the contention that the defendant's officers failed in the committee report to properly interpret development plan policies in relation to the retention of the existing use as an important component of the creative industries in this part of the defendant's administrative area.

4. This judgment is structured as follows. Firstly, the history of the consideration of the planning application will be set out. Secondly, the judgment will consider further evidence which was provided by the defendant following the grant of permission to apply for judicial review. Thirdly, the judgment will consider the relevant planning policy relating to the submissions made by the claimant in this case. Fourthly, the defendant's guidance to the members of its planning committee will be examined. Fifthly, the relevant legal principles will be rehearsed. Finally, the grounds will be examined and conclusions reached in relation to their validity.

The history of the planning application

5. Given the nature of the grounds which have been identified in this case, the narrative of events relating to the planning application focuses in particular upon, firstly, the material which was provided in relation to development viability and, secondly, the consultation process and the consideration of the application by members.

6. The application was submitted accompanied by a range of documentation addressing the various considerations bearing upon the question of whether or not planning permission should be granted. The Planning Statement, which was part of the application documentation, noted at paragraph 1.16 that a Viability Assessment Report had been prepared to support the application and had been submitted separately "on a private and confidential basis". This report was, in the form submitted to the defendant, subject to heavy redaction. It was posted on the defendant's website in the redacted version, albeit that the defendant asked the interested party to produce an unredacted version for publication. There is no dispute but that it is not possible to understand the viability of the proposed development from the redacted version, since none of the figures relevant to the calculation of viability are contained within the document.

7. It appears that the defendant did not press for the unredacted version of the Viability Assessment Report on the basis that it had become apparent that there would be a need for a revised version of this assessment prior to the application being determined. On 10 May 2018 the claimant wrote to the defendant setting out a number of matters upon which it relied to object to the proposed planning application. In particular the letter of objection noted that at that stage the interested party was offering no affordable housing, and the claimant objected on the basis that both national planning policy and the defendant's own guidance contained an expectation that information on viability would be provided on an "open book" basis. The claimant complained of a lack of transparency in the material produced with the application so as to justify the interested party's position that no affordable housing contribution should be comprised within the application.

8. As anticipated by the defendant, in September 2018 further material was provided by the interested party bearing upon the question of viability. On 12 September 2018 the

consultants acting on behalf of the interested party wrote in relation to a number of issues providing additional information and clarification in respect of the application. In particular, in relation to viability the letter records the following as being provided as part of the planning obligations required in support of the application, which the consultants explained were justified by an updated viability appraisal enclosed with the correspondence:

> "Viability
>
> Please find attached (Enclosure 3) the updated FVA (dated September 2018) which was originally produced in April 2018 pursuant to viability discussions with the Council and their advisors. The FVA has been updated to reflect further discussions with officers and increase the agreed CIL and S106 financial contributions arising from the development to a figure of £2million from £1.983. The FVA and Summary Report is provided in an unredacted format and can be disclosed to the public.
>
> The FVA demonstrates that the maximum economically feasible amount of employment floorspace has been accommodated within the development.
>
> Affordable Housing Contribution
>
> Pursuant to further discussions with the Council, the Applicant has agreed that the £40,708 S106 contribution previously identified (under the November 2016 consent) for affordable workspace can be reallocated towards the provision of off site affordable housing given that the scheme already comprises 24% affordable workspace.
>
> The redistribution of this contribution results in a minimum S106 affordable housing contribution of £206,797. However, subject to further analysis of the CIL liability of the development, the affordable housing contribution could rise to £805,000."

9. An element of the additional viability information which was submitted in September 2018 was what is described as a "Summary Appraisal". For completeness this document is produced as Appendix 1 to this judgment. The document shows a revenue from residential sales of £33,855,000, together with a valuation of the commercial elements of the development in the sum of £27,130,882. The appraisal identifies a number of elements of cost to be incurred in order to realise the development value. The first of these costs was identified as acquisition costs, described in particular as "Residualised Price" in the sum of £12,298,787. Construction costs and a contingency are identified. Other costs which are specified in the document include Mayoral and Borough CIL in the sum of £1,412,644 together with section 106 contributions of £421,267 and "additional contributions" of £166,089. After these and other costs were taken into account various performance measures are set out in the document, demonstrating profit on cost at 20.53%.

10. A further document produced by the interested party's consultant was entitled "Viability Assessment Summary". This document records that the initial viability assessment concluded that zero affordable housing could be provided as part of the project. A review undertaken by the defendant's consultants identified increased capacity in the form of a surplus within the project's viability of £1.5 million. The outcome of what appears to have been further discussions and negotiations between the defendant and the consultants engaged by both the interested party and the defendant is described in the document in the following terms:

> "The table below provides the summary of the key differences in the appraisals between the respective assessors.

Assumption	**Savills**	**Strettons / Tuner Morum**
Residential Sales Value	£35,295,000	£33,855,000
Commercial GDV	£24,227,429	£26,925,000
Costs	£28,743,884	£25,837,747
Benchmark	£12.84	£12
Profit on GVD	16.64%	16.90%
Professional Fees	10%	10%
Planning Contributions	£1,421,100	£1,421,100
Finance Rate	7%	6.75%

> The largest areas of difference between Savills and BNPP were:
>
> - Benchmark Land Value;
> - Construction Costs;
> - Sales Values;
> - Commercial Values; and

- Finance.

Following this analysis, the Applicant's team provided further information in respect of the proposed scheme, particularly in respect of the affordable commercial space to correct the appraisal provided by Turner Morum.

The Applicant then, despite disagreeing with the conclusions of (sic) provided by Strettons and Turner Morum, agreed to accept their remaining appraisal parameters on a without prejudice basis in order to progress the application."

11. The consequence of these calculations in relation to the planning contributions which could be expected from the proposed development were set out in the "Viability Assessment Summary" in the following terms:

"3.1 Whilst the Applicant they disagreed with the evidence provided by Strettons and Turner Morum, confirmed they would accept these assumptions (sic). This produced the following viable level of planning obligations:

- S106 Costs at £421,267 comprising:

o Highways - £100,130;

o Employment and Training - £226,504;

o Travel Plan - £3500;

o Tow Path Upgrade - £35,000;

o S106 Monitoring - £15,425

- Mayoral and Borough CIL of between £814,773.83 and £1,412,644;

- Additional Contributions of £206,797 which might be provided towards affordable housing.

3.2 The total contributions then equate to £2,000,000 of which between £814,773 and £1,412,644 will be Mayoral and Local CIL costs. If the CIL saving is apparent at the point this scheme is delivered, the total Planning Contributions (in addition to affordable workspace) of £2m would be maintained.

…

3.4 Savills then tested the ability to provide affordable housing on site with the contribution of £206,797. We have determined that this would not allow for even one unit of affordable housing on-site and as such would revert to a financial contribution.

3.5 We have also tested the ability for affordable housing on site in the event that the CIL saving is secured (i.e. an extra circa £598K totalling circa £805K). We have determined that between 3 and 4 units of Shared Ownership could be provided on site. We understand from discussions with local Registered Providers that this is an insufficient number of homes to deliver efficient management for their residents and as such a financial contribution is agreed.

…

Viability

Please find attached (Enclosure 3) the updated FVA (dated September 2018) which was originally produced in April 2018 pursuant to viability discussions within the Council and their advisors. The FVA has been updated to reflect further discussions with officers and increased the agreed CIL and S106 financial contributions arising from the development to a figure of £2million from £1.983million. The FVA and Summary Report is provided in an unredacted format and can be disclosed to the public.

The FVA demonstrates that the maximum economically feasible amount of employment floorspace has been accompanied within the development.

Affordable Housing Contribution

Pursuant to further discussions with the Council, the Applicant has agreed that the £40,708 S106 contribution previously identified (under the November 2016 consent) for affordable workspace can be reallocated towards the provision of off site affordable housing given that the scheme already comprises 24% affordable workspace.

The redistribution of this contribution results in a minimum S106 affordable housing contribution of £206,797. However, subject to further analysis of the CIL liability of the development, the affordable housing contribution could rise to £805,000."

12. Another piece of documentary evidence accompanying the application and submitted at the outset was entitled "Viability Report relating to Employment Floorspace" dated 3 August 2017. The purpose of this document was to examine the supply of, and demand for, commercial floorspace in the immediate area of the site, and examine whether it would be viable for the buildings currently on the site to remain, or whether they could be substantially refurbished for a B1 office use. At paragraphs 3.3 and 3.4 of this report the buildings on site are described as "mainly unattractive and basic and comprise a maze of small and larger spaces" which required investment both structurally and internally. The author of the report expresses the opinion that "massive refurbishment to bring it up to a modern specification" would be required to make it attractive to modern office occupiers. In relation to the current condition of the buildings it was stated that "it would be almost impossible to find an occupier to take occupation of the two buildings for a B1 or similar use". Having considered the potential cost of refurbishment to an appropriate specification, the author of the report concludes that refurbishment would not be financially viable. Indeed, the ultimate conclusion of this aspect of the report was that "even a refurbishment would not be viable with the existing buildings and would only work if a new build could be considered".

13. On the 21 December 2018 the defendant published the report which had been prepared by officers to assist members in the task of determining the planning application at their committee meeting to be held on 9 January 2019. On 27 December 2018 the claimant's managing director Mr McCartney wrote to Councillor Stops (the chair of the committee) pointing out what he regarded as flaws in the officers' report. Shortly after receiving this email, Councillor Stops wrote back to Mr McCartney in the following terms:

> "Planning members are advised to resist being lobbied by either applicant or objectors. As such I have passed your note onto officers and ask them to take account of and report to members as appropriate."

14. On 7 January 2019 the claimant's solicitors wrote to the defendant's Head of Planning copying in all members of the planning committee, ward councillors, the mayor and relevant planning officers. The letter pointed out concerns and objections in relation to the published committee report, and in particular expressed concern in relation to the way in which the committee report had addressed the question of viability and financial contributions to affordable housing. On 8 January 2019 Councillor Snell (a member of the committee) responded to the claimant's solicitors letter with an email in the following terms:

> "Dear Ms Ring
>
> Planning decisions are "quasi-judicial" meaning that Councillors who determine their outcome have to do so based on evidence provided through formal channels so we are advised we cannot allow ourselves to be lobbied. I have sought

> legal clarification on this and paraphrase their advice as follow:-
>
> Members must determine planning applications before them with an open, impartial mind and all applications must be assessed on their planning merits alone. Any other matters that are not material to planning issues should be disregarded and members should not pre-determine their position on any application. The number of objections or representations received on a planning application is not a material planning consideration and therefore not relevant when determining an application.
>
> To avoid the perception that Members have been influenced they should forward any lobbying letters to Governance Services and refrain from reading them. Objectors or supporters of any Planning Application should make their views known by;
>
> - Writing to the Council's Planning Service
>
> - Contacting Governance Services and ask to speak to the relevant Sub-Committee meeting
>
> - Contact Councillors who are not on the Committee to see if they will make representations
>
> In the light of this advice I have not read your email but passed it on to the Governance Services Officer who will ensure the evidence presented to the relevant Planning Committee is complete."

15. The committee report covered a wide variety of considerations bearing upon the question as to whether or not planning permission should be granted. In particular, in relation to employment, the committee report noted that the site was located within the Wenlock Priority Employment Area ("PEA") and also the Core Growth Area of the City Fringe Opportunity Area ("CFOA"). The committee report described the policy implications of these designations, from the core strategy and the London Plan respectively, in the following paragraphs of its analysis:

> "5.3.2 The London Plan identifies that the CFOA as having an indicative employment capacity of 70,000 jobs and a minimum of 8,700 new homes.
>
> 5.3.3 The Core Strategy sets out that the main purpose of the PEAs is to protect and promote business locations in the borough, especially in areas where clusters are well established. As a reflection of this they are exempt from permitted development rights allowing a change from office to residential uses.

> 5.3.4 Policies CS17, CS18, and DM17 confirm that residential uses (C3) may be acceptable in PEA's, as long as such uses are auxiliary to business and do not undermine the primary and long-term function of PEA's as employment areas. There is no specific ratio given in any policy as an acceptable split in employment to residential uses. There is no specific preference given to a single employment use class. Specifically for Wenlock PEA, policy DM17 states that development must result in an increase of office floorspace compared to the existing amount.
>
> …
>
> 5.3.6 5.3.6 Consequently, it is concluded that the primary function of sites within these designations is to support and promote commercial opportunities, but there may be opportunities to supplement this with other uses including residential
>
> 5.3.7 Policy DM14 of the DMLP sets out a prescriptive set of criteria that proposals for the redevelopment of sites containing employment land and floorspace, and where the loss of employment land and floorspace must meet to be considered compliant. DM17 states that applicants must first consider the commercial opportunities and potential of that land and floorspace and demonstrate in the first instance that the maximum economically feasible amount of employment land and floorspace is provided. New A Class and residential (C3) uses may be acceptable in PEAs, as long as auxiliary to business, and where not considered to draw trade away from existing identified retail centres to the detriment of their vitality and viability."

