Neutral Citation Number: [2020] EWHC 270 (Admin)

Case No: CO/2809/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 February 2020

Before :

MRS JUSTICE LANG DBE

- -

Between :

SAINSBURY'S SUPERMARKETS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) LONDON BOROUGH OF TOWER HAMLETS	**Defendants**

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- -

Timothy Corner QC (instructed by **Dentons UK and Middle East LLP**) for the **Claimant**
Richard Turney (instructed by the **Government Legal Department**) for the **First Defendant**
Andrew Byass (instructed by **Legal Services**) for the **Second Defendant**

Hearing date: 15 January 2020

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, dated 10 June 2019, in which he dismissed an appeal by the Claimant, under section 78 TCPA 1990, against the failure of the Second Defendant ("the Council") to determine its application for planning permission to demolish its Whitechapel store at 1 Cambridge Heath Road, London E1 5SD ("the Site") and re-develop the Site.

2. Permission was granted by Lieven J. on 24 September 2019.

Planning history

3. On 14 July 2017, the Claimant applied to the Council, which is the local planning authority, for planning permission to replace its existing store and car park with a replacement store; an "explore learning" facility; flexible retail/office/community floor space; 471 residential units arranged in eight blocks; an energy centre and plant at basement level; 240 "retail" car parking spaces and 40 disabled car parking spaces for use by the proposed residential units; two additional disabled units proposed at Merceron Street; creation of an east-west public realm route from Cambridge Heath Road to Brady Street and public realm provision and enhancements; and associated highway works to Brady Street, Merceron Street, Darling Row and Collingwood Street and Cambridge Heath Road.

4. The Council failed to determine the application and on 1 December 2017 the Claimant appealed.

5. On 15 February 2018, the application was reported to the Council's Strategic Development Committee, which resolved that it would have refused the application on four grounds relating to:

   i) affordable housing and viability;

   ii) harm to the setting of the listed Albion Yard Brewery and the Whitechapel Market Conservation Area in views from Whitechapel Road;

   iii) unacceptable impact on daylight and sunlight to surrounding properties;

   iv) the absence of a legal agreement.

6. On 14 December 2017, the appeal was recovered by the First Defendant for his own determination.

7. An inquiry was held before an Inspector (Mr David Nicholson RIBA IHBC), between 9 and 19 October 2018. On 18 February 2019, the Inspector submitted his report ("IR") to the First Defendant, recommending that the appeal should be allowed and that planning permission should be granted, subject to conditions.

8. The Inspector set out the main considerations at IR 11.1:

i) whether the proposals would preserve or enhance the character or appearance of the Whitechapel Market Conservation Area ("CA");

ii) the effects of the proposals on the significance of the Grade II listed Albion Yard Brewery Entrance provided by its setting;

iii) the effect of the proposals on the setting of the non-designated heritage assets of the former Working Lads Institute ("WLI");

iv) the effect of the proposals on the living conditions of adjacent residents with particular regard to the daylight and sunlight received by the surrounding properties;

v) whether the public benefits of the proposals would outweigh the harm identified and the overall planning balances.

Heritage assets

9. The Inspector considered heritage assets at IR 11.2 to IR 11.14. At IR 11.4 he dealt with the Conservation Area. He said that:

> "… although there would be harm to the CA, which should be given considerable importance and weight, the impact on both its character and appearance should be given only slight to moderate weight."

10. At IR 11.5 to 11.9 he considered the issue of harm to setting of the Albion Brewery. He said at IR 11.7 that block 3 in the proposal would have a marked, detrimental impact on the contribution that the setting makes to the significance of the building's facade and to its special interest. He added:

> "To put this degree of harm at the lower end of the scale is to slightly underestimate the weight that should be given to the harm to the significance of the building as a designated heritage asset as a result of development in its immediate setting."

11. At IR 11.10 to 11.11 the Inspector decided that any harm to the Former Working Lads Institute (a non-designated heritage asset) should not be a major consideration in the appeal.

12. At IR 11.12 to 11.14 the Inspector dealt with cumulative heritage impact. He held that the most substantial harm was to the Brewery Entrance (IR 11.12). At IR 11.13 he drew attention to the guidance in paragraphs 193 to 194 of the National Planning Policy Framework ("the Framework") that harm to the significance of the designated heritage assets should require clear and convincing justification, and the guidance at paragraph 196 that less than substantial harm is subject to an assessment of the public benefits of the scheme.

13. At IR 11.14 he said that because of the harm to heritage assets the proposals would:

> "conflict with CLP Policy 7.8 and CS Policy SP 10; and with MDD policies DM 26 and DM 27. Again, this conflict would need to be considered against other relevant policies in order to determine compliance or otherwise with the development plan as a whole."

Amenity - daylight and sunlight

14. The Inspector considered the issue of daylight and sunlight at IR 11.15 to 11.28.

15. At IR 11.15 and 11.16, he said:

> "11.15 It was a joint matter in dispute as to whether the proposals would result in unacceptable harm to the amenity of surrounding residents in terms of adverse impacts on the levels of daylight and sunlight. This acknowledges that the disagreement was about more than just a reduction in natural light levels. Indeed, there was no dispute that there would be adverse impacts on daylight and sunlight as the Appellant's own figures demonstrate this.
>
> 11.16 Planning policy with regard to daylight and sunlight falls under CLP Policy 7.6 B (d) and MDD Policy DM 25, both for amenity. As these suggest, daylight and sunlight should not be considered in isolation from other factors affecting living conditions. The Mayor's Housing SPG also refers to amenity and expects flexibility when using BRE guidelines. NPPF 123 (c) expects a *flexible approach… (as long as the resulting scheme would provide acceptable living standards).* For all these policies it is not just a simple question of whether or not daylight would be acceptable but a matter which needs to be considered in the overall amenity balance."

