IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 319 (LC)
Case No: ACQ/24/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – appeal against certificate of appropriate alternative development – avoidance of harm to heritage assets – compliance with design standards – appeal allowed

IN THE MATTER OF AN APPEAL UNDER SECTION 18 LAND COMPENSATION ACT 1961

BETWEEN:

PRO INVESTMENTS LTD	**Claimant**
and	
LONDON BOROUGH OF HOUNSLOW	**Respondent**

Re: Land at Capital Interchange Way
Brentford
TW8 0EX

Martin Rodger QC, Deputy Chamber President, and Mr P D McCrea FRICS

Royal Courts of Justice

11-13 June 2019

Guy Roots QC and *Merrow Golden*, instructed by Gateley Plc for the claimant

Timothy Mould QC and *Andrew Byass*, instructed by Taylor Wessing LLP for the respondent

The following cases are referred to in this decision:

City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447

East Northamptonshire District Council and others v Secretary of State for CLG [2014] EWCA Civ 137

Essex Showground Group Ltd v Essex County Council [2006] RVR 336

Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682

Porter v Secretary of State [1996] 3 All ER 693

Introduction

1. A new football stadium is being built at Brentford in the London Borough of Hounslow, on a site to the north of Kew Bridge. A significant contribution to the cost of the new stadium is to be met from the sale of flats in ten new apartment buildings on land surrounding the stadium site. Planning permission was granted for the new apartment buildings in 2014 despite contraventions of planning policy, because of the local planning authority's assessment of the significant public benefit the development will deliver through regeneration of the area and the retention of Brentford FC in the Borough.

2. Three of the new buildings are to be on the site of Capital Court, a redundant 1980s office block which has been vacant for several years.

3. To enable the scheme to proceed the Capital Court site was compulsorily acquired by the respondent, the London Borough of Hounslow, from the claimant, PRO Investments Ltd, pursuant to the London Borough of Hounslow (Lionel Road South) Compulsory Purchase Order 2014. A general vesting declaration made under powers conferred by the CPO vested the site in the respondent on 1 September 2016, which is therefore the valuation date for the assessment of compensation.

4. The Tribunal is now required to determine the amount of compensation payable to the claimant for the Capital Court site. Before doing so it is first necessary to decide what the site might have been used for if the stadium scheme had not proceeded.

5. In the absence of agreement, the means of determining that question is by an application for a certificate of appropriate alternative development (a "CAAD") made to the local planning authority under section 17 of the Land Compensation Act 1961 ("the LCA 1961"). The purpose of a CAAD is to describe planning permissions which would have been likely to have been granted if land had not been acquired compulsorily, together with a general indication of the conditions or obligations to which the permission could reasonably have been expected to be subject. Any person dissatisfied with the decision of an authority concerning a CAAD may appeal to the Tribunal under section 18 of the LCA 1961.

6. On 19 January 2018 the claimant applied to the respondent, in its capacity as the local planning authority, for a CAAD in respect of the Capital Court site. It proposed that an appropriate alternative development of its site would comprise a residential scheme involving two blocks of between nine and sixteen storeys providing 309 units. The scope of this scheme was broadly comparable to the development of the site permitted as enabling works in connection with the new stadium, which comprises three blocks of nine, thirteen and sixteen storeys providing 253 flats.

7. On 23 March 2018 the respondent issued a CAAD describing six types of development which it considered appropriate. These included office use, various commercial or community uses, and housing; the housing contemplated by the certificate was limited to 80 residential

units in a mixed-use development comprising four to six storey buildings with part eight storeys which would include 1,500-2,000 sqm of office space on the lower floors.

8. The respondent considered that the development proposed by the claimant would not have received planning permission for two reasons. First, because it would be an "overly tall and dense development that would be harmful to the townscape and the significance of various designated heritage assets"; and, secondly, because the planning framework for the area and its characteristics meant that residential use would only be likely to be permitted as part of a mixed-use development in which employment uses formed "a considerable proportion" of the development.