16. Against the backdrop of this policy the committee report went on to consider, amongst other employment use related issues, the question of whether or not the existing use of the site by the claimant was in any way protected by development plan policy. The conclusions of the officers in respect of this issue were set out as follows:

> "5.3.36 On assessment of the proposed space, in the basement and throughout, it is considered by Officers that the specific operational needs of Holborn Studios, as set out in their consultation comments, would not be accommodated. It is therefore logical to assume that if the proposed development is approved, this user may likely vacate the site as it could no longer operate from this space. Beyond this, Holborn Studios have also stated that the studio space proposed would be unsuitable for any "photographic and moving image studio" and "in their professional opinion would be unviable". Officers do not contend this opinion and consider that it may not be useable for the quality of work which is presently carried out there, but Officers consider that the proposed development is

> capable of providing for a wide range of occupiers within the B1 use being applied for, including those within the photographic studio trade.
>
> 5.3.37 Other businesses operating under licence from Holborn Studios in the existing buildings have also commented that they would be forced to vacate the space if the application was approved. Based on visual inspection of the existing buildings and space in which they operate. Officers believe that this is not due to their operational needs and more the relationship they have with Holborn Studios and requirement to vacate during construction. On this assessment, it is considered that the proposed floorspace could meet their operational needs.
>
> 5.3.38 Policy DM14 does not seek to protect specific types of employment floorspace, merely the quantum. Further to this, CS Policy 18 and DM15 seek to provide flexible employment floorspace, suitable for various users and no specific or existing use.
>
> 5.3.39 In strictly policy terms, the development provides the maximum economically feasible amount of employment floorspace, which is an uplift against the existing provision in line with DM14.
>
> 5.3.40. Overall, there is a clear policy objective for new business floorspace to be designated to respond to changing economic conditions and support economic growth. The space is considered to meet modern standards, be flexible, suitable for a range of sizes, suitable for a range of uses within B1 in line with CS Policy 18 and DM15.
>
> 5.3.41 The proposed development may lead to the loss of Holborn Studios. Given the number of consultation comments in support of its retention the loss of Holborn Studios of regrettable, however it is considered that there is no Development Plan policy requirement to retain the specific type of floorspace that Holborn Studios desire within the broader B1 use class."

17. The committee report then went on to set out the considerations in respect of viability and affordable housing. It appears from the committee report that matters had moved on following the receipt of the additional information in September 2018. In particular, the interested party now proposed a contribution of £757,076 towards the delivery of affordable housing. The committee report provided as follows in relation to both the viability information and also the contribution proposed towards affordable housing:

> "Housing Affordability

5.3.58 In reflection of London Plan policies, Hackney Core Strategy policy 20 sets a target of 50% of new residential development to be affordable within developments of 10 or more units, with a tenure split of 60% affordable/social rent and 40% intermediate, subject to site characteristics, location and scheme viability. CS Policy 20 sets out a sequence that affordable housing should be delivered on-site in the first instance, where off-site provision and in-lieu contributions may only be considered in exceptional circumstances. Policy DM21 sets out the requirement to comply with CS Policy 20, and outlines criteria to which on site provision of affordable housing will apply to, subject to the content of supporting paragraphs 5.3.5, 5.3.6 and 5.3.7 of the DMLP.

5.3.59 The content of the policies' supporting paragraphs details the instances where in lieu contributions are acceptable, and how such should be ring fenced for the delivery of affordable housing.

5.3.60 The application proposes no on site affordable housing. The application was supported by a viability assessment that outlined it would be unviable to provide any affordable housing.

5.3.61 It is acknowledged that the proposal reflects that of application reference 2015/2596. This proposal also did not provide any affordable housing offer. However, since this 2015 application the context and date upon which viability assessments are undertaken has changed.

5.3.62 The table below provides the summary of the key differences in the appraisals between the respective assessors:

Assumption	**Applicant's Agent**	**Independent Assessors**
Residential Sales Value	£35,295,000	£33,855,000
Commercial GDV	£24,227,429	£26,925,000
Costs	£28,743,884	£25,837,747
Benchmark Land Value	£12,840,000	£12,000,000

Profit on GDV	16.64%	16.90%
Professional Fees	10%	10%
Planning Contributions	£1,421,100	£1,421,100
Finance Rate	7%	6.75%

5.3.63 The largest areas of difference between the Applicant's Agent and Independent Assessors were:

- Benchmark Land Value;

- Construction Costs;

- Sales Values;

- Commercial Values; and

- Finance.

5.3.64 Through negotiations with Officers the conclusions provided by independent assessors were accepted by the applicant. Consequently, the applicant agreed to the provision of £757,076 beyond that of other financial contributions and non-financial obligations to satisfy policy requirements.

5.3.65 As discussed, there is a policy emphasis on maximising employment led development on this site in the first instance. The proposed development is considered to be acceptable with regards to these policies, specifically the affordable workspace offer. On this basis, it was considered that the £757,076 viability surplus should be attributed towards meeting or mitigating a further policy issue or material concern. It was concluded by Officers that housing delivery, and specifically affordable housing delivery is a primary strategic issue in the wider borough, (and it was raised during consultation), therefore on this basis the surplus should be provided towards this matter, in line with affordable housing policy.

5.3.66 Officers therefore consider that the affordable housing provision represents the maximum reasonable amount once other policies have been fully satisfied.

> 5.3.67 The affordable housing provision is offered as a financial contribution, and consequently, there is therefore a contribution in lieu of affordable housing provision on site or on an alternative site within the vicinity.
>
> 5.3.68 The provisions of affordable housing of site reflecting £757,076 was assessed internally. There is an identified borough wide need for social rented units, and the most pressing need in the borough within this tenure is for 3 bed social rented units. Given land values it is considered unlikely that the surplus amount would secure more than two of such units of site. This level of provision alone is not preferred by Registered Providers (RPs) in general, and it could be difficult to secure an RP to a manage them in isolation. Further to this, layout design changes to accommodate the units and access, are considered to undermine the delivery of the maximum feasible amount of employment and affordable housing workspace, and the maximum reasonable amount of affordable housing.
>
> 5.3.69 In comparison, the off-site contributions could be secured, ring fenced and used within the Council's affordable housing supply programme, which would ensure the delivery of the maximum amount of affordable housing within the borough, in more predominantly residential areas that can better support family housing.
>
> 5.3.70 Overall, the contribution of £757,076 towards affordable housing delivery does not undermine the policy compliant employment element and its benefits, represents a betterment against the previous application reference 2015/2596 and will ensure the delivery of the maximum amount of affordable delivery for this amount."

18. As a consequence of this material the section of the committee report which dealt with planning obligations noted that, amongst other financial contributions which would be made to accompany the planning permission if approved, there was a proposed financial contribution for affordable housing amounting to £757,076 as part of the total financial contributions of £1,185,226. This sum, taken with the total CIL liability which was assumed to be £814,774, meant that the total amount of financial contributions and CIL liability for the proposed development was £2 million. In the committee report the officers recommended that planning permission should be granted subject to conditions and the completion of a legal agreement to reflect matters such as the financial contributions which were envisaged.

19. Having set out the relevant statutory basis for decision-taking in relation to planning applications the officers drew together their conclusions in the following paragraphs:

> "6.2 The proposed development is considered to be employment led and offer the most economically feasible amount of such floorspace of employment space which is considered to be of a modern standard, cater for and sustain a

> wider range of B1 uses in line with policy designations and their supporting evidence base, generating possibly more employment opportunities; secure the provision of 1,355m2 (24%) affordable workspace with a defined rent, quantum and fair process that exceeds policy requirements; provide further uses with additional benefits of their own, which will support the employment use, whilst not undermining the wider operation of the PEA, and secure the viable delivery of the employment element; all of which is considered to support and sustain the PEA and is in line with pertinent employment policy.
>
> 6.3 The residential element of the proposed development will deliver 50 units deemed to be of a high standard of accommodation, supporting the borough in meeting its housing targets, and offers the contribution of £757,076 to the provision of affordable housing.
>
> 6.4 The proposed development adopts an approach to heritage conservation which is considered on balance, acceptable. This is achieved through the retention of the most significant elements of the sit, removing later adhoc structures, careful massing, vernacular design and high quality materials. Impacts have been assessed in line with the pertinent policy, legislation and considerations, and are considered to be, on balance, acceptable.
>
> 6.5 The likely loss of Holborn Studios and the impacts of this as a result of the proposed development have been considered, and on balance this is considered to be acceptable when assessed against all Development Plan policies.
>
> 6.6 Overall, the proposal is considered to comply with the pertinent policies in the development plan for the reasons set out above, there would be compliance with the adopted development plan viewed as a whole and other material considerations do not indicate that the plan should not be followed. Accordingly the application for full planning permission reference 2017/3511 is recommended for approval, subject, to conditions and the completion of a legal agreement."

20. Following the receipt of the letter from the claimant's solicitors the officers prepared an addendum to the committee report addressing the various points which had been made in their correspondence. Dealing firstly with the contention of the claimant's solicitor that the availability of information in relation to affordable housing was unlawful the addendum report concluded as follows:

> "Information outlining an agreed appraisal and a viability summary explaining the agreed viability assessment, the assumptions adopted by the council and their independent advisors Strettons and Turner Morum, the final agreed viability

> assumptions and planning obligations provisions was made publicly available on 14th September 2018. This information has been formally consulted upon twice. Overall the Council consider that the publicly available information provided to be proportionate and in line with national guidance on this matter."

21. The addendum went on to contend that the background papers which had been identified in the committee report were appropriate. The only background papers which were identified by the committee report were the Hackney Development Plan (2015) and the London Plan (2016). The addendum report observed that this was in line with all reports to committee on planning applications, and that drawings, supporting documents and development plan policies were referred to in the committee report itself and were publicly available. The addendum report engaged with the concern expressed in the claimant's solicitors letter that the warning that committee members received against reading anything other than the committee report was unlawful. The addendum report recorded as follows:

> "Committee Members are not warned against reading anything other than the report and, for instance, they are entirely free to look at all the application documents that are published on our website the viewing by anyone that is interested. Members are warned about viewing lobbying material as this can be considered to be prejudicial to their consideration of the application. Members are free to inspect any site from the highway and an officer is only required when the site is entered as this usually involves the applicant or an objector to the application."

22. Paragraph 5.3.62 of the committee report was corrected in order to provide a corrected table in relation to the viability assessment which was as follows:

> "Paragraph 5.3.62 should read:

Assumption	**Applicant's Agent**	**Independent Assessors**
Residential Sales Value	£35,295,000	£33,855,000
Commercial GDV	£24,227,429	£26,925,000
Costs	£28,743,884	£25,837,747
Benchmark Land Value	£12,840,000	£12,305,000

Profit on GDV	16.64%	16.90%
Professional Fees	10%	10%
Planning Contributions	£1,421,100	£1,421,100
Finance Rate	7%	6.75%

> The first column of figures was the position of the applicant's agent. The second column of figures is that of the Council's independent assessor, to which the applicant agreed to which informed the viability assessment."

23. At the defendant's planning committee meeting the claimant was represented by, amongst others, Mr Richard Harwood QC, who also represents them in relation to this application for judicial review. During the course of his representations to the committee Mr Harwood pointed out the claimant's concern that the material on viability in the public domain appeared to demonstrate that the interested party's consultants had undertaken the exercise on the basis of a residualised value, rather than taking an existing use value plus approach which was what was required by policy (as set out below). This concern was taken up by Councillor Snell. Mr Robert Carney, who had been one of the defendant's officers and who had been involved with the consideration and negotiation of the viability of the development (albeit that by the time he attended the committee meeting he was working for a consultancy) was called upon to address these concerns, and in particular whether or not a residualised value approach had been taken to the viability exercise. His observations in respect of this issue, as recorded on the transcript contained within the court's papers, were as follows:

> "Perhaps I'll deal with the specifics of the, the values of where- of where they have been reported and Stuart will want to talk about, uh, the transparency of the information in the public domain. So I just want to clarify, we've used an existing use value plus approach in accordance with all guidance and the- what that approach- that approach forms was known as benchmark land value, that's referred to in the table at 5.3.62. Uh, you have the applicant's proposed benchmark land value and then the independent assessor's benchmark land value. And what you do is you, uh, look at the residual land value and the appraisal, basically, given them the residual land value, show them the appraisal equals or is more than the benchmark- benchmark land value, the scheme is viable. Because what that means is that a hypothetical, uh, developer can purchase the site at a figure above the benchmark land value. And we see in appraisal it's just shy of that benchmark land value. But

> basically, um, through our negotiations we accepted that the scheme had maximised, uh, it's viability with the, um, agreed contributions."