16. At IR 11.26-11.28 the Inspector summarised the overall position:

> "11.26 It follows that a balance is to be struck in determining what might or might not be unacceptable before concluding whether or not a scheme would be policy compliant. This applies to CLP Policies 3.5 A and 7.6 B (d); CS Policy SP 02 (6); and MDD Policy DM 25 (1) parts (c) and (d). In each case the balance should tip in favour of the proposals. Given compliance with the other criteria in CLP Policy 7.7, including with the plan-led approach in 7.7 A, the degree of overshadowing with regard to 7.7 (D) (a) would not be such as to breach this policy as a whole.
>
> 11.27 With regard to CS SP 10(4) (a), in the context of a development which would need to satisfy the CS vision for Whitechapel, the proposed development would protect amenity

> and promote well-being in terms of preventing loss of privacy although there would be a loss of daylight and sunlight.
>
> 11.28 NPPF 123 (c) falls under the chapter; Achieving appropriate densities. Where land for housing is limited, it seeks optimal use of each site's potential. For housing applications, NPPF 123 (c) expects a flexible approach to applying daylight and sunlight policies or guidance where they would otherwise inhibit an efficient use of the site (as long as the resulting scheme would provide acceptable living standards). Given the quality of design, and so the overall balance with regard to living conditions, the scheme would comply with NPPF 123."

Affordable housing and other benefits

17. At IR 11.29 the Inspector referred to the pressing need for additional housing, including affordable housing. At IR 11.30 he referred to the need to optimise housing development and the suitability of the site for higher density development. At IR 11.32 he recorded that the Council had withdrawn its objections in respect of affordable housing because it now accepted that the proposed affordable housing offer represented the maximum reasonable amount that could be delivered by the scheme.

18. The Inspector dealt with the quality of the affordable housing at IR 11.33-11.34:

> "11.33 Nonetheless, with regard to the weight to the benefits of AH, the Council argued that the mix of affordable unit sizes would be sub-optimal, with insufficient larger units. In describing the main entrance to the AH as *poor doors*, it drew attention not only to the simple design but also to the position of these at the north end of the scheme. Unlike the private units, this would put them at the greatest walking distances from public transport, shops and services. The podium barrier would not only divide the types of tenure, but also separate the amenity and play space areas as well as extend walking distances (although access to these could be addressed through condition 43). Although more than one witness was questioned on this, no persuasive explanation was given as to why the units were separated in this way. If the SoS shares these concerns then he should seek an alternative arrangement through a further s106 Agreement.
>
> 11.34 To a very small extent this concern was addressed by the revised s106 Agreement which would include a few shared ownership units on the other side of the proposed barrier. Nevertheless, the location of vast majority of the AH, including all the rented housing, would be both at the far end of the site altogether rather than integrated, and this counts heavily against the benefits of the AH. …."

19. At IR 11.42-11.46 the Inspector dealt with benefits of the scheme. At IR 11.42 he noted that the Council acknowledged that the public benefits of the proposed development

included additional housing, delivery of affordable housing, increased retail provision and enhancement to the local public realm although it disagreed on their weight.

20. At IR 11.43 he said that the affordable housing would make a significant contribution to the Borough's needs, though the significant shortfall against policy expectation reduced the weight to that contribution.

21. At 11.44 the Inspector said:

> "Moreover, as above, the less than ideal mix of AH unit sizes, the segregation, the division of the podium spaces and the longer routes through less attractively positioned entrances would reduce the quality of the AH. Consequently, the weight to be given to the benefits of AH should be no more than moderate."

Planning balances

22. At IR 11.47, the Inspector found that in terms of paragraph 196 of the Framework, the public benefits of the scheme would outweigh the harm to heritage assets. Whilst giving considerable importance and weight to the effect on the settings of the Brewery Entrance and the CA, he concluded that "development should not be prevented simply as a result of harm to the settings of those heritage assets".

23. On the issue of "Living conditions-daylight and sunlight", the Inspector concluded at 11.48:

> "11.48 The closing statements summarise the position for the surrounding properties. In very many cases, there would be an appreciable reduction in daylight and some significant loss of sunlight. However, in very few cases would this amount to a considerable loss and, for these, many are ground floor rooms which are covered by blinds or curtains for reasons of privacy. Many other windows which would suffer a loss are already under balconies and electric lighting is likely to be in use during the day in any event. Daylight is one of many factors when considering living conditions and should not be looked at in isolation. Of comparable importance is outlook. The distances between neighbouring buildings and the taller buildings proposed would be significant. At the moment, many surrounding windows look out on the generally blank façades to the superstore or its delivery yard. The proposals would provide a more interesting and attractive outlook with good separating distances to the taller elements. The public realm improvements should also lift the quality of the environment as a whole and so indirectly improve living standards for the residents of surrounding buildings."