9. On 19 April 2018, the claimant appealed to the Tribunal against the CAAD and at the same time made a reference for the determination of the compensation payable by the respondent for the Capital Court site.

10. With the agreement of the parties, the Tribunal considered the appeal against the CAAD as a preliminary issue. We also directed that any issue concerning the planning assumptions to be made for the purpose of deciding the amount of compensation payable to the claimant should be determined at the same time. In the event neither party has invited us to determine any additional question concerning planning assumptions.

11. At the hearing of the reference the claimant was represented by Mr Guy Roots QC and Ms Merrow Golden, and the respondent by Mr Timothy Mould QC and Mr Andrew Byass.

12. Written and oral evidence was given on behalf of the claimant by Mr Sean Bashforth (an expert on town and country planning), and by Mr Nick Bridgland (an expert on heritage issues). Reports by Mr Dani Fiumicelli (on noise) and by Ms Alice McLean (on air quality) were also filed on behalf of the claimant, but the issues to which these related were subsequently agreed.

13. Written and oral evidence was given on behalf of the respondent by Mr Shane Baker (on planning matters), by Mr Dominic Chapman (on design issues) and by Mr Sean Doran (on heritage assets). Evidence on noise and air quality by Mr Nigel Mann was received in writing.

14. We are grateful to all those who participated in the hearing for their assistance.

The issues

15. The parties agree that a residential land use on the Capital Court site, including some employment floor space, would have been acceptable in principle at the valuation date of 1 September 2016. They also agree the general nature of the planning conditions which any planning permission for such a mixed-use development would have been subject to, and that an agreement pursuant to section 106 of the Town and Country Planning Act 1990 would have been required and would include a commitment that 40% of the new residential units would be

affordable housing, with the precise tenure split between social renting and intermediate tenures being left to negotiation with the respondent.

16. The overarching issue in the appeal is whether, on the relevant statutory assumptions, planning permission could reasonably have been expected to have been granted for the scheme of development proposed by the claimant (which we will refer to as "the claimant's scheme", without distinguishing between various iterations except where necessary) or whether permission could only have been expected for the lesser scheme described in the CAAD granted by the respondent (which we will call "the respondent's scheme").

17. Resolution of that question depends on two issues of planning judgment which are reflected in the reasons stated in the CAAD for the refusal of the claimant's scheme.

18. The first and most significant issue concerns the height, scale, and massing of development which would have been acceptable, having regard in particular to the degree of harm which the claimant's scheme would cause to the setting of a number of heritage assets in the locality of the Capital Court site and its impact on the character of the existing townscape. Mr Doran, for the respondent, and Mr Bridgland, for the claimant, disagree on which heritage assets would be affected and what level of harm would be caused. The parties' planning experts, Mr Bashforth and Mr Baker, also disagree on whether such harm as would be caused to the significance of heritage assets would nevertheless be outweighed by other material considerations so as to make the claimant's scheme acceptable.

19. The second substantial area of disagreement concerns the amount of employment space required to be included in a scheme of development of the scale proposed by the claimant to satisfy the relevant employment policies in the statutory development plan.

20. It is common ground that these issues must be determined in the context of the statutory development plan. As at the valuation date of 1 September 2016 that plan comprised the Hounslow local plan and the London plan.

The relevant legal framework

21. There was no disagreement between the parties on the relevant principles of law to be applied by the Tribunal.

22. In assessing the amount of compensation payable in accordance with rule 2 of section 5 of the LCA 1961, section 14(2)(a) requires that account may be taken of any planning permission in force on the valuation date for development on the reference land or other land. By section 14(3) it may also be assumed that planning permission was in force on the valuation date for "appropriate alternative development" as defined in section 14(4). Such development means (in short) development for which, on the assumptions in section 14(5) but otherwise in the circumstances known to the market on the valuation date, planning permission could

reasonably have been expected to be granted on an application determined on or after the valuation date.