24. He subsequently reconfirmed his view that the exercise had been one based on existing use value plus. In addition to this issue, the transcript discloses that the oral presentation to the committee made by Mr Harwood, both at the outset of the meeting and in response to members' questions, covered the other objections raised by the claimant, including the issues related to employment land policy and the impact on the claimant's use. At the conclusion of the debate members voted, and the officers' recommendation contained in the committee report was accepted. Following the resolution to grant planning permission, negotiations were undertaken for the production of a planning obligation which led to the grant of conditional planning permission which is the subject of these proceedings on 9 August 2019.

Evidence following the grant of permission

25. Following the grant of permission to apply for judicial review the defendant lodged further evidence from two witnesses. Firstly, evidence was lodged from Mr Robert Brew dealing with the planning policy issues, the submission of viability evidence as part of the application and the identification of the Planning Code of Practice for Members ("the defendant's Code") which was in force at the time when the decision was taken by members on 9 January 2019. The questions associated with the evidence related to the defendant's Code are dealt with further shortly. Secondly, evidence was lodged from Mr Carney dealing with the viability assessment and the information which was provided by the interested party in connection with that issue together with the investigation of the matter by the defendant. His evidence commences with the discussions about viability which occurred in connection with the first and earlier planning application. It appears that in those discussions the interested party did not adopt an existing use value plus approach, but one based on an acquisition price derived from neighbouring market values. The defendant's consultants negotiated the benchmark land value down on an existing use value plus approach to £12.84 million in the first application, which then formed the starting point of the September 2017 viability report in respect of the planning permission under review. The defendant commissioned its own work in relation to that which is described by Mr Carney in his evidence as follows:

> "19. Again, the September 2017 Savills FVA was outsourced to be reviewed by Hackney's appointed consultants. Strettons were appointed in conjunction with Turner Morum to review the submitted FVA on behalf of Hackney, while the build costs were reviewed separately by WT Partnership Cost Consultants. Due to the commercially sensitive nature of this information, it was not made public.
>
> 20. As part of a separate instruction, WT Partnership reviewed the proposed costs in the September 2017 Savills FVA and prepared a report dated October 2017, which concluded the proposed costs in the FVA had been overestimated by £3,420,434 or 11.90%, and their estimated build costs for the scheme were £25,323,450.

21. As instructed, Strettons and Turner Morum then reviewed the FVA, and using WT Partnership's proposed build costs identified above, they concluded in their joint December 2017 reports, that the scheme was actually viable, by approximately £1.5 million.

22. The main reasons for the improved viability position were as follows:

- An increase in commercial values to £28,235,000 from £24,870,000.

- Reduced estimate of building costs by WT Partnership.

- The proposed BLV was reduced from £12.84 million to £12.3 million. (Based upon an EUV of £10.7 million, with a 15% landowner premium applied to it, reduced from the 20% premium applied in the first application by Deloitte Real Estate).

23. Strettons reported two separate Existing Use Values. These were £7,820,000 and £10,700,000. The reason two separate vales were reported, was the first assumed that the existing tenants remained in occupation and any tenants' improvements which had been made to the property could not be rentalised. The second higher value of £10,700,000 assumed vacant possession of the property, and after 6 month letting period, it assumed the property re-let at a higher rental than the existing tenants were paying.

24. The December 2017 Turner Morum report based on the BLV off the higher EUV of £10,700,000 and applied a 15% premium to this, though his report highlights in section 3.6 that "the Council may well want to seek assurances as to the realistic prospect of vacant possession being obtained on the site".

25. The ability to achieve vacant possession was considered by officers. My understanding was that the developer had confirmed its ability to determine the leases to the planning officers working on the case. Furthermore, the supporting planning documents such as the September 2017 Savills FVA highlighted that the applicant as landlord of the property had a break option in its lease from June 2018 with 12 months' notice. The December 2017 Strettons valuation report also confirmed that the lease could not be broken on any date after June 2018 with 12 months' notice.

26. Ultimately, it appeared reasonable to assume that vacant possession of the site could be achieved, as not only did the lease enable the landlord to do so, but the applicant maintained

> it had the ability to do so. The fact that the applicant was progressing with the planning application, appeared testament to its belief it would be able to do so.
>
> 27. Furthermore, it did not appear realistic to expect a landowner to release a site for development at a value which was considerably less than it could achieve in accordance with other potential options which were available to it. It therefore, appeared unreasonable to expect a site to come forward for development at a benchmark, land value which was based off the lower £7,820,000 EUV."

26. Mr Carney then goes on to describe how there was further negotiation leading to agreement on proposed build costs which led to a reduction in the profits generated by the development, reducing them to £633,000. He records that whilst there was greater clarity in relation to some items requiring off-site contributions that the interested party's viability consultants had suggested a higher estimate of the required CIL of £1,412,267, an increase on earlier estimates of that requirement. A further issue which emerged was a government proposal from December 2017 proposing to cut ground rents on new developments to zero. The uncertainty created by this proposal and the impact which it had on the viability discussions and the emergence of the figure of financial contributions is described in Mr Carney's evidence as follows:

> "37. The September 2017 Savills FVA had placed a value of £500,000 on the proposed ground rents, and the December 2017 Turner Morum report had valued them at £484,000. However, following the Department's comments, Savills in an email dated 21 February 2018, suggested 3 different approaches on how they could potentially now be considered in the appraisal:
>
> 1. Maintain them at £484,000
>
> 2. Remove them entirely and place no value for them
>
> 3. Include them at a higher yield of 10% to reflect the increased uncertainty, reflecting a revised value of £175,000.
>
> 38. Having tabled the three scenarios outlined above, Savills then proposed differing levels of further contributions:

	Ground rent proposed options	**Maximum payment in lieu**
1.	Maintained at £484,000	£350,000
2.	Removed ground rents (no value)	£14,000

3.	Apply a yield of 10% in line with GLA approach	£150,000

39. The September 2017 Savills FVA had originally included a figure of £250,000 as an offsite contribution, though no allowance had been made for the s106 costs identified in paragraph 32 above. Meaning that only option 1 above, based on maintaining the ground rents at their original proposed value, would lead to a further planning gain contribution of £100,000.

40. To place significant value against ground rents in the appraisal was highly subjective, as the industry at the time was either placing a reduced value, or no value at all on ground rents, following the proposed government changes. However, the applicant's consultant stated the applicant recognised the need to maintain and/or try to improve upon the contributions within the scheme, and highlighted the applicant was prepared to consider an improved offer of a further £100,000, which was on the assumption that the ground rents would generate a profit for the applicant.

41. Following this revised proposal from the applicant, officers sought to determine the full extent of the CIL liabilities. Based off the highest CIL estimate (assuming no relief) of £1,833,911, myself and the case officer pushed for a further £350,000 contribution to account for the surplus profit if ground rents could be fully reflected in the appraisal at a value of £484,000. This would have equated to a total planning contribution "pot" of £2,183,911.

42. Ultimately, the applicant pushed back against this level of contribution, and a meeting was arranged on 16 April 2018 between the applicant and their consultants, and myself and the planning case officers. In this meeting each side stated the reasons for their position, but despite multiple attempts to negotiate a higher figure with the applicant, their final offer was for a total "pot" of £2,000,000 which effectively assumed a yield of 8.5% was applied to the ground rents, reflecting a gross value of £205,882.

43. The applicant's position was based on the fact they did not fully agree with the findings of Stretton's and Turner Morum in their December 2017 reports, and also due to the continued uncertainty which by this point surrounded ground rents and the ability for them to generate a value.

…

> 45. My understanding is that further work was undertaken by the case officer to determine the exact CIL liabilities and therefore the extent of the relief which could be used to improve the policy compliance of the scheme. After the CIL liability was determined, the viability position was agreed to reflect a total planning gain contribution of £2 million, which was aggregated of the various s106 costs and CIL estimates, as set out in section 3: "Agreed Planning contributions" of the Savills Viability Assessment Summary and in the committee report."

27. Mr Carney then proceeds in his evidence to deal with a description of the figures presented in the committee report in the following terms:

> "48. The final agreed position was set out in the appraisal prepared by Savills and dated the 12 September 2018 and labelled as "Agreed Appraisal", which was available as part of the application documents for Planning Application 2017/3511 on the Council's website.
>
> 49. I understand that it has previously been suggested that due to the fact the agreed appraisal refers to a "residualised price" of £12,298,787, that the Benchmark Land Value (BLV) for the application was not based on the recommended Established Use Value plus premium (EUV+) approach. However, the reason it is referred to as "residualised price" is because the appraisal has been prepared using Argus Developer, which is a development software package widely used by the property industry, and this is how the model reports the land value. It is not possible, as far as I am aware, to alter the appraisal in Argus to refer to BLV.
>
> 50. I understand that the Claimant has previously highlighted discrepancies in some of the viability numbers in the committee report and supporting documents on the Hackney planning portal. In particular, the committee report referred to two separate benchmark land values, the "applicant's agent" BLV of £12,840,000 and the "Independent assessors" BLV of £12,000,000.
>
> 51. The reported £12,000,000 independent assessors figure was a typing mistake copied from the table in section 2.4 of the Savills Viability Assessment Summary report. It should have read £12,305,000, as this was the Council's proposed BLV, based on the findings of December 2017 Turner Morum/ Strettons report.
>
> 52. The addendum on the night identified this mistake, and it was clarified and changed to £12,305,000. As I have set out above, this BLV has been calculated using an EUV plus methodology, and I confirmed this on the night of the committee to the Councillors when questioned on this matter,

> and reiterated that Hackney had for many years sought to use this approach when assessing site viability.
>
> 53. I understand that the claimant has also queried how the £757,076 contribution to offside affordable housing identified in the Planning Sub-Committee report has been calculated. I can confirm, that based on a total agreed contribution of £2 million, the £757,076 figure if what is left after the known s106 and CIL costs have been accounted for."

Relevant planning policy

28. The first area of planning policy to be considered in relation to this case is that pertaining to affordable housing. Paragraph 5.3.58 of the committee report set out the development plan policies requiring the provision of affordable housing (and a target tenure split) and identified that affordable housing should be delivered on site and contributions towards affordable housing only considered in exceptional circumstances. It was against the background of that policy framework for affordable housing that the interested party produced a viability exercise to demonstrate that it was not possible for the proposed development to meet the policy requirements. Arguments of this kind are not unusual, and therefore further policy exists in order to determine the validity of viability assessments in this context.

29. The starting point for considering policy associated with viability assessments is that which is provided in the National Planning Policy Framework ("the Framework"). At paragraph 57 the Framework which was operational at the time of decision-taking provided as follows:

> "57. Where up-to-date policies have set out the contributions expected from development, planning applications that comply with them should be assumed to be viable. It is up to the applicant to demonstrate whether particular circumstances justify the need for a viability assessment at the application stage. The weight to be given to a viability assessment is a matter for the decision maker, having regard to all the circumstances in the case, including whether the plan and the viability evidence underpinning it is up to date, and any chance in site circumstances since the plan was brought into force. All viability assessments, including any undertaken at the plan-making stage, should reflect the recommended approach in national planning guidance, including standardised inputs, and should be made publicly available."

30. It will be noted that the policy refers to the need to reflect the approach set out in the Planning Policy Guidance ("PPG") relevant to the question of viability assessments. The PPG (current at the time of decision-taking) reiterates the starting point that planning applications are assumed to be viable against the backdrop of contributions set out in up-to-date planning policies. It goes on to consider how a viability exercise should be undertaken and, in particular, provides the following detail in relation to undertaking an assessment of viability, including the specification of the approach to be taken in respect of defining the cost of land for the purposes of the exercise and the

manner in which the viability assessment should be presented and published in order to ensure accountability. It is necessary, in the circumstances of the present case, to set out these passages at some length.