24. The Inspector's conclusion on the development plan and overall planning balance were at 11.49 – 11.55:

> "11.49 For the above reasons, the public benefits would outweigh the harm to the designated heritage assets such that it would be acceptable under NPPF 196. It follows that NPPF 11 (c) applies and the starting point is whether or not the scheme would comply with the development plan, taken as a whole.
>
> 11.50 For all the reasons set out above, on balance the scheme would comply with CLP Policies 3.4, 3.5, 3.8, 3.11, 3.12, 7.4, 7.5, 7.6 and 7.7. It would accord with CS Policies SP 02 (6), SP 10 and SP 12; and with MDD policies DM 24, DM 26 and DM 27…….
>
> 11.51 There would remain conflict with CLP policy 7.8, CS policy SP 10 and MDD policies DM 26 and 27 regarding heritage, and CS SP 10 (4) (a) for daylight and sunlight. There would be a conflict with aspects of CLP policies 3.5 A, 7.6B (d), and 7.7 (D) (a); CS policy SP 02 (6); and MDD Policy DM 25 (1) parts (c) and (d) although in each case there is a balance to be struck.
>
> 11.52 Overall the limited tension with the policies identified above would be significantly outweighed by the extent to which the benefits would accord with policies. Consequently, on balance, the proposals would comply with the development plan as a whole and should be allowed unless material considerations indicate otherwise…..
>
> 11.54 The balance from the NPPF is also a material consideration. Overall, this also indicates that planning permission should be granted. Even if the above conflict with the development plan were assessed as non-compliant, as above, there would be benefits from additional housing, AH, increased retail provision, public realm enhancement and design quality in particular which together warrant substantial weight. These benefits, and the broad support from policies in the NPPF, would outweigh any conflict with the development plan in any event.
>
> 11.55 For the reasons set out above, and having regard to all other matters raised, the development should be allowed."

25. On 10 June 2019 the First Defendant issued his decision letter ("DL") in which he disagreed with the Inspector's recommendation, and dismissed the appeal.

Heritage assets

26. At DL13 and 14, the First Defendant agreed with the Inspector's assessment of harm to the heritage assets, which should be given considerable importance and weight. He agreed with the Inspector that the proposal conflicted with CLP Policy 7.8, CS Policy SP 10 and MDD policies DM 26 and 27.

Amenity – daylight and sunlight

27. At DL16-18, the First Defendant found as follows:

> "16. The Secretary of State notes that the BRE guidelines recommend a vertical sky component (VSC) of 27%. However, the guidelines, the Mayor's Housing SPG and paragraph 123(c) of the Framework all expect a flexible approach. The Secretary of State notes that the appellant aimed for retained levels of VSC of at least 15%, while achieving a high density (IR5.3). It is a matter of common ground that 19% of windows in the surrounding blocks (243 windows) would suffer a significant loss of VSC (being left with a VSC of less than 15%), while the majority of those (175 windows) would be left with a VSC of less than 10% (IR5.3 and ID7). The Secretary of State agrees with the Inspector's assessment that very many existing neighbours would experience a gloomier outlook than they do at present, and that a large number of windows would be affected, many quite significantly (IR11.17). He considers that this harmful impact on neighbouring properties carries substantial weight against the proposal, and is in conflict with CS policy SP10(4)(a), which seeks to prevent loss of access to daylight and sunlight.
>
> 17. The Secretary of State further agrees with the Inspector that concerns raised in respect of the impact on Swanlea School should be given limited weight (IR11.24). He also agrees that it is likely that a number of future residents would experience less than ideal, if not poor levels of sunlight and daylight (IR11.25).
>
> 18. The Secretary of State has gone on to consider the overall amenity balance. He agrees with the inspector at IR11.18 that occupiers should not feel overlooked or have the sense of an overbearing outlook. He further agrees that there would be marked improvements to the appearance of the street scene, and greatly improved public realm (IR11.18 and IR11.21). He considers that these significant improvements in the living conditions of neighbouring residents weigh in the amenity balance and agrees with the Inspector at IR11.28 that, overall, the scheme would comply with paragraph 123(c) of the Framework. The Secretary of State considers, in line with the Inspector at IR11.51, that there is a conflict with aspects of CLP Policies 3.5 A, 7.6B (d) and 7.7 (D) (a), CS Policy SP02(6) and MDD Policy DM25(1)(c) and (d), but in the light of his conclusions on amenity in the evidence before him in this case concludes that there is no overall conflict with these policies."

Affordable housing

28. The First Defendant found, at DL 20, in agreement with the Inspector, that the proposed affordable housing would make a significant contribution to the Borough's needs but there was "a significant shortfall against policy expectation" which reduced the weight to given to it, "reinforced by the Council's concerns regarding the mix of affordable unit sizes".

29. The First Defendant identified the flaws in the affordable housing proposal at DL22-23:

> "22 The Secretary of State has further considered the fact that the social rented housing is positioned at the north end of the scheme, at the greatest walking distance from public transport, shops and services, and that the podium barrier would not only divide the types of tenure, but also separate the amenity and play space areas. He notes the Inspector's comment that no persuasive explanation was given as to why the units were separated in this way (IR11.33). He agrees with the Inspector that to a very small extent this would be addressed by the inclusion of the few shared ownership units on the other side of the proposed barrier, and has taken into account that condition 43 requires the measures for providing access to be approved. Nonetheless the location of the vast majority of the affordable housing, including all the rented housing, would be both at the far end of the site and altogether rather than integrated (IR11.34).
>
> 23 In assessing the implications of this, the Secretary of State has taken into account that the Framework aims not just to deliver raw housing numbers, but to achieve healthy, inclusive and safe places (paragraph 91). He considers that the separation of the affordable housing, amenity and play space areas is not in keeping with the aims of paragraph 91 (a) to achieve inclusive places that promote social interaction, including opportunities for meetings between people who would not otherwise come into contact with each other. The Secretary of State considers that this carries substantial weight against the proposal."

30. The First Defendant explained his reasons for rejecting the Inspector's suggestion that he should seek an alternative arrangement through a further section 106 TCPA 1990 agreement, at DL24:

> "24 The Secretary of State has considered the Inspector's comments at IR11.33 that if the Secretary of State shares his concerns, then he should seek an alternative arrangement through a further s. 106 agreement. However the Secretary of State notes that previous concerns about this matter which were addressed by a revised s. 106 agreement only resulted in the inclusion of the few shared ownership units on the other side of the proposed barrier (IR11.34). He therefore considers that a

> seeking more fundamental changes via further revisions to the s. 106 agreement is unlikely to be successful. He has also taken into account that other matters also weigh against the grant of permission. Overall he does not consider that a 'minded to allow' letter would be an appropriate approach in this case."