23. The relevant assumptions required to be made by section 14(5) (as substituted by the Localism Act 2011, section 232) are (in summary): that the scheme underlying the compulsory acquisition had been cancelled on the 'launch date' as defined in section 14(6), which in this case was 23 December 2014; that no action had been taken by the acquiring authority wholly or mainly for the purposes of the scheme; and that there is no prospect of the same scheme or a project to meet substantially the same need being carried out in exercise of a statutory function or by the exercise of compulsory purchase powers.

24. On an appeal to the Tribunal against a CAAD under section 18 the Tribunal must consider the matters to which the certificate relates as if the application had been made to it in the first place, and it may confirm, vary or cancel the certificate and issue a different certificate in its place.

25. In *Porter v Secretary of State* [1996] 3 All ER 693, 703-704 Stuart-Smith LJ said that the question whether a planning permission could reasonably have been expected to be granted is to be determined on the balance of probabilities in the light of all the evidence. In *Essex Showground Group Ltd v Essex County Council* [2006] RVR 336, the Lands Tribunal (George Bartlett QC, President and PR Francis FRICS) explained that the proper approach is to determine what a reasonable local planning authority would have decided, having correctly directed itself on law and planning policy, in the circumstances to be assumed at the valuation date.

26. By section 38(6) of the Planning and Compulsory Purchase Act 2004, the determination of a planning application must be in accordance with the statutory development plan unless material considerations indicate otherwise. As Lord Clyde explained in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1458 E-F:

> "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."

27. What constitutes a "material consideration" for this purpose is a matter of law, but the weight to be given to it and the balancing of relevant policy considerations which may tend in opposite directions are matters of judgment for the decision maker, as Lord Clyde emphasised (at 1458F-H).

28. By section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, in deciding whether to grant planning permission for development which affects a listed building or its setting, the decision maker must have special regard to the desirability of

preserving the building or its setting. By section 72(1) of the same Act special attention must also be paid to the desirability of preserving or enhancing the character or appearance of conservation areas.

29. In *East Northamptonshire District Council and others v Secretary of State for CLG* [2014] EWCA Civ 137, Sullivan LJ provided guidance on the application of sections 66(1) and 72(1) of the 1990 Act. Mr Roots QC summarised that guidance in the following propositions which Mr Mould QC agreed:

a. despite the slight difference in wording, the nature of the duties in section 66(1) and section 72(1) is the same;

b. "preserving" in both enactments means doing no harm;

c. a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give considerable importance and weight;

d. there is a strong presumption against granting planning permission for development that would harm the character or appearance of a conservation area;

e. even if the harm to heritage assets is found to be less than substantial, in the balancing exercise, considerable weight must be given to the desirability of preserving the setting of listed buildings and preserving the character and appearance of conservation areas;

f. if the harm to the setting of a listed building would be less than substantial that will plainly lessen the strength of the strong presumption against granting planning permission but does not entirely remove it.

30. There was some debate about the relevance of events occurring after the valuation date to the determination of the appeal, but the proper approach was not seriously in dispute. It was common ground that account may be taken of the determination of planning applications on other sites in the locality both before and after the valuation date. The weight to be attached to the outcome of such applications will depend on the comparability of the circumstances. In making the required comparison and in assessing the relevance of a post-valuation date event an important consideration will be the statutory assumption that the scheme underlying the compulsory acquisition was cancelled on the launch date of 23 December 2014. Where the grant of a planning permission may have been influenced by the expectation of a development which must be assumed to have been cancelled, considerable caution will be required when determining how much reliance can safely be placed on it as evidence of the likely progress of an application for a different development on the assumptions required by section 14(5), LCA 1961.

Planning policy

31. The relevant planning policy context was not contentious and we have had regard to all of the matters identified by the parties in their statement of agreed facts. It is necessary for us to refer only to the most material statements of policy.