> "Standardised inputs to viability assessment
>
> What are the principles for carrying out a viability assessment?
>
> Viability assessment is a process of assessing whether a site is financially viable, by looking at whether the value generated by a development is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium, and developer return.
>
> This National Planning Guidance sets out the government's recommended approach to viability assessment for planning. The approach supports accountability for communities by enabling them to understand the key inputs to and outcomes of viability assessment.
>
> Any viability assessment should be supported by appropriate evidence by engagement with developers, landowners, and infrastructure and affordable housing providers. Any viability assessment should follow the government's recommended approach to assessing viability as set out in this National Planning Guidance and be proportionate, simple, transparent and publicly available. Improving transparency of data associated with viability assessment will, over time, improve the data available for future assessment as well as provide more accountability regarding how viability informs decision making.
>
> …
>
> How should land value be defined for the purpose of viability assessment?
>
> To define land value for any viability assessment, a benchmark land value should be established on the basis of the existing use value (EUV) of the land, plus a premium for the land owner. The premium for the landowner should reflect the minimum return at which it is considered a reasonable landowner would be willing to sell their land. The premium should provide a reasonable incentive, in comparison with other options available, for the landowner to sell land for a development while allowing a sufficient contribution to comply with policy requirements. This approach is often called 'existing use value plus' (EUV+).

In order to establish benchmark value, plan makers, landowners, developers, infrastructure and affordable housing providers should engage and provide evidence to inform this iterative and collaborative process.

…

What factors should be considered to establish benchmark land value?

Benchmark land value should:

- Be based upon existing use value

- Allow for a premium to landowners (including equity resulting from those building their own homes)

- Reflect the implications of abnormal costs; site-specific infrastructure costs; and professional site fees and

- Be informed by market evidence including current uses, costs and values wherever possible. Where recent market evidence is used to inform assessment of benchmark land value this evidence should be based on developments which are compliant with policies, including for affordable housing. Where this evidence is not available plan makers and applicants should identify and evidence any adjustments to reflect the costs of policy compliance. This is so that historic benchmark land values of non-policy compliant developments are not used to inflate values over time.

  …

  What is meant by existing use value in viability assessment?

  Existing use value (EUV) is the first component of calculating benchmark land value. EUV is the value of the land in its existing use together with the right to implement any development for which there are policy compliant extant planning consents, including realistic deemed consents, but without regards to alternative uses. Existing use value is not the price paid and should disregard hope value. Existing use values will vary depending on the type of site and development types.

  …

  How should the premium to the landowner be defined for viability assessment?

> The premium (or the 'plus' in EUV) is the second component of benchmark land value. It is the amount above existing use value (EUV) that goes to the landowner. The premium should provide a reasonable incentive for a land owner to bring forward land for development while allowing a sufficient contribution to comply with policy requirements.
>
> Plan makers should establish a reasonable premium to the landowner for the purpose of ensuring the viability of their plan. This will be an iterative process informed by professional judgement and must be based upon the best available evidence informed by cross sector collaboration. For any viability assessment data sources to inform the establishment the landowner premium should include market evidence and can include benchmark land values from other viability assessments. Any data used should reasonably identify any adjustments necessary to reflect the cost of policy compliance (including affordable housing), or differences in the quality of the land, site scale, market performance of different building use types and reasonable expectations of local landowners. Local authorities can request data on the price paid for land (or the price expected to be paid through an option agreement).
>
> …
>
> Accountability
>
> How should a viability assessment be presented and published to ensure accountability?
>
> Complexity and variance is inherent in viability assessment. In order to improve clarity and accountability it is an expectation that any viability assessment is prepared with professional integrity by a suitably qualified practitioner and presented in accordance with this National Planning Guidance. Practitioners should ensure that the findings of a viability assessment are presented clearly. An executive summary should be used to set out key findings of a viability assessment in a clear way.
>
> The inputs and findings of any viability assessment should be set out in a way that aids clear interpretation and interrogation by decision makers. Reports and findings should clearly state what assumptions have been made about costs and values (including gross development value, benchmark land values including the landowner premium, developer's return and costs). At the decision making stage, any deviation from the figures used in the viability

> assessment of the plan should be explained and supported by evidence.
>
> …
>
> Should a viability assessment be publicly available?
>
> Any viability assessment should be prepared on the basis that it will be made publicly available other than in exceptional circumstances. Even in those circumstances an executive summary should be made publicly available. Information used in viability assessment is not usually specific to that developer and thereby need not contain commercially sensitive data. In circumstances where it is deemed that specific details of an assessment are commercially sensitive, the information should be aggregated in published viability assessments and executive summaries, and included as part of total costs figures. Where an exemption from publication is sought, the planning authority must be satisfied that the information to be excluded is commercially sensitive. This might include information relating to negotiations, such as ongoing negotiations over land purchase, and information relating to compensation that may be due to individuals, such as right to light compensation. The aggregated information should be clearly set out to the satisfaction of the decision maker. Any sensitive personal information should not be made public.
>
> An executive summary prepared in accordance with data standards published by government and in line with the template (template to be published in autumn 2018) will present the data and findings of a viability assessment more clearly so that the process and findings are accessible to affected communities. As a minimum, the government recommends that the executive summary sets out the gross development value, benchmark land value including landowner premium, costs, as set out in this guidance where applicable, and return to developer. Where a viability assessment is submitted to accompany a planning application, the executive summary should refer back to the viability assessment that informed the plan and summarise what has changed since then. It should also set out the proposed developer contributions and how this compares with policy requirements."

31. The defendant produced its own guidance in relation to viability assessments in a document entitled "Development Viability Guidance Note". This document identified the defendant's preferred approach to benchmark land value as being a value derived using an existing use value plus approach to the identification of the relevant land

value. The document also described the defendant's expectations in relation to openness and transparency at paragraph 3.6 of the document in the following terms:

> "Openness and Transparency
>
> 3.6 Information relevant to the plan-making and planning application process is publicly available. This is consistent with the NPPF which places a requirement on councils to facilitate community involvement in planning decisions. Planning Policy Guidance states that transparency of viability evidence is encouraged wherever possible. The Environmental Information Regulations (2004) recognise the benefits of public participation and include a presumption in favour of disclosure. To ensure transparency and public participation:
>
> - The Council will expect information to be provided on an 'open book' basis and that this information can be made available to the public, including on the Council's website, alongside other planning application documents. In submitting development viability information, applicants do so in the knowledge that this may be publicly available, alongside other planning application documents. Where an applicant requests that a redacted version of the development viability appraisal only be made public, the Council will require justification for the components of the report to be redacted and the period of time for which they should redacted. As such a planning application will not be registered (made valid) unless it is accompanied by an 'open book' development viability assessment, and a redacted development viability appraisal, including justification (in line with paragraph 3.1-3.3);
>
> - The Council may make information available to planning sub-committee members or any other member who has legitimate interest in seeing it; and
>
> - The Council may make information available to a third party where another body has a role in determining an application or providing public subsidy and when fulfilling their duties under the Environmental Information Regulations and freedom of information legislation."

32. Turning from the issues associated with the interested party's viability assessment to those related to the claimant's use of the site, a variety of policies are said by the claimant to justify the conclusion that there are policies protecting its existing use and seeking to secure its retention. This policy is contained in a number of documents starting with the Mayor of London's City Fringe Opportunity Area Planning Framework and the site of the proposed application falls within the operational area of this policy. Within the document it is noted at paragraph 1.60, identified as Strategy One, that there are strategic policies in development plans including that of the defendant in relation to this area, and the document aims to give guidance on how those policies can be applied in order to best deliver their agreed vision and objectives

and ensure a consistent and coordinated approach. The document notes particular conditions encouraging clustering in the City Fringe and amongst those conditions is said to be "Location and creative vibe", it being said that "the area is centrally located and has for decades attracted small businesses and artists who were also attracted by the availability of cheap space". One of the five objectives to achieve the document's vision is "supporting the mix of uses that makes the city fringe special". Against the background of these observations the document provides as follows:

> "Creative Character
>
> 4.3 In the decades before the proliferation of digital technology this area experienced an influx of artists as well as small businesses, attracted by the availability of cheap space.
>
> 4.4 As already mentioned, the creative character of the area has made it more attractive as a business and residential location. It is important that these positive characteristics persist as the business cluster expands and consolidates. The growth of the parallel cluster and associated retail, leisure, café, cultural and night-time economy are all important here. There is also a potentially important role for temporary or "pop-up" uses."

33. Turning to the defendant's Core Strategy, in the chapter associated with economic development the claimant draws attention to the fact that one of the overarching principles in relation to the policies in that chapter is the support for a creative economy, and the ambition "to continue to attract the creative sector into the borough and to use this investment as part of the overall regeneration of the borough". Within the chapter Core Strategy Policies 17 and 18 provide as follows:

> "Core Strategy Policy 17
>
> Economic Development
>
> The Council will encourage economic development, growth and promotion of effective use of land through the identification and regeneration of sites for employment generating uses, the promotion of employment clusters and the encouragement of mixed use development with a strong viable employment component that meets the identified needs of the area, as set out in the Delivering Sustainable Growth chapter of this document. The Council expects to be able to deliver approximately 407,000sqm of employment floorspace to meet future demand.
>
> The Council will encourage economic diversity, support existing businesses and business development by facilitating the location of micro, small and medium companies in the borough.
>
> …

> Core Strategy Policy 18
>
> Promoting Employment Land
>
> The Council will protect employment land and floorspace last used for employment purposes anywhere in the borough.
>
> Redevelopment of existing employment land and floorspace may be allowed, as provided for in Policy 17 (Economic Development), when it will clearly contribute to: addressing worklessness; improvising business function and attractiveness; enhancing the specification of business premises; improving the immediate area; increasing the take-up of existing employment floorspace; and meeting the identified up-to-date needs of businesses located, or wishing to locate, in the borough."

34. The final element of policy in this connection is the Development Management Local Plan adopted in July 2015. In the chapter of that document dedicated to "A Dynamic and Creative Economy", policy DM 16 makes provision for affordable workspace and is explained by paragraph 4.1.3 of the explanatory text as follows:

> "4.1.3 Employment land (generally 'B' class use) is dispersed across the Borough, but some key concentrations are in Hackney Wick, the south around Shoreditch/Hoxton/Haggerston, and in the centre of the Borough around Dalston and Hackney Central. The Core Strategy designates a number of 'employment areas' within the Borough, with different typologies (Core Strategy policy 17). To reflect the changing nature of the local economy from a heavier industrial, manufacturing and distribution base to a need to provide higher grade, more modern and less 'heavy' commercial uses, the Priority Employment Areas (PEAs) and Other Industrial Area designations allow for mixed use development where appropriate. However, there is still a need to ensure land supply for these 'heavier' type industries, while providing land and floorspace for new types of businesses, particularly knowledge-based economy and the creative and cultural sector of which the Borough is at the 'forefront' of the Government's; 'Tech City' initiative and also new typologies of commercial floorspace will come through within the Olympic Park in Hackney Wick over time. Given this, and the release of employment land in recent years, the Core Strategy's position is to protect employment land and floorspace last used for employment use anywhere in the Borough."

35. It will be recalled that the site with which the application was concerned fell within a PEA. The Development Management Local Plan addressed the purpose of such areas in the following terms:

> "Policy DM16 – Affordable Workspace

> The Council will seek 10% of the new floorspace within major commercial development schemes in the Borough, and within new major mixed-use schemes in the Borough's designated employment areas, to be affordable workspace, subject to scheme viability.
>
> The applicant should submit evidence of agreement to lease the workspace preferably in association with a Council registered workspace provider. Under this preferred option the commercial terms to be agreed between the applicant and Council registered workspace provider are to be secured via legal agreement.
>
> If on-site provision is not possible, financial contributions for equivalent off-site provision will be sought.
>
> In addition, proposals for the redevelopment of existing low value employment floorspace reliant on less than market-level rent should reprovide such floorspace suitable, in terms of design, rents and service charges, for these existing uses, subject to scheme viability, current lease arrangements and the desire of existing businesses to remain on-site.
>
> …
>
> .10.4 The key purpose of PEAs, as set out in the Hackney Employment Growth Options Study 2006, is that they "should resemble the core portfolio of existing employment land assets that should be safeguarded for employment use, and in Atkins 2010 that the promotion of other uses should, "…seek to retain the primary function of these areas as employment (B use) locations. In considering proposals, particular emphasis should be given to the need not to compromise the ongoing operations of existing businesses in the area. Furthermore, proposals should not be encouraged where they are likely to limit or prevent investment opportunities for B use businesses in the area. If the proposal is likely to undermine the long-term functioning of the area as an employment (B use) location, such proposals should be discouraged." Atkins also recommended that B2 and B8 uses would be acceptable in PEAs.