Planning balance and overall conclusion

31. The First Defendant's conclusions were set out at DL29-33:

> "29 For the reasons given above the Secretary of State considers that the appeal scheme is in conflict with CLP Policy 7.8, CS Policy SP10 and MDD Policies DM26 and DM27 regrading [sic] heritage and is also in conflict with CS Policy SP10(4)(a) regarding daylight and sunlight. He further considers that there are clear conflicts with these policies, which are of central importance to the proposal. Given the great weight attaching to harm to heritage assets, and the substantial weight attaching to the harm from loss of daylight and sunlight, he disagrees with the Inspector that there is 'limited tension' with these policies (IR11.52), and considers that the proposal is not in accordance with the development plan overall. He has gone on to consider whether there are other material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 30 The Secretary of State considers that the proposal fails to meet the Framework's aims of creating an inclusive place, and that this attracts substantial weight against the proposal. The harm from loss of daylight and sunlight attracts substantial weight against the proposal. The harm to heritage assets attracts great weight against the proposal while the impact on the character and appearance of the Conservation Area carries slight to moderate weight against the proposal.
>
> 31 The Secretary of state considers that the housing benefits attract substantial weight in favour of the proposal, well the affordable housing element attracts moderate weight in favour. The quality of design and the public realm improvements attracts substantial weight in favour of the proposal, while the increased retail provision attracts limited weight and the provision of a new learning facility carries a little weight in favour of the proposal.
>
> 32 The Secretary of State has considered whether the identified 'less than substantial' harm to the significance of the designated heritage assets are outweighed by the public benefits of the proposal. He agrees with the Inspector at IR11.47 that the benefits of the appeal scheme are collectively sufficient to outbalance the identified 'less than substantial' harm to the significance of the above heritage assets and considers that the

> balancing exercise under paragraph 196 of the Framework is therefore favourable to the proposal. He further considers that with respect to the non-designated Former Working Lads Institute, paragraph 197 is also favourable to the proposal."
>
> 33 The Secretary of State concludes that there are no material considerations which indicate that the proposal should be determined other than in accordance with the development plan. He therefore concludes that the appeal should be dismissed and planning permission refused."

Statutory and policy framework

32. The Claimant relied upon the "seven familiar principles" set out by Lindblom J. in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), at [19].

(i) Applications under section 288 TCPA 1990

33. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

34. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

35. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

36. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

37. In *Clarke Homes*, Sir Thomas Bingham MR said, at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary

> of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

38. The First Defendant was under a statutory duty to give reasons for his decision, pursuant to rule 18 of the Town and Country Planning (Inquiries Procedure)(England) Rules 2000.

39. In *South Buckinghamshire District Council v Porter* (No 2) [2004] 1 WLR 1953, Lord Brown reviewed the authorities and gave the following guidance on the nature and extent of the inspector's duty to give reasons:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

40. In *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153, Lord Bridge confirmed the requirement of substantial prejudice, at 167D-E:

> "The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given."

41. Where the Secretary of State disagrees with his Inspector's report, there is no heightened standard of reasons, but he must explain the reasons for the disagreement.

As Lindblom LJ said in *Secretary of State for Housing and Local Government v Allen* [2016] EWCA Civ 767 at [19]:

> "Where the Secretary of State disagrees with an inspector, as he did in this case, it will of course be necessary for him to explain why he disagrees, and to do so in sufficiently clear terms. He must explain why he rejects the inspector's view. He must do so fully, and clearly. But there is no heightened standard for "proper, adequate and intelligible" reasons in such a case. Whether the reasons given are "proper, adequate and intelligible" will always depend on the circumstances of the case, and in a case where the Secretary of State differs from his inspector this will depend on the particular circumstances in which he does so (see, for example, the decision of this court in *Horada and others v Secretary of State for Communities and Local Government [2016] EWCA Civ 169*, in particular the judgment of Lord Thomas of Cwmgiedd C.J., at paragraphs 57 to 59, and the judgment of Lewison L.J. at paragraphs 34 to 40). It is a truism that the Secretary of State does not have to give reasons for his reasons. What he has to do is to make sure that his decision letter shows why the outcome of the appeal was as it was, bearing in mind that the parties to the appeal know well what the issues were. In this case he did that."

(ii) Decision-making

42. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

43. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision

on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175* , 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan.

There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.

Counsel for the Secretary of State suggested in the course of his submissions that in the practical application of the section two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal

> prescription nor even general guidance are useful or appropriate."

44. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].

45. In *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, Lord Hoffmann described the extent of the Court's role in reviewing material considerations, at 780F-H:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> The distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the planning authority or the Secretary of State."

46. In *R (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, [2015] 1 WLR 2367, Richards L.J. cited Lord Clyde's speech in *City of Edinburgh Council*, and said:

> "28.…. It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. …."

47. The First Defendant relied particularly on the summary of the relevant principles in *BDW Trading v SSCLG* [2016] EWCA Civ 493, [2017] PTSR 1337, where Lindblom LJ agreed, at [27], with counsel's submission that the court has "consistently recognised" "latitude for decision-makers in discharging the section 38(6) duty" (at [25]). Lindblom LJ said:

"19. The section 38(6) duty is the essential component of the "plan-led" system of development control. It embodies a "presumption in favour of the development plan", as Lord Hope of Craighead described it in his speech in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447* (at p.1449H), and, as Lord Clyde said in the same case (at p.1458B), "a priority to be given to the development plan in the determination of planning matters". The nature of the duty and the force of the presumption are already the subject of much authority, which need not be enlarged in this case.