32. Specific policies on the location and design of tall buildings are included in Policy 7.7 of the London Plan published in March 2016. At the most general level the policy requires that tall buildings should not have "an unacceptably harmful impact on their surroundings". The impact of such buildings on sensitive locations, including conservation areas, listed buildings and their settings, and registered historic parks, should be given particular consideration. Paragraph 7.25 provides the following further commentary:

> "Tall and large buildings are those that are substantially taller than their surroundings, cause significant change to the skyline or are larger than the threshold sizes set for the referral of planning applications to the Mayor. Whilst high density does not need to imply high rise, tall and large buildings can form part of a strategic approach to meeting the regeneration and economic development goals laid out in the London Plan, particularly in order to make optimal use of the capacity of sites with high levels of public transport accessibility. However, they can also have a significant detrimental impact on local character. Therefore, they should be resisted in areas that will be particularly sensitive to their impacts and only be considered if they are the most appropriate way to achieve the optimum density in highly accessible locations, are able to enhance the qualities of their immediate and wider settings, or if they make a significant contribution to local regeneration."

33. Policies on heritage assets are contained in Policy 7.8 of the London Plan. Development affecting heritage assets and their settings should "conserve their significance by being sympathetic to their form, scale, materials and architectural detail". The subject of harm is considered at paragraph 7.31A, which distinguishes both between assets of different quality and between degrees of harm, as follows:

> "Substantial harm to or loss of a designated heritage asset should be exceptional with substantial harm to or loss of those assets designated of the highest significance being wholly exceptional. Where a development proposal will lead to less than substantial harm to the significance of a designated asset, this harm should be weighed against the public benefits of the proposal, including securing its optimal viable use. Enabling development that would otherwise not comply with planning policies, but which would secure the future conservation of a heritage asset should be assessed to see if the benefits of departing from those policies outweigh the disbenefits."

34. The same distinctions between different levels of harm and assets of different degrees of importance is apparent in paragraphs 131 to 134 of the National Planning Policy Framework 2012, which, although not part of the statutory development plan, would have guided a decision maker considering any application for permission for the claimant's scheme at the valuation date. In *Mordue v Secretary of State for Communities and Local Government* [2016]

1 WLR 2682 at [28], Sales LJ said that, generally, "a decision-maker who works through [paragraphs 131 – 134] in accordance with their terms will have complied with the section 66(1) duty".

35. The heritage experts agreed that an assessment of "substantial" harm represents a high threshold, and that the expression "less than substantial" covers a wide range of lesser impacts.

36. As far as the local plan is concerned we were referred in particular to policies CC3 and CC4 of the Hounslow Local Plan, dealing with tall buildings and heritage respectively. The Plan is supportive of a limited number of tall buildings in Brentford town centre in locations which respect the area's townscape and heritage assets, and along a section of the A4 "Golden Mile". Where a development proposal would lead to less than substantial harm to the significance of a designated heritage asset, that harm would require to be outweighed by the public benefits of the proposal, including securing its optimum viable use.

37. Policy ED2 of the Hounslow Local Plan seeks to maintain the borough's employment land supply. The Capital Court site is not within a designated strategic employment location or a locally significant industrial site. Policy ED2(e) nevertheless requires that development proposals which would lead to the loss of certain employment uses, including offices, should satisfy a number of conditions. First, they should demonstrate a lack of demand by means of evidence of active marketing for employment uses for at least a year; secondly, the introduction of a non-employment use should be shown to be necessary to achieve a viable scheme, with new employment uses being preferred over a combination including non-employment uses; and thirdly, it should be shown that surrounding uses or sites will not be undermined by the proposal.

Capital Court and its immediate surroundings

38. The appeal site is at Capital Interchange Way in Brentford, just to the west of the Chiswick roundabout between Kew Bridge and the elevated section of the M4, in an area characterised until recently by low-rise commercial and industrial property. It is within easy walking distance of Kew