The defendant's Planning Code for Councillors

36. In accordance with good practice, the defendant adopted and published a Planning Code for Councillors to guide members of its planning committee in relation to the conduct and discharge of their duties in dealing with planning matters. An issue emerged during the course of the proceedings as to which version of this Code was operational at the time when the application which is the subject of this judicial review was being considered. As part of the evidence at the initiation of these proceedings, and indeed at the time of the oral application for permission, it was

accepted that the Code in force contained the following provisions under the rubric "How to avoid a conflict of interest and still assist your constituents":

> "1.4. Where Members receive lobbying material through the post or by email they should forward it to the Committee Clerks unread, it can then be re-directed in accordance with the Council's guidelines. If a Member is approached by an individual or an organisation in relation to a particular planning application on the agenda of an upcoming meeting, the Member should explain that they are unable to personally comment on the application but that the person or organisation may:
>
> - Where the application is not yet on the agenda, write to the Planning Officer responsible for the particular application/enforcement action who will take into account any material planning considerations raised in the representations when preparing the report for Committee.
>
> - Contact the Committee Clerk to request to speak at the committee meeting;
>
> - Contact an alternative Councillor who is not a member or substitute member of the Planning Committees.
>
> 1.5 If a Committee Member does decide to become involved in organising the support of or opposition to a planning application, or has allowed themselves to be lobbied, then that Member should accordingly declare an interest at the beginning of the committee meeting (see 'When to…Declare an Interest' below) and remove themselves from the room when the Planning Sub-committee is determining the item in question. By becoming involved in a planning application prior to the committee meeting other than to read the Planning Officer's report and to attend Site Visit accompanied the Planning Officers, the Member risks forfeiting his or her right to take part in the discussion or vote on that particular item."

37. It was maintained at the hearing by the claimant that this version of the Code ("the claimant's Code") was the one which was operative at the material time. In support of this contention the claimant made the following observations. Firstly, attention is drawn to a leaflet published by the defendant dated February 2016 and entitled "How to have your say at the Planning Sub- Committee", in which the following is stated:

> "All Planning Sub-Committee members will keep an open mind on applications and it is advised that you don't contact any of the councillors before a meeting. The meetings are necessarily formal because the Chair and members want to listen to everyone and have the chance to ask questions so that they can fully understand the issues."

38. The claimant also drew attention to a letter of notification which was sent out in respect of the planning application, which in turn drew attention to the fact that the committee report had been published and which itself enclosed the leaflet "How to have your say at the Planning Sub- Committee". The same text as is set out above was repeated in the leaflet which came with that correspondence. Additionally, the claimant drew attention to the observation of members set out above when the claimant wrote to them prior to the meeting of the committee. Each of these matters, it is submitted, is consistent with the continuing operation of the claimant's Code.

39. As set out above, one of the matters covered in the evidence lodged by the defendant was whether or not the claimant's Code was the one which was operative at the time when the committee reached their decision. In the witness statement of Mr Brew he states that the relevant code which applied the time of the planning committee meeting was not the claimant's Code, which had been superseded many years prior to the meeting. He indicated in his evidence that in 2011 the defendant's Constitution was reviewed and rewritten, and that part of that exercise was the revision of what is known as the "Planning Code of Practice for Members", i.e. the defendant's Code. He stated that, apart from minor changes, it is the 2011 version of the Code which had been in place since then, and he attached to his witness statement an early version of the defendant's Code which was in place in September 2013. Mr Brew also produced a version of this code dated July 2018 which would have been the operational version at the time when the committee reached its decision. In his witness statement Mr Brew drew attention to significant differences between the claimant's Code and the defendant's Code. In particular the section under the rubric "How to avoid a conflict-of-interest and still assist your constituents" has the following guidance set out:

> "2.1 Planning Sub-Committee Members have to retain an open mind on any application as they are a part of the decision making process and cannot be seen to side with either the applicant or those who are making representations at the meeting at which the application would be determined. Adhering to the following rules will also ensure that public confidence in the Sub-Committee is maintained and serve to minimise the prospect of non-planning related matters and affecting the judgment of Sub-Committee Members.
>
> …
>
> 2.3 Where Sub-Committee Members receive lobbying material through the post or by email about an application coming before the Planning Sub-Committee they should forward it to Governance Services as soon as they realise it is lobbying material. If a Sub-Committee Member is approached by an individual or an organisation in relation to a particular application on the agenda of an upcoming meeting, the Sub-Committee Member should advise the person or organisation that it is not appropriate for them to personally comment on the application by that the person or organisation may:

> - write to the Planning Service concerning the particular application who will then response and update the person or organisation accordingly.
>
> - contact Governance Services to requests to speak at the Sub-Committee meeting. Such representation must be received by 4pm on the day prior to a Sub-Committee meeting. Any request to speak may be refused if the representation is not received by the deadline;
>
> - contact an alternative Member of the Council who is not to be part of the Sub-Committee meeting at which the application will be heard.
>
> 2.4 Council Members should represent the best interests of residents. Sometimes they may find themselves in a difficult situation where they are sent lobbying material. If a Council Member finds themselves in such a situation they need to decide whether they wish to sit on the Sub-Committee and hear the application or represent the interests of their residents."

40. In support of the contention that this version is a more contemporaneous one, and certainly one drafted after 2011, Mr Brew drew attention to the section dealing with "Predetermination or bias", which reflects the provisions of the Localism Act 2011 that had clarified that the predisposition of a member of the committee did not necessarily amount to an unlawful predetermination. It is the defendant's position that there was nothing in the defendant's Code from July 2018 which was either unlawful in terms of the proper procedure for determining planning applications by members of a committee, nor was there anything in it which was inconsistent with the material set out in the committee report.

The law

41. When determining an application for planning permission the decision-taker is required by section 70 (2) of the Town and Country Planning Act 1990 to have regard to the provisions of the development plan so far as is material to that application. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 requires that a determination in relation to an application for planning permission "must be made in accordance with the plan unless material considerations indicate otherwise".

42. When the question of interpretation of a planning policy arises, it is a question of law for the court to determine: see *Tesco Stores v Dundee City Council* [2012] PTSR 983. It needs to be borne in mind that not all questions associated with planning policies are matters of law for the court to determine. Some issues arising in connection with planning policy are, in truth, questions of the application of a policy rather than its interpretation. Some elements of planning policy are not suitable for legal interpretation on the basis that they are in reality questions of planning judgement. These themes are explored and explained in the judgements of Lord Carnwath in *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at paragraphs 23 to 26, and in *Samuel Smith Old Brewery (Tadcaster) v*

North Yorkshire County Council [2020] UKSC 3; [2020] PTSR 221 at paragraphs 21 to 28 and 39.

43. Where a question of interpretation of planning policy does genuinely arise for the court, in approaching that question the court must bear in mind that the policy is not a statute or other formal legal instrument, but is intended to be a practical aid to decision-taking. These documents are statements of policy and their purpose and intended audience (being both professionals and the wider public) must be taken into account in assessing any question of interpretation which arises. The policy should be read and interpreted in a straightforward manner, taking into account the context in which it arises. This approach to the interpretation of policy is now well-established from cases such as *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81 (see paragraph 23) and *Monkhill Limited v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1993, with both of these authorities and the recent decision of Holgate J in *Gladman v Secretary of State for Housing Communities and Local Government* [2020] EWHC 518 synthesising the earlier authorities that are referred to in the judgments.

44. Part of the complaint of the claimant under ground 1 is the contention that, unlawfully, the defendant failed to comply with the requirements under the Local Government Act 1972 to provide background papers in relation to the committee report. Specific provision is made in the 1972 Act in relation to background papers within section 100 D in the following terms:

> "100D- Inspection of background papers.
>
> (1) Subject, in the case of section 100C(1), to subsequent (2) below, if and so long as copies of the whole part of a report for a meeting of a principle council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public-
>
> (a) those copies shall each include a copy of s list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the officers of the council.
>
> …
>
> (4) 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
>
> …

> (5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which-
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report,"

45. The question of what is "exempt information" is dealt with in section 100 I of the 1972 Act, which cross refers to part 1 of schedule 12A to the 1972 Act. For the purposes of the present case the important paragraphs of schedule 12 A are paragraphs 3 and 10 which provide as follows:

> "3. Information relating to the financial or business affairs of any particular person (including the authority holding that information).
>
> …
>
> 10.
>
> Information which-
>
> (a) falls within any of paragraphs 1 to 7 above; and
>
> (b) is not prevented from being exempt by virtue of paragraph 8 or 9 above,
>
> is exempt information if and so long, as in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

46. In connection with these legal provisions the claimant places reliance upon the case of *R(Joicey) v Northumberland County Council* [2014] EWHC 3657; [2015] PTSR 622. This case concerned an application for planning permission for a wind turbine. A noise report in relation to the impact of the proposed development was prepared and submitted as part of the planning application. Within that report the assessment applied higher noise levels in accordance with good practice to both the residence on the farm and also tenants living in cottages on the farmland on the basis that all of these individuals were "financially involved" in the project. The noise report was not placed on the defendant's website until the day before the committee meeting, and was not identified as a background paper to the committee report which had been prepared. The claimant in that case contended that there had been a breach of the legislative requirements in relation to background papers. The defendant's response to the claimant's submissions and the conclusions of Cranston J were as follows:

> "46. For the Council Mr White QC advanced three main arguments, all subsumed in a sense in his contention that the claimant was not prejudiced by the statutory breaches or the

denial of the claimant's legitimate expectation. First, he submitted, the councillors had the WSP noise assessment report before them on the day of the planning committee. The claimant himself had access to it, for some 36 hours before the meeting. Not only was he able to make the point about its late availability in his 5 minute presentation, but he was also able to lay before the committee the main points of his critique of the noise assessment report and where the applicant's consultants had gone wrong. In Mr White's submission the claimant's line that the report was flawed could not have been clearer. His presentation to the committee was a clear, cogent and powerful case about the noise issues. The points about the WSP noise assessment, which he made in his email on 8 November to the Council, and in his email on 10 November to Cllr Kelly he made in his presentation to the planning committee. Even now we have not been told what would have been in the detailed submissions which the claimant contends with more time he would have made. If the committee meeting of 5 November had been postponed for several months the claimant's submissions would have remained the same.

47. If this is an argument that the Council complied with its legal obligations to publish, it is not one I accept. Right to know provisions relevant to the taking of a decision such as those in the 1972 Act and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. R. v North and East Devon Health Authority Ex p. Coughlan [2001] QB 213, [108]; R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC [2014] UKSC 56, [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central).

48. In my view publication was not effected in a timely manner in this case. The WSP noise assessment was a 74 page technical document. It was directed to ordinary members of the public who might wish to make representations on the planning application. As to the claimant, he has some background in wind turbines and was able to make a few effective points about what he conceived as the flaws in the assessment in his presentation to the committee. But this was only one of a number of points he had to deal with in what, after all, was a

> very short period of 5 minutes. In light of the statement in the officer's report of "no planning history", he dealt with that, as well as the officer's failure to mention the Renewable Energy guidance. So the claimant's exposure of what he contended were the flaws in the assessment report was necessarily brief. With more time than 36 hours I have no doubt that he could have done more. Given the history of the matter, noise went to the heart of the committee's decision and not tangential."

47. Mr Andrew Fraser-Urquhart QC, who appeared on behalf of the defendant, placed reliance in response to these submissions upon the case of *R(Perry) v Hackney LBC* [2014] EWHC 3499; [2015] JPL 454, a decision of Patterson J in relation to 2 planning applications for mixed-use development. In connection with both of the applications a viability assessment was submitted to the defendant in support of the contention that a non-compliant offer of affordable housing should be accepted as a departure from the relevant planning policy. In both cases the viability assessment was submitted in confidence and was never made available in anything other than a redacted form. The claimant submitted that on a number of grounds the viability report ought to have been in the public domain and in particular, available to objectors to the applications and the members of the planning committee. In respect of the submission that there was a common law right of access to this information for the members of the planning committee Patterson J concluded that the information was clearly confidential as it contained information in relation to build and sales costs and residential values which were "of the utmost commercial sensitivity". She concluded that there was no common law right for members of the committee to be provided with the report in the following terms:

> "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 the members refused the planning application or say they wanted a higher level of inspection. Members, therefore, had a choice, whether to go along with the officer advice, seek further information or to accede to the Claimant' submission 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 a further safeguard of a provision within the s.106 that enabled a review of the vulnerability exercise if the development had not started within 12 months of the grant of permission."

48. The claimant further submitted that the members of the planning committee had a statutory right to see the viability assessments by virtue of the provisions of the 1972

Act. The defendant contended that the material was exempt information, on the basis that the material related to the financial and business affairs of the applicant. Having set out the statutory framework, and in particular the language of paragraph 3 of Schedule 12 A in respect of information which "relates to" financial and business affairs or negotiations for a contract, Patterson J set out her conclusions as follows:

> "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 (Disclosure)* [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 constructing 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 if 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 s.100F(2A) is to give the parties the 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 para.10 of sch. 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 sch. 12A does not require a formal decision to that effect."