20. Without seeking to be exhaustive, I think there are five things one can fairly say in the light of the authorities.

21. First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in City of Edinburgh Council, at p.1458D to p.1459A, and p.1459D-G). Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions (see Lord Clyde's speech in City of Edinburgh Council , at p.1459D-F, the judgments of Lord Reed and Lord Hope in *Tesco Stores Ltd. v Dundee City Council [2012] UKSC 13*, respectively at paragraphs 19 and 34, and the judgment of Sullivan J., as he then was, in *R. v Rochdale Metropolitan Borough Council, ex p. Milne [2001] J.P.L. 470*, at paragraphs 48 to 50). Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration" (see Lord Clyde's speech in City of Edinburgh Council, at p.1459H to p.1460D). Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole (see the judgment of Richards L.J. in *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, at paragraph 28, and the judgment of Patterson J. in *Tiviot Way Investments Ltd. v Secretary of State for Communities and Local Government [2015] EWHC 2489 (Admin)*, at paragraphs 27 to 36). And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the

> development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance (see the judgment of Richards L.J. in Hampton Bishop Parish Council, at paragraph 30)."

(iii) The Planning (Listed Buildings and Conservation Areas) Act 1990 ("the PLBCAA 1990")

48. Section 66(1) PLBCAA 1990 provides:

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

49. Section 72(1) PLBCAA 1990 provides:

> "72. General duty as respects conservation areas in exercise of planning functions
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any [functions under or by virtue of] any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

50. In *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, Sullivan LJ gave guidance on the application of section 66(1) PLBCAA 1990, holding that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when exercising his powers under section 70(2) TCPA 1990 in dealing with an application for planning permission.

(iv) National Planning Policy Framework

51. The Framework (February 2019 edition) is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making. It is policy, not statute, but a decision-maker who decides to depart from it must give cogent reasons for doing so.

52. Paragraph 11 provides a presumption in favour of sustainable development. Paragraph (c) applied in this case, which meant "approving development proposals that accord with an up-to-date development plan without delay".

53. In the section on "Promoting healthy and safe communities", paragraph 91 provides:

> "Planning policies and decisions should aim to achieve healthy, inclusive and safe places which:
>
> a) promote social interaction, including opportunities for meetings between people who might not otherwise come into contact with each other – for example through mixed-use developments, strong neighbourhood centres, street layouts that allow for easy pedestrian and cycle connections within and between neighbourhoods, and active street frontages;
>
> b) are safe and accessible, so that crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion – for example through the use of clear and legible pedestrian routes, and high quality public space, which encourage the active and continual use of public areas; and
>
> c) enable and support healthy lifestyles, especially where this would address identified local health and well-being needs – for example through the provision of safe and accessible green infrastructure, sports facilities, local shops, access to healthier food, allotments and layouts that encourage walking and cycling."

54. In the section on "Making effective use of land", paragraph 123 provides:

> "Where there is an existing or anticipated shortage of land for meeting identified housing needs, it is especially important that planning policies and decisions avoid homes being built at low densities, and ensure that developments make optimal use of the potential of each site. In these circumstances:
>
> …..
>
> (c) Local planning authorities should refuse applications which they consider fail to make efficient use of land, taking into account the policies in this Framework. In this context, when considering applications for housing, authorities should take a flexible approach in applying policies or guidance relating to daylight and sunlight, where they would otherwise inhibit making efficient use of the site (as long as the resulting scheme would provide acceptable living standards)."

55. National policy on "Conserving and enhancing the historic environment" in section 16 of the Framework is to be interpreted and applied consistently with the statutory duties under the PLBCAA 1990.

56. The relevant polices are set out below:

> "**Considering potential impacts**

> 193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:
>
> a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
>
> b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply….
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.
>
> 197. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

(v) Development plan policies

57. The Development Plan consisted of the London Plan ("CLP"), consolidated with alterations between 2011 and March 2016; the Tower Hamlets Core Strategy ("CS"), adopted in September 2010; and the Tower Hamlets Managing Development Document ("MDD"), adopted in April 2013.

58. CLP Policy 3.5 provides, so far as is material:

> "POLICY 3.5 QUALITY AND DESIGN OF HOUSING DEVELOPMENTS
>
> Strategic
>
> A Housing developments should be of the highest quality internally, externally and in relation to their context and to the wider environment, taking account of strategic policies in this Plan to protect and enhance London's residential environment and attractiveness as a place to live … … ."

59. CLP Policy 7.6 provides, so far as is material:

> "POLICY 7.6 ARCHITECTURE
> …
> Planning decisions
> B Buildings and structures should
> (d) not cause unacceptable harm to the amenity of surrounding land and buildings, particularly residential buildings, in relation to privacy, overshadowing, wind and microclimate. This is particularly important for tall buildings."

60. CLP Policy 7.7 provides, so far as is material:

> "POLICY 7.7 LOCATION AND DESIGN OF TALL AND LARGE BUILDINGS
> …
> Planning decisions
> D Tall buildings:
> a. should not affect their surroundings adversely in terms of microclimate, wind turbulence, overshadowing, noise, reflected glare, aviation, navigation and telecommunication interference."

61. CLP Policy 7.8 provides, so far as is material:

> "POLICY 7.8 HERITAGE ASSETS AND ARCHAEOLOGY
> …
> Planning decisions
> …
> D Development affecting heritage assets and their settings should conserve their significance, by being sympathetic to their form, scale, materials and architectural detail."

62. CS Policy SP02 provides, so far as is material:

> "6 Ensuring all housing is appropriate, high-quality, well-designed and sustainable. This will be achieved by:
> (a) Setting housing design standards.
> (b) Working with housing partners to facilitate existing homes to be brought up to at least the Decent Homes standard.