49. Finally, in relation to the rights of the claimant as an objector to have sight of the viability documents on the basis that the documents were background papers covered by the provisions of the 1972 Act, Patterson J stated as follows:

> "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."

50. On the basis of this authority it is contended by Mr Fraser-Urquhart that the defendant was entitled to only provide to the public the material which they did and, that the

approach which was taken in the committee report to the listing of background papers was entirely legitimate.

51. Turning to ground 2, the claimant contended that the approach taken both in the claimant's Code, and also by members in response to the receipt of representations from the claimant, was unlawful. The claimant draws attention to the provisions of Article 10 of the ECHR safeguarding everyone's right to freedom of expression including the freedom to hold opinions, and receive and impart information and ideas, without interference by a public authority. Article 10 provides as follows:

> "**Freedom of expression**
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

52. The claimant relies upon the case of *R(Lord Carlisle of Berriew) v Secretary of State for the Home Department* [2015] AC 95 which concerned a decision of the Home Secretary to exclude from the United Kingdom a dissident Iranian politician on the basis that her presence in the United Kingdom "would not be conducive to the public good for reasons of foreign policy and in the light of the need to take a firm stance against terrorism". The claimant and other parliamentarians wished the exclusion to be lifted to enable the Iranian politician to address meetings in Parliament on issues associated with Iran. The Home Secretary reviewed her decision but declined to change it. One of the issues with which the case was concerned was the claimant's contention, on the basis that Article 10 was engaged, that the decision amounted to a breach of those rights. In the event, the Supreme Court were unpersuaded that there was any legal error in the decision that the Home Secretary had reached. However, in the course of her judgement Baroness Hale observed the following as to whether or not the rights under article 10 had been impeded:

> "94 The Secretary of State originally argued that there was no interference with the art 10 right by refusing Mrs Rajavi permission to come here to meet the parliamentarians. They could always go to Paris to meet her. Or they could exchange views by audio or video conferencing methods (which these days are so effective that they are regularly used in court

> proceedings). But it was soon accepted that to prevent them from meeting face-to-face in the Houses of Parliament is indeed an interference with their rights. It would be much harder for the numbers of parliamentarians who wish to meet Mrs Rajavi to do so in any other way. There is also the important symbolic value of a meeting in the Houses of Parliament. On the other hand, it must also be accepted that, as there are other ways in which the parliamentarians could communicate with Mrs Rajavi, the interference is not as serious as it would be if they were banned from all forms of communication with her."

53. The observations of Lord Steyn in the case of *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115 are also relied upon by the claimant in support of its contention that the approach taken in the claimant's Code, and by the members of the planning committee who responded to the claimant's representations, were unlawful. Lord Steyn observed at page 126 F to G as follows:

> "Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. First, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market:" *Abrams v United States (1919) 250 U.S. 616, 630, per* Holmes J. (dissenting). Thirdly, freedom of speech is the lifeblood of the democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."

54. In short, the claimant submitted that there was no reason in law by the members of the planning committee should not receive representations from objectors to an application that they were considering. Indeed, the receipt and consideration of such representations were a positive feature of the democratic function that they were performing in determining the planning application.

Submissions and conclusions

55. As set out above, the claimant's ground one has a number of strands to it. As presented by Mr Harwood in his oral submissions, the first strand of argument is the failure of the defendant to make information in relation to viability available, in particular having regard to the legal requirements to furnish background papers with the committee report, and further in the light of the planning policy bearing upon viability assessments which has been set out above. The second strand of argument is the claimant's contention that the material which was produced and placed in the

public domain by the defendant was incomplete, inconsistent and, in effect, incomprehensible. The third strand of argument is that, in so far as it is relevant, the evidence of Mr Carney raises points which the claimant would have wished to have commented upon had that material about which he now provides evidence been put in the public domain prior to the decision being taken.

56. In developing the first strand of argument under ground one, Mr Harwood submitted that the committee report was in breach of the requirements under the 1972 Act set out above to list relevant background papers as part of the report. He submits that it is clear that there was documentation in existence and relied upon by officers in preparing the report and its recommendations, in particular bearing upon the question of the viability of development, which was not included in the list of background papers within the committee report. Whilst the defendant had sought to suggest that this material was exempt information, based on the case of *Perry* and the fact that it bore upon the financial affairs of the interested party, this was not a tenable proposition bearing in mind that the clear purpose and intention of national planning policy was that information about the viability of a development should be transparent, coherent and in the public domain. In that connection, and in so far as the defendant had concluded that planning policy did not require the disclosure of further information to explain how the contribution in relation to affordable housing had been arrived at, they had plainly misunderstood and misinterpreted the relevant planning policy. Further, in the light of the contents of the defendant's own policy in relation to viability assessments, and the terms of its Statement of Community Involvement, there was a legitimate expectation that all of the material in relation to the viability of the development would be placed into the public domain as part of the consultation on the planning application.

57. In respect of the second strand of argument, Mr Harwood contended that the material that was placed in the public domain about the development's viability could not be reconciled and was incomprehensible. The figures contained within paragraph 2.4 of the viability assessment (and set out in that paragraph's table) cannot be reconciled with the figures appearing in the summary appraisal attached as Appendix 1 to this judgment. Further, the figure which purports to be the benchmark land value within Appendix 1 is described as a "Residualised Price", and both this language and the structure of the appraisal itself support the contention that in fact it is the figure left over after costs and profit have been identified, rather than a figure representing an analysis of existing use value plus of the kind required by the relevant policy. The observations of Mr Carney indicating that there was a fixed figure of £2 million included for planning gain further supported this contention. The figure of £12,305,000 from the revised paragraph 5.3.62 in the addendum report was the first mention of a benchmark land value, and the report provides no explanation of what the existing use value was or how any premium had been calculated.

58. So far as the third strand of the argument is concerned, Mr Harwood observes that reliance upon this evidence could only arise if the court were being expected to have resort to the jurisdiction under section 31(2A) of the Senior Courts Act 1981 (a point which had not been pleaded), and encouraged to form the view that the decision would not have been substantially different if the illegality complained of had not taken place. In truth, Mr Carney's evidence created its own difficulties for the defendant. Within his skeleton argument Mr Harwood pointed out that the clear and

obvious implication of Mr Carney's evidence is that there is a substantial amount of material which has not been disclosed, but which pre-existed the committee report and the decision, and which ought to have been in the public domain. This material includes, for example, the reports of costs consultants and the joint report prepared for the council in December 2017; the discussion and documentation surrounding ground rents and their capital value; and the documentation leading to the resolution that the affordable housing contribution figure should be £757,075, bearing in mind that it had varied over the course of the life of the application.

59. Secondly, Mr Carney's evidence indicated that there were differences in the course of the negotiation related to the ground rents which might have been derived from the existing use, and the influence that those ground rental values might have upon the existing use value. However, that was material which the claimant would have wished to comment upon based on the fact that, as the tenant of the interested party, it was particularly well-placed to investigate and contend the assumptions behind the higher rental values that were being assumed in the valuation work. Furthermore, the assumptions of higher ground rent for the existing use appears contrary to the conclusions of the Viability Report relating to Employment Floorspace which are set out above. This is a further matter upon which the claimant would have wished to comment. Thus, far from saving the defendant from the conclusion that its approach to viability was unlawful, in fact Mr Carney's evidence makes their case significantly worse.

60. In response to the submissions Mr Fraser-Urquhart, on behalf of the defendant, contended as follows. Firstly, he relied upon the decision of this court in *Perry,* in similar circumstances, that there was no obligation on the council to place confidential information bearing upon the question of viability into the public domain. He contends that the key question for the court's consideration is whether or not such material as has been placed into the public domain is sufficient to enable a member of the public to make a sensible contribution to the consultation on the application. The satisfaction of that requirement does not require every single document bearing upon viability to be disclosed. In reality, the summary appraisal document provided a good deal of detail which could have been investigated by anyone interested in the issue of viability. At the committee, both members and those interested public participants who were present were reassured that it was an existing use value plus approach which was taken in the decision. Both in his skeleton argument and also in his oral submissions Mr Fraser-Urquhart conceded that it was "correct that the process of internal assessment by the defendant, and ongoing negotiation with the interested party was not disclosed in full, such that it is not always possible to reconcile the published information", but he went on to contend that the defendant was entitled to conclude that sufficient viability information had been provided for an interested person to make informed representations about whether or not the affordable housing contribution was appropriate. In respect of legitimate expectation Mr Fraser-Urquhart submitted there was no unequivocal promise made by the defendant in any of the documents relied upon to the effect that all viability information will be placed into the public domain. So far as the relevant policies are concerned Mr Fraser-Urquhart observed that the duty within the policy was placed upon the developer in relation to providing information about viability and that the breadth of the duty contended for by the claimant was not supported by the policy documents which were relied upon.

61. My conclusions in relation to ground 1 are as follows. The first point raised is whether or not the defendant complied with its obligations under the 1972 Act in relation to the provision and listing of background papers. In short, I have no doubt that the defendant failed to comply with its obligations under section 100 D of the 1972 Act, not simply in relation to listing background papers but also in failing to provide them for inspection. It is clear from the evidence which has been set out above, including in particular the evidence of Mr Carney, that there was a significant quantity of documentation bearing upon the viability issues generated both before and especially after those documents that were published in relation to viability on the defendant's website. It appears clear from Mr Carney's evidence that, after the material from September 2018 which the defendant published, there was a significant volume of further technical work addressing ground rents and their impact on existing use value, the derivation of figures for the planning obligations and CIL and also the identification of a benchmark land value. Whilst not all of this material needed to be produced and listed it is simply inconceivable that none of this material would have qualified under section 100 D (5) of the 1972 Act. Clearly the contents of the committee report dealing with the viability exercise and its ultimate conclusions as to the affordable housing contribution which could legitimately be required, depended upon the contents of this material. There was, therefore, information which should have been listed and of which copies should have been provided for inspection.

62. In fact, during the course of argument, Mr Fraser-Urquhart conceded on behalf of the defendant that there had been a breach of section 100 D of the 1972 Act in relation to the provision of background information. However, he submitted that there had in reality been substantial compliance with the requirements on the basis, firstly, that reliant upon the case of *Perry*, a significant quantity of the missing documentation was exempt information and therefore did not need to be listed or available for inspection, and, secondly, that the material which had been published was sufficient to enable an interested person to formulate their objection in relation to the application. In my view, the answer to the first submission in relation to exempt information is related to the contentions in respect of planning policy made in the case, and the answer to the second is related to the second strand of Mr Harwood's argument, related to the question of whether or not the information published was coherent and comprehensible.

63. In my view there are some clear principles set out in the Framework and the PPG to which it refers. Firstly, in accordance with the Framework viability assessments (where they are justified) should reflect the approach set out in PPG, and be made publicly available. Secondly, and in following the approach recommended in the Framework and the PPG, standardised inputs should be used including, for the purpose of land value, a benchmark land value based upon existing use value plus as described in the PPG. Thirdly, as set out in the PPG, the inputs and findings of a viability assessment should be set out "in a way that aids clear interpretation and interrogation by decision-makers" and be made publicly available save in exceptional circumstances. As the PPG makes clear, the preparation of a viability assessment "is not usually specific to that developer and thereby need not contain commercially sensitive data". Even if some elements of the assessment are commercially sensitive, as the PPG points out, they can be aggregated in a published viability assessment so as to avoid disclosure of sensitive material.

64. As Mr Harwood pointed out in his submissions, there is an exception to the definition of exempt information contained in paragraph 10 of Schedule 12 to the 1972 Act where "the public interest in maintaining the exemption outweighs the public interest in disclosing the information." In my judgment the existence of the policy contained in the Framework and the guidance contained in the PPG have an important bearing on the consideration of whether or not there is a public interest in disclosing the information contained in a viability assessment (even if it is properly to be characterised as commercially sensitive, bearing in mind the observations in the PPG about the extent to which information in such an assessment would be specific to a particular developer). It is clear from the material in the Framework and the PPG that save in exceptional circumstances the anticipation is that viability assessments, including their standardised inputs, will be placed in the public domain in order to ensure transparency, accountability and access to decision-taking for communities affected by development. The interests which placing viability assessments into the public domain serve are clearly public interests, which in my view support the contention that such assessments are not exempt information unless the exceptional circumstances spoken to by the PPG arise and solely an executive summary should be put in the public domain. It is unclear to me based on the material before the court how, if ever, the defendant ever considered the question of the public interest in relation to this exemption in the context of the relevant national planning policy. I am, therefore, unable to accept the submission advanced on behalf of the defendant that their failure to comply with section 100 D of the 1972 Act was a matter justified by the contention that the material withheld was exempt information.