(c) Requiring new developments to comply with accessibility standards, including 'Lifetime Homes' requirements.
(d) Requiring adequate provision of housing amenity space for new homes… including private amenity space in every development and communal amenity space for developments providing 10 units or more.
(e) Requiring sites that are providing family homes to provide adequate space for play space for children.
(f) Requiring new homes to respond to climate change…"

63. CS Policy SP10 provides, so far as is material:

"2 Protect and enhance the following heritage assets and their settings:
...
Statutory Listed Buildings..
Conservation Areas..
Locally Listed Buildings….

4 Ensure that buildings and neighbourhoods promote good design principles to create buildings, spaces and places that are high-quality, sustainable, accessible, attractive, durable and well-integrated with their surrounds. This will be achieved through ensuring development:
(a) Protects amenity, and promotes well-being (including preventing loss of privacy and access to daylight and sunlight)…"

64. MDD Policy DM25 provides, so far as is material:

"1 Development should seek to protect, and where possible improve, the amenity of surrounding existing and future residents and building occupants, as well as the amenity of the surrounding public realm by
a. not resulting in an unacceptable loss of privacy, nor enable a reasonable level of overlooking or unacceptable increase in the sense of enclosure;
b. not resulting in the unacceptable loss of outlook;
c. ensuring adequate levels of daylight and sunlight for new residential development;
d. not resulting in an unacceptable material deterioration of the sunlighting and daylighting conditions of surrounding development including habitable rooms of residential dwellings, schools, community uses and offices and not result in an unacceptable level of overshadowing to surrounding open space; and
e. not creating unacceptable levels of noise, vibration, artificial light, odour, fume or dust pollution during the construction and life of the development."

65. MDD Policy DM26 provides, so far as is material:

> "…
> 2. Proposals for tall buildings will be required to satisfy the criteria listed below:
> …
> e. Not adversely impact on heritage assets or strategic and local views, including their settings and backdrops…"

66. MDD Policy DM27 provides, so far as is material:

> "1. Development will be required to protect and enhance the borough's heritage assets, their setting and their significance as key elements of developing the sense of place of the boroughs distinctive 'Places'."

Grounds of challenge

67. The Claimant relied upon the following grounds of challenge:

i) **Ground 1:** Having concluded he was not content with the location of the affordable housing, the First Defendant's decision not to revert to the Claimant (as the Inspector recommended) and provide it with the opportunity to offer an alternative location for the proposed affordable housing, through a revised section 106 TCPA 1990 agreement, was irrational and/or unintelligible and/or he gave insufficient reasons for his decision.

ii) **Ground 2**: In determining the planning balance and overall conclusion, the First Defendant (a) failed to take account of relevant considerations and/or reached an irrational and/or unintelligible decision and/or failed to give sufficient reasons for his decision; and (b) failed to have regard to relevant considerations in concluding that there were no material considerations which indicated that the proposal should be determined otherwise than in accordance with the development plan.

68. The Claimant submitted, in support of Ground 1, that all matters save for the location of the affordable housing, were resolved in the Claimant's favour, and therefore the decision was irrational. The Defendants did not agree with the Claimant's reading of the First Defendant's decision letter, and the dispute between the parties on this issue was at the heart of Ground 2. Therefore, it is convenient to consider Ground 2 first.

Ground 2

69. The Claimant's challenge was largely based upon the First Defendant's findings on daylight and sunlight. The conclusions in DL29 were inconsistent with his findings in DL18. His conclusion, at DL29, that the proposal was in conflict with CS policy SP(10)(4)(a) regarding daylight and sunlight was perverse and/or failed to take into account his earlier finding at DL18 that there was no overall conflict with the amenity policies listed, which included MDD Policy DM25(1)(d). MDD Policy DM25(1)(d) requires that development should not result in "an unacceptable material deterioration of the sunlighting and daylighting conditions of surrounding development". If he did

take account of DL18, his decision was inadequately reasoned, because the Claimant did not know why the proposal was found to be in overall conflict with the development plan.

70. In my judgment, the Claimant's submission was based upon a misreading of the DL. CS Policy SP10(4)(a) provides:

> "4 Ensure that buildings and neighbourhoods promote good design principles to create buildings, spaces and places that are high-quality, sustainable, accessible, attractive, durable and well-integrated with their surrounds. This will be achieved through ensuring development:
>
> a. Protects amenity, and promotes well-being (including preventing loss of privacy and access to daylight and sunlight);…"

71. At DL16, the First Defendant set out in some detail, and with reference to the Inspector's findings, that "very many existing neighbours would experience a gloomier outlook than they do at present, and that a large number of windows would be affected, many quite significantly". He concluded:

> "this harmful impact on neighbouring properties carries substantial weight against the proposal, and is in conflict with CS policy SP10(4)(a) which seeks to prevent loss of access to daylight and sunlight."

72. Consistently with DL16, the First Defendant concluded at DL29 that the proposal was in conflict with CS Policy SP10(4)(a) regarding loss of daylight and sunlight. He attached substantial weight to this harm, and disagreed with the Inspector there was only "limited tension" with this policy.

73. In the final sentence of DL18, the First Defendant agreed with the Inspector's finding, at IR 11.51, that there was conflict with aspects of MDD Policy DM25(1)(c) and (d), among other policies. MDD Policy DM25, which is set out at paragraph 64 above, seeks to "protect and where possible improve the amenity of surrounding existing and future residents and building occupants, as well as the amenity of the surrounding public realm". There was conflict with sub-paragraphs (c) and (d) of the policy because of the reduced levels of daylight and sunlight for residents and neighbours. In concluding that, whilst there was some conflict, there was no overall conflict with these policies, the First Defendant was reflecting the view of the Inspector, at IR 11.26, that a balance had to be struck in respect of the policies listed in that paragraph. MDD Policy DM25(1) was a policy on amenity which included many other factors, in addition to daylight and sunlight. The First Defendant's finding on overall amenity did not contradict the separate finding in DL16, in respect of CS Policy SP10(4)(a), which had a different overall purpose, and was expressed in different terms and with a different emphasis to Policy DM25(1)(d).