65. I appreciate that this is a different approach from that taken by Patterson J in the case of *Perry*. However, at the time of her considering the issues in that case neither the Framework nor the PPG existed in the terms in which they do at present, and the judgments which she reached in relation to whether or not the viability assessments in that case were exempt information were arrived at in a materially different context in which the question of the public interest under paragraph 10 of schedule 12 of the 1972 Act was not informed to the extent as now by any relevant policy or guidance framing the question of what the public might expect to be provided with in connection with a planning application where viability was advanced as a reason for exemption from contributions or obligations underpinned by planning policy. The circumstances of this case are therefore significantly different from those which had to be evaluated by Patterson J in *Perry*.

66. The questions which then arise are as to whether the material which was in the public domain was comprehensive and coherent, such that it met the deficiencies in relation to the defendant's obligations under section 100 D of the 1972 Act, and addressed the requirements of the Framework and PPG in relation to the provision of viability assessment. In my view there are critical elements of the material in the public domain in relation to viability, set out in the documentation published on the defendant's website and in the committee report, which are opaque and unexplained.

67. The starting point for this assessment is, as set out above, the concession made on behalf of the defendant that the published information is incapable of being reconciled. A number of different figures are contained within the material in relation, for instance, to benchmark land value which are not consistent with one another and

the discrepancies and indeed the figures themselves are unexplained. The figures which appear in paragraph 5.3.62 (as corrected in the addendum report) are different from the figures which appear in the summary appraisal contained in Appendix 1 to this judgment and also the figures presented in the September 2018 viability appraisal at table 2.4. None of these differences or inconsistencies are explained nor are they capable of being understood.

68. In addition to the inconsistency in the figures there is, in particular, no explanation as to how the components of the benchmark land value in the committee report have been arrived at. Firstly, the figure is asserted globally, and there is no explanation as to the assumption in relation to existing use value and the figure which has been used for the landowner's premium or the "plus" which is the additional component of the benchmark land value. In my view it is clear from the guidance contained in the PPG that both in the case of a viability appraisal (and also in the case of there being exceptional circumstances such that only an executive summary need be placed in the public domain) the material should identify both the existing use value and the landowners premium which has been used to derive the benchmark land value. Nowhere in the material prior to the decision are those elements identified separately, and without that having been done the objective of the PPG for inputs and findings to be set out in a way which enables clear interpretation and interrogation of those figures has been frustrated.

69. The evidence of Mr Carney demonstrates that the derivation of the existing use value, bearing in mind the existence of the claimants leasehold interest and the impact upon establishing the existing use value of both the ability of the site to be re-let in its current condition and the potential to create ground rents if redeveloped, was a subject which had the potential to be both contentious and have a critical bearing on the outcome of the viability assessment. Given the way in which the material was presented it was not possible for an objector to understand what the existing use value was, let alone how it had been derived, so as to engage in the viability case which was being advanced. In my view there is substance in the claimant's submission that the material was opaque and unexplained, and that the defendant's contention that notwithstanding the absence of the listing of the background papers lying behind the figures contained in the committee report (which would have required them to be available for inspection) sufficient was presented such that substantial compliance with the requirements of the 1972 Act was achieved should be rejected.

70. In addition to the points identified above in relation to the lack of transparency in the benchmark land value further points arise in respect of the material provided at Appendix 1. As has been noted above, the claimant drew attention to the figure contained in the summary appraisal for the acquisition of the site in the sum of £12,298,787 is described as a "Residualised Price". It is submitted from both the use of that term and also the presentation of the table that this figure is not, as claimed by the defendant, a figure derived using the existing use value plus methodology, but rather a value derived after all of the other costs and sales values of the development have been taken into account, including the need for the developer to make an appropriate profit. In my view there is considerable force in this point on the basis that, notwithstanding Mr Carney asserting both in his presentation to the planning committee and also in his witness statement that the benchmark land value was derived using an existing use value plus methodology, there is no explanation within

that material as to how the figure in Appendix 1 (or indeed the other various figures contained elsewhere in the committee report and the addendum) were derived using that methodology. In reality, therefore, the only material that was publicly available presented the appraisal in a format which was redolent of the derivation of the cost of the land being derived on a residual basis, and nowhere is it set out how a benchmark land value was derived in accordance with the PPG by concluding upon an existing use value and an appropriate measure for the landowner's premium. Thus, beyond the assertion that an existing use value plus methodology was used, there is nothing to explain how it was used and what values for the existing use value and landowner's premium were deployed. These matters add to the concern in relation to the absence of any of the background papers which would explain and substantiate the viability assessment figures contained in the committee report and the failure to properly interpret the requirements of the Framework and the PPG in respect of a publicly available viability assessment including standardised inputs, in particular the existing use value and the landowner's premium. This failure clearly compromised the opportunity for the public to engage in this issue on an informed basis, understanding the components which it was said made up the benchmark land value.

71. Drawing the threads together, the material contained in the public domain at the time when the decision was taken by the planning committee to resolve to grant planning permission was inconsistent and opaque. It contained figures which differed in relation to, for instance, benchmark land value and the differences between the figures were not explained. No explanation was provided as to how the benchmark land value had been arrived at in terms of establishing an existing use value and identify a landowner's premium as was asserted to have been case. Read against the background of the policy and guidance contained in the Framework and the PPG it was not possible to identify from the material in the public domain standardised inputs of the existing use value and landowner's premium, and the purpose of the policy to secure transparency and accountability in the production of viability assessment was not served. In particular, it was plain from the material available at the time of the decision (in particular in terms of the material inconsistencies in the material produced in September 2018 and the differences from the material in the committee report) that there was substantial additional background material on which the committee report was based which was neither listed nor available for inspection in accordance with the requirements of the 1972 Act. In my view the principles identified in the case of *Joicey* by Cranston J at paragraph 47 are clearly on point, since the purpose of having a legal obligation to confer a right to know in relation to material underpinning a democratic decision-taking process is to enable members of the public to make well-informed observations on the substance of the decision. The failure to provide the background material underpinning the viability assessment in the present case, in circumstances where such material as was in the public domain was opaque and incoherent, was a clear and material legal error in the decision-taking process. In reality, in my judgment, the material with which the public was provided failed Mr Fraser-Urquhart's own test of being adequate to enable the member of the public to make a sensible response to the consultation on the application.

72. In the light of this conclusion the claimant must succeed under ground one of this judicial review, and the decision of the defendant in relation to the interested party's planning application must be quashed. Turning to the potential application of section 31(2A) of the 1981 Act, as is recorded above the reality is that Mr Carney's evidence

is, in any event, of limited utility to the defendant, and certainly does not in my view resolve the concerns in relation to the legality of the defendant's decision. Nor is there any need to deal with the claimant's submissions in relation to legitimate expectation. The flaws in the material available in the public domain and the defaults in relation to the provision of background information are sufficient to establish the validity of the claimant's complaints in relation to ground one.

73. Turning to ground two, Mr Harwood contends that, as set out above, the claimant's Code was operative at the time of the decision based on the responses of members of the planning committee to receiving representations from the claimant, and also the correspondence provided by the defendant when consulting on the committee report. In relation to the dispute as to which Code was operational at the time of the taking of this decision, I have no doubt that Mr Brew is correct in his evidence that it was the defendant's Code which was intended to be operational at the time. It is not suggested by the claimant that there is any legal flaw in the approach taken in the defendant's Code in respect of the treatment of objector's representations, a view with which I concur for the reasons which are set out below. That is not, however, necessarily an end of the matter.

74. It is clear from the correspondence with the two members of the planning committee set out above that it appears that it was their view that they should not be receiving representations from members of the public in relation to planning applications that they were considering, and, in particular, that they ought not to be receiving lobbying material. The leaflet entitled "How to have your say at the Planning Sub-Committee" contained material to similar effect which advised the public not to contact any of the councillors on the committee prior to a meeting in respect of an application that they were considering. This advice was repeated in the letter of notification which the claimant received upon the publication of the defendant's committee report. This approach appears inconsistent with the defendant's Code, in so far as that Code contemplates at paragraph 2.3 that lobbying material may be received by members of the committee, and, in the event that it is, the person or organisation who has sent it should be advised that it would not be appropriate for the member to personally comment on the application and be given information about how to make representations in writing and at the committee, following which the communication should be passed to officers, no doubt for logging and incorporation in the committee report as appropriate. It appears from the evidence which is available that both in the standard correspondence notifying members of the public during the course of the development control process, and also in practice in the way in which at least two members of the planning committee conducted themselves, that lobbying or direct communication with members of the planning committee to seek to influence their opinion was considered to be clearly discouraged or even precluded, notwithstanding the provisions of the defendant's Code.

75. During the course of his submissions Mr Harwood drew attention to a document published by the Local Government Association entitled "Probity in Planning". Within that document at section 7 in the chapter concerned with "Lobbying of and by councillors" the following is recorded:

> "Lobbying is a normal part of the planning process. Those who may be affected by a planning decision, whether through an application, a site allocation in a development plan or an

> emerging policy, will often seek to influence it through an approach to their ward member or a member of the planning committee."

76. Mr Harwood also submitted that it is well-established on the authorities that planning is not a quasi-judicial function. That this is the case is established by the observations of Pill LJ in *R(Lewis) v Redcar and Cleveland Borough Council* [2009] 1WLR 83 at paragraph 69, and Rix LJ at paragraphs 92 and 94. These matters, it is submitted, support the claimant's contention that the approach taken in substance by the defendant of barring lobbying of members of the planning committee was one which was unlawful for the reasons set out above.

77. On behalf of the defendant, Mr Fraser-Urquhart submitted that the approach taken by the defendant in the defendant's Code was entirely lawful, and that the filtering mechanism of dissuading members of the public from lobbying members of the planning committee was one which was reasonable and did not amount to a breach of the requirements of free speech under article 10 of the ECHR (on the basis that it was a proportionate interference with that right), nor the breach of any requirement at common law. Furthermore, he contended that on the facts of this particular case the claimant had a very full opportunity at the meeting of the planning committee to air its views in relation to the development, covering all of the ground which was included within the claimant's letter relating to the committee report. In addition, members had drawn to their attention the points which were being made by the claimant through the preparation of the addendum report which addressed, amongst other matters, the issues which had been raised by the claimant in relation to the committee report.

78. There was in substance no contention before the court but that issues in relation to freedom of expression and the application of Article 10 of the ECHR were engaged in the communication between members of a local authority, and in particular members of a planning committee, and members of the public who they represent and on whose behalf they were making decisions in the public interest. In my view that position is indisputably correct. Similarly, bearing in mind the importance of the decisions which the members of the planning committee are making, and the fact that they are acting in the context of a democratically representative role, the need for the communication of views and opinions between councillors and the public whom they represent must be afforded significant weight. In my view, it would be extremely difficult to justify as proportionate the discouragement, prohibition or prevention of communication between public and the councillors representing them which was otherwise in accordance with the law. Here it was no part of the defendant's case to suggest that the communication which the claimant made in their correspondence in respect of the committee report was anything other than lawful.

79. On behalf of the defendant Mr Fraser-Urquhart submitted that it was proportionate for there to be a requirement that members passed to officers any lobbying material which they received in respect of applications that they were due to consider. That may be, but in my judgment it could not be proportionate for those communications to be passed to officers subject to an injunction that members must not read them. Receiving communications from objectors to an application for planning permission is an important feature of freedom of expression in connection with democratic decision-taking and in undertaking this aspect of local authority business. Whilst it

may make perfect sense after the communication has been read for the member to pass it on to officers (so that for instance its existence can be logged in the file relating to the application, and any issues which need to be addressed in advice to members can be taken up in a committee report), the preclusion or prevention of members reading such material could not be justified as proportionate since it would serve no proper purpose in the decision-taking process. Any concern that members might receive misleading or illegitimate material will be resolved by the passing of that correspondence to officers, so that any such problem of that kind would be rectified. In my view there is an additional issue of fairness which arises if members of the planning committee are prevented from reading lobbying material from objectors and required to pass that information unread to their officers. The position that would leave members in would be that they would be reliant only on material from the applicant placed on the public record as part of the application or the information and opinions summarised and edited in the committee report. It is an important feature of the opportunity of an objector to a planning application to be able to present that objection and the points which they wish to make in the manner which they believe will make them most cogent and persuasive. Of course, it is a matter for the individual councillor in the discharge of his responsibilities to choose what evidence and opinion it is that he or she wishes to study in discharging the responsibility of determining a planning application, but the issue in the present case is having the access to all the material bearing upon the application in order to make that choice. If the choice is curtailed by an instruction not to read any lobbying material from members of the public that has a significant impact on the ability of a member of the public to make a case in relation to a proposed development making the points that they wish to make in the way in which they would wish to make them.

80. The question which then arises is as to whether or not on the facts of the present case there has been any breach of those requirements. As set out above I am satisfied that the defendant's Code was the relevant Code in operation at the time when this decision was reached. It appears to me that the defendant's Code does not discourage or preclude members of the planning committee receiving lobbying material from members of the public and reading it, and that the observations which it makes in relation to passing any communication on to officers and advising the member of the public as to other means available to make their views known to the planning process are entirely sensible administrative measures in the context of the receipt of lobbying material.

81. The difficulty for the defendant is that in my view it does not appear that that approach set out in the defendant's Code was followed by two members of the planning committee or in the defendant's standard correspondence in relation to notification. The standard correspondence clearly advised against members of the public writing directly to members of the committee; there was no warrant for that advice or discouragement and it impeded the freedom of expression of a member of the public who was entitled to write to a member of the planning committee setting out in his or her own terms the points they wish to be considered in respect of an application and expect that the member would have the opportunity to read it. It appears that Councillor Stops was under the impression that he was to resist being lobbied by either an applicant or member of the public, and Councillor Snell had apparently taken legal advice to the effect that he should refrain from reading any lobbying letter and forward it on to officers. Neither of these approaches reflects the

defendant's Code, nor does it reflect the entitlement to freedom of expression in accordance with the legal principles set out above. Indeed, the addendum to the committee report responding to this point fails to reflect the need for members to be open to being lobbied consistent with the legitimate exchange of views and opinion on the merits of an application. Officers observed "members are warned about viewing lobbying material as this can be considered to be prejudicial to their consideration of the application". In truth, there was nothing in the defendant's Code warning members against lobbying material, and in fact the defendant's Code simply contained administrative measures as to the steps to be taken in respect of lobbying material that members of the committee might receive.

82. I am therefore unpersuaded that the defendant's Code was in fact being operated bearing in mind in the way in which this application and in particular the claimant's objections in relation to it were considered. Whilst Mr Fraser-Urquhart contends that the evidence only shows two members of the committee declining to receive and read the claimant's lobbying material, the fact remains that they did, and it is not suggested how the other members of the committee may have approached this issue.

83. The question which then arises is as to whether or not Mr Fraser-Urquhart is entitled to contend that the breaches for which the claimant contends did not give arise or give rise to any material prejudice, in that the claimant was able to make very full representations at the meeting of the planning committee, in particular through the submissions made by Mr Harwood to the committee which covered the ground contained in the claimant's letter.

84. In my view there is considerable force in these submissions. Having reviewed both the claimant's letter of objection and also the transcript of the committee proceedings which is before the court, it is clear to me that Mr Harwood was not only able to, but did in fact, present to the members of the committee all of the principal points set out in the letter and in considerable detail. The submissions made in his oral presentation were referenced to the relevant policies and explained for the benefit of the members the substance of the claimant's concerns, for instance, in relation to the question of viability and the employment policies which are set out above. In all Mr Harwood addressed the committee three times, and each time at some length; in addition to the opportunity to set out the claimant's case, he also responded to the questions raised by the members in respect of the claimant's concerns and was able to elaborate on the points at issue. In short, I am satisfied that through the oral presentation to the committee Mr Harwood was able to convey the objections of the claimant to the committee fully and effectively, and that any interference with Article 10 arising from the treatment of the claimant's letter of objection to the committee report was rectified by through the extensive and detailed oral presentation which was made on the claimant's behalf at the committee meeting. Thus, reviewing the defendant's treatment of the claimant's objections in the process of considering the application overall, I am not satisfied that there was interference with the claimant's Article 10 rights: by the time the decision was reached the claimant had clearly communicated its objections directly to the members of the committee. Further, in so far as the point raised is one of fairness, I am satisfied in the circumstances of this case the claimant suffered no prejudice. As is well established on the authorities (see for instance *Hopkins Homes v SSCLG* [2014] PTSR 1145 at paragraph 49) it is necessary for a

claimant to establish material prejudice before relief could be granted in respect of an allegation of procedural unfairness.

85. Mr Harwood contends that there is a qualitative difference between the claimant being able to rely upon written objections in the form of the letter and oral submissions at the committee meeting. The written submissions were detailed, and contained a draft reason for refusal, and the provision of the letter in advance gave members a chance to give thought to the points raised and reflect upon them before the meeting. He relies upon the decision of *R v Kelly v London Borough of Hounslow* [2010] EWHC 1256 (Admin), in which objectors to an application for planning permission received late notice of an invitation to a committee such that the objectors were deprived of the opportunity to make an oral presentation to the committee. I am not satisfied on the facts of this case, and these matters are obviously fact-sensitive, that the claimant was prejudiced by the treatment of the letter of objection. As I have already observed, in reality the principal issues contained in the letter were all covered in the claimant's presentation to the committee, when they were able to present their objections to the committee. I am unimpressed by the suggestion that the claimant was prejudiced by members not having the claimant's draft of a reason for refusal before them in circumstances where in effect it was very clear what the nature of the claimant's case was and the members of the committee were perfectly capable of formulating their own reason for refusal (if necessary with the assistance of officers) if they were persuaded of the claimant's arguments. The case of *Kelly* was factually different in that, for instance, being deprived of the opportunity to make oral submissions to the committee meant that the claimants in that case were deprived of the opportunity to respond to the officer's analysis of the merits of the case in the committee report, and persuade the committee through their oral presentation to their point of view on the matters of judgment upon which the decision turned. In this case the claimant had that opportunity and took it, having the benefit of Mr Harwood's skills as an advocate to support them.

86. For all of these reasons I am satisfied that the claimant's ground two is not made out and that relief should not be granted in relation to it.

87. I propose to state my conclusions in respect of ground three relatively briefly. It will be recalled that ground three is the complaint that the members were misled by the officers in the committee report when they observed in paragraph 5.3.41 that "it is considered that there is no development plan policy requirement to retain the specific type of floor space that Holborn Studios desire within the broader B1 use class". In support of the contention that this was a misleading observation Mr Harwood relies upon the aspects of planning policy which are set out above bearing upon the creative industries in the area occupied by the site in question, coupled with the policies fostering the protection and development of economic activity. Those policies upon which reliance is placed are set out above.

88. In my view the submissions made on behalf of the defendant in relation to this ground are clearly correct. It is important to place the observation of the officers in context, and in particular in the context of reading the committee report as a whole. The first point to observe is that in the extracts of the committee report set out above, and elsewhere, officers set out and summarised the policy context related to employment development in a manner that is not criticised by the claimant in relation to its coverage. Secondly, and bearing in mind the only question of law for the court could

be whether or not planning policy has been misinterpreted, it is important to observe that nowhere in any of the policies relied upon by the claimant does the need to protect the specific and bespoke use operated by the claimant, and its particular requirements in relation to accommodation, arise. To that extent, therefore, in my view the officer's observation in paragraph 5.3.41 was not misleading, nor did it omit or misinterpret the relevant policies which were rehearsed in the committee report. The officers were not suggesting that there was no policy relevant to the claimant's use of the premises as an employment use, but that there was no policy specific to the claimant's use specifically.

89. Thirdly, that observation must be placed in the context of a wider discussion in the committee report of the requirements of policies such as CS17 and CS18 from the Core Strategy and DM16 in relation to affordable workspace which related to the wider objectives of protecting and enhancing employment provision and economic development, including a diversity of economic activity embracing the creative industries. The application of that raft of policies, and the weight to be attached to its various elements, were all a matter ultimately for the members of the planning committee. The approach which they adopted, and which is reflected in the conclusions of the committee report at paragraphs 6.2 and 6.5, reflected the need to appraise the application against the various policies, including in that appraisal the likely loss of the claimant's use. As recorded in paragraph 6.5 of the committee report the conclusion that was reached by the officers measured against the policies set out above was that the benefits of the proposal in terms of the employment it proposed weighed against the loss of the claimant's use, and rendered the application on balance acceptable. That was a conclusion which was reached based upon the correct interpretation of the policies that there was no policy requirement to retain the specific type of use operated and required by the claimant, but that nonetheless the loss of the claimant's use was relevant to the considerations comprised in the policies related more generally to employment activity. Whilst as a matter of planning merit that balance might be struck in different ways, there was in my judgement nothing unlawful in the way in which the policies were interpreted or the considerations taken into account in the balance set out in the committee report. I do not therefore consider that the claimant's complaints in relation to ground three have been made out on analysis.

90. For all of the reasons which have been set out above I am satisfied that the claimant should succeed in relation to ground one of this judicial review, but that grounds two and three should be dismissed, and that the defendant's decision in relation to the interested party's planning application should be quashed.

Judgment Approved by the court for handing down.

Appendix 1:

Summary Appraisal for Phase 1

Currency in £

REVENUE							
Sales Valuation	**Units**	**ft²**	**Rate ft²**	**Unit Price**	**Gross Sales**		
Market Sale	50	37,297	907.71	677,100	33,855,000		
Rental Area Summary				**Initial**	**Net Rent**	**Initial**	**Net MRV**
	Units	**ft²**	**Rate ft²**	**MRV/Unit**	**at Sale**	**MRV**	**at Sale**
Commercial	1	37,329	35.00	1,306,515	1,110,538	1,306,515	1,110,538
A3 use	1	1,249	20.00	24,980	24,980	24,980	24,980
Block A Converted	1	11,690	28.00	327,320	278,222	327,320	278,222
Ground Rents	50			350	17,500	17,500	17,500
Totals	**53**	**50,268**			**1,431,240**	**1,676,315**	**1,431,240**
Investment Valuation							
Commercial							
Manual Value					21,210,000		
A3 use							
Manual Value					395,000		
Block A Converted							
Manual Value					5,320,000		
Ground Rents							
Current Rent	17,500	YP @	8.5000%	11.7647	205,882		
					27,130,882		
GROSS DEVELOPMENT VALUE				**60,985,882**			
		6.80%	(1,844,900)				
Purchaser's Costs				(1,844,900)			
NET DEVELOPMENT VALUE				**59,140,982**			
Income from Tenants				11,667			
Additional Revenue							
49 Eagle Wharf Road			705,000				
Unit 1, 50 Eagle Wharf Road			114,000				
Unit 2, 50 Eagle Wharf Road			150,000				
Units 3&4, Eagle Wharf Road			531,000				
				1,500,000			
NET REALISATION				**60,652,649**			
OUTLAY							
ACQUISITION COSTS							
Residualised Price			12,298,787				
Stamp Duty			604,439				
Agent Fee		1.00%	122,988				
Legal Fee		0.50%	61,494				
				13,087,708			
CONSTRUCTION COSTS							
Construction	**ft²**	**Rate ft²**	**Cost**				
Commercial	46,479 ft²	234.46 pf²	10,897,466				
A3 use	1,367 ft²	234.46 pf²	320,507				
Block A Converted	14,273 ft²	234.46 pf²	3,346,448				
Market Sale	49,557 ft²	234.46 pf²	11,619,134				
Totals	**111,676 ft²**		**26,183,555**	**26,183,555**			
Contingency		2.10%	549,855				
Mayoral and Borough CIL			1,412,644				
Section 106			421,267				
Additional Contributions			166,089				
				2,549,855			
PROFESSIONAL FEES							
Professional Fees		10.00%	2,618,355				
				2,618,355			
MARKETING & LETTING							
Marketing		3.00%	1,015,650				
Letting Agent Fee		10.00%	143,124				
Letting Legal Fee		5.00%	71,562				
				1,230,336			

Judgment Approved by the court for handing down.

DISPOSAL FEES			
Sales Legal Fee	0.50%	169,275	
			169,275
FINANCE			
Debit Rate 6.75% Credit Rate 1.00% (Nominal)			
Total Finance Cost			4,482,557
TOTAL COSTS			**50,321,641**
PROFIT			
			10,331,008

Performance Measures	
Profit on Cost%	20.53%
Profit on GDV%	16.94%
Profit on NDV%	17.47%
Development Yield% (on Rent)	2.84%
Equivalent Yield% (Nominal)	5.78%
Equivalent Yield% (True)	5.99%
IRR	18.62%
Rent Cover	7 yrs 3 mths
Profit Erosion (finance rate 6.750%)	2 yrs 9 mths