74. Given that there was ample evidence before the Inspector to substantiate the loss of daylight and sunlight, the First Defendant was required to decide whether there was a policy conflict, and the weight to give to it in the overall planning balance. This was a

planning judgment on which his view differed from that of the Inspector, and the Claimant.

75. Despite the criticisms of the structure and drafting of the DL, which admittedly was not of a high standard, I do not consider that the Claimant can be in any genuine, as opposed to forensic, doubt as to the reasons why the First Defendant concluded that the proposal was in overall conflict with the development plan. At DL29, the First Defendant identified "clear conflicts" with five policies in the development plan, which he found were of central importance, some of which attracted considerable weight. He disagreed with the Inspector's assessment that the "tension" with these policies was "limited".

76. The Claimant's submissions under part (b) differed somewhat between the Statement of Facts and Grounds, the skeleton argument and the oral submissions. It was alleged that the First Defendant failed to take account of material considerations which indicated that the proposal should be determined otherwise than in accordance with the development plan, in particular, his finding at DL18 that the overall amenity balance was in favour of the proposal. It was irrational to rely upon loss of daylight and sunlight when he had earlier concluded that the effect on daylight and sunlight was acceptable. He had also accepted, at DL32, that the public benefits outweighed the heritage harm, applying paragraph 196 of the Framework.

77. As Lord Clyde explained in *City of Edinburgh Council*, the effect of section 70(2) TCPA 1990 and section 38(6) PCPA 2004, is that the relevant development plan policies govern the decision, unless there are material considerations which indicate that, in the particular case, the provisions of the development plan should not be followed. The manner in which the decision-maker structures his decision in accordance with this principle is a matter for him to decide – there is no universal prescription. His decision can only be challenged on public law grounds. The assessment of the facts and the weighing of the considerations are matters for the decision-maker, not the court.

78. At DL29, the First Defendant concluded that "the proposal is not in accordance with the development plan overall" because of the policy conflicts which he identified. He correctly directed himself to go on to consider whether there were material considerations which indicated that the proposal should be determined otherwise than in accordance with the development plan.

79. At DL30 to DL32, he considered the material considerations. On a fair interpretation of the DL, read as a whole, the First Defendant did have regard to material considerations in favour of the proposal, including those relating to amenity and heritage.

80. At DL31, he considered that the housing benefits and the affordable housing attracted weight in favour of the proposal. He specifically identified the quality of design and the public realm improvement as material considerations in favour of the proposal. This was a reference back to DL18 where the First Defendant agreed with the Inspector's findings that "the marked improvements in the appearance of the street scene, and a greatly improved public realm" were "significant improvements in the living conditions of neighbouring residents" which weighed "in the amenity balance". I have no doubt that the First Defendant had well in mind that he had just concluded at DL18 that, despite the conflict with some policy aspects, including daylight and sunlight, there was

no overall conflict with the policies on amenity, including MDD Policy DM25(1). However, as I have already explained, it is clear from the First Defendant's finding at DL18 that he found that there was some conflict with MDD Policy DM25(1)(c) and (d), on daylight and sunlight, and from his finding at DL16 that there was conflict with CS Policy SP10(4)(a), in respect of loss of neighbours' daylight and sunlight. Therefore, it was not irrational or inconsistent for him to take this consideration into account.

81. In relation to heritage asset harm, at DL32, the First Defendant had regard to the material consideration in favour of the proposal that, applying paragraph 196 of the Framework, the benefits of the scheme outweighed the heritage harm.

82. However, the First Defendant concluded that these material considerations in favour of the proposal were not decisive and did not justify a departure from the policies in the development plan. In my view, this was the meaning of DL33, which I accept was poorly expressed. It cannot have meant that there were no considerations at all in favour of the proposal since considerations in favour were identified in the preceding paragraphs.

83. It is apparent from DL30 that, in the view of the First Defendant, there were a number of material considerations which weighed against the proposal.

84. First, the flaws in the proposal for affordable housing meant that the aims of paragraph 91 of the Framework were not met, which attracted substantial weight against the proposal.

85. Second, the First Defendant found that the harm from loss of daylight and sunlight attracted substantial weight against the proposal.

86. Third, under sections 66(1) and 72(1) PLBCAA 1990, there was an overarching statutory duty to treat a finding of harm to heritage assets as a consideration to which the decision-maker must give considerable importance and weight when exercising his powers under section 70(2) TCPA 1990 in dealing with an application for planning permission. The First Defendant found that the harm to heritage assets attracted great weight against the proposal, while the impact on the character and appearance of the Conservation Area carried slight to moderate weight against the proposal.

87. In my judgment, the First Defendant was entitled to dismiss the appeal, and refuse planning permission, on the basis that the proposal was not in accordance with the development plan overall, and that the material considerations did not indicate that the development plan should not be followed. There was no identifiable public law error in the First Defendant's decision-making, and therefore no grounds for a legal challenge.

88. Therefore Ground 2 does not succeed.

Ground 1

89. The Claimant submitted that the First Defendant acted irrationally in not taking up the Inspector's suggestion, in IR 11.33, that he should seek an alternative arrangement for

the proposed affordable housing through a further agreement under section 106 TCPA 1990. This could have been achieved by sending a "minded to grant" letter to the parties, inviting further representations on the location of the proposed affordable housing, which would have enabled the Claimant to revise its proposal accordingly. The Claimant also submitted that the Inspector's reasons for not so doing were unintelligible and inadequate.

90. The Inspector found at IR 11.33 and 11.34:

> "11.33 Nonetheless, with regard to the weight to the benefits of AH, the Council argued that the mix of affordable unit sizes would be sub-optimal, with insufficient larger units. In describing the main entrance to the AH as *poor doors*, it drew attention not only to the simple design but also to the position of these at the north end of the scheme. Unlike the private units, this would put them at the greatest walking distances from public transport, shops and services. The podium barrier would not only divide the types of tenure, but also separate the amenity and play space areas as well as extend walking distances (although access to these could be addressed through condition 43). Although more than one witness was questioned on this, no persuasive explanation was given as to why the units were separated in this way. If the SoS shares these concerns then he should seek an alternative arrangement through a further s106 Agreement.
>
> 11.34 To a very small extent this concern was addressed by the revised s106 Agreement which would include a few shared ownership units on the other side of the proposed barrier. Nevertheless, the location of vast majority of the AH, including all the rented housing, would be both at the far end of the site altogether rather than integrated, and this counts heavily against the benefits of the AH. …."

91. The First Defendant decided not to seek an alternative arrangement for the following reasons, set out at DL24:

> "24. The Secretary of State has considered the Inspector's comments at IR11.33 that if the Secretary of State shares his concerns, then he should seek an alternative arrangement through a further s.106 agreement. However the Secretary of State notes that previous concerns about this matter which were addressed by a revised s.106 agreement only resulted in the inclusion of the few shared ownership units on the other side of the proposed barrier (IR11.34). He therefore considers that a seeking more fundamental changes via further revisions to the s. 106 agreement is unlikely to be successful. He has also taken into account that other matters also weigh against the grant of permission. Overall he does not consider that a 'minded to allow' letter would be an appropriate approach in this case."

92. It was common ground that there is no statutory basis for a "minded to" letter to be sent in circumstances such as these, nor any guidance. In contrast, there is provision in rule 17(5) of the Town and Country Planning (Inquiries Procedure)(England) Rules 2000 for the Secretary of State to give the parties an opportunity to make representations if he "differs from the inspector on any matter of fact" or "takes into consideration any new evidence or new matter of fact (not being a matter of government policy)" and for that reason disagrees with the inspector.

93. The Secretary of State has a discretion as to whether to refer matters back to the parties, or to issue a "minded to" decision: see *Eagle Star Insurance Co v Secretary of State for the Environment* [1992] JPL 434, per Sir Graham Eyre QC sitting as a Deputy Judge of the High Court, at 436 – 438, 441; *Murphy v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1015, per Lewison LJ at [28].

94. Mr Richard Watson, Head of the Planning Casework Unit in the Ministry of Housing, Communities and Local Government, explained in his witness statement that the issuing of a "minded to" letter is within the sole discretion of the Secretary of State. He said, at paragraphs 7 and 8:

> "7. It is exceptional for "minded to" letters to be issued. Over the last 10 years, fewer than one a year have been issued, out of more than 600 cases decided by the Secretary of State (as opposed to by an Inspector). As decision-maker, the Secretary of State's job is to decide on the recovered appeal or called-in planning application which is before him. He is not required or expected to work with parties to improve proposals, or allow them further opportunities to make an unacceptable proposal acceptable. The fact that he has done so in a very small number of cases does not mean there is any expectation or policy that he will do so in all cases where it is suggested.
>
> 8. Planning practitioners familiar with the system would understand that the use of "minded to" decisions is exceptional and very unlikely to be the outcome in any given case."

95. In my judgment, the First Defendant's reasons for deciding not to issue a "minded to" letter were rational and intelligible.

96. First, he was entitled to conclude that seeking more fundamental changes through a further revised section 106 agreement was unlikely to be successful.

97. Previous revisions to the section 106 agreement, in response to the concerns raised, had achieved minimal improvements to the unsatisfactory location of the affordable housing in the north of the development. It only resulted in the inclusion of a few (about 7, I was told by Mr Corner QC) shared ownership units on the other side of the proposed barrier. No rented units were moved south of the barrier. Moreover, the barrier was a fundamental part of the design. The Claimant made proposals to this Court suggesting ways in which the affordable housing could be relocated south of the barrier, which the Council cast considerable doubt upon. Most importantly, they were not presented to the Inspector or Secretary of State during the appeal process.

98. The quality of the proposed affordable housing was put squarely in issue at the Inquiry by the Council and the Greater London Authority ("GLA"). Despite this, the Claimant did not respond to the Council's and the GLA's concerns prior to, or during the Inquiry, by putting forward an alternative proposal in an amended section 106 agreement. Instead, it maintained that the concentration of affordable housing in the northern portion of the proposed development was appropriate. Thus, although the Claimant had had ample opportunity to address the location of the affordable housing units during the course of the Inquiry, when the views of all present could have been aired, it chose not to do so.

99. The Claimant did not invite or request a "minded to" letter so that it could amend its proposal, in the event that the existing proposal was found to be unacceptable.

100. The Inspector's findings were firmly against the Claimant on the issue of affordable housing, and so were the findings of the First Defendant. They found significant flaws in the affordable housing scheme; not mere details which could be easily resolved.

101. The First Defendant rightly took into account the fact that other matters weighed against the grant of permission. As I have set out under Ground 2, he found that the proposal was not in accordance with the development plan overall, and there were material considerations against the proposal, as well as in favour. Therefore, the Claimant was wrong to assert that all the other points had been decided in its favour. Therefore, it was far from certain that addressing the distribution of affordable housing would have decisively altered the planning balance in the Claimant's favour.

102. In my judgment, the reasons given were both intelligible and adequate, bearing in mind the parties' knowledge of the background. In any event, the Claimant has failed to establish any prejudice from the alleged weakness in the reasons.

103. Therefore, Ground 1 does not succeed.

Final conclusion

104. For the reasons set out above, the claim is dismissed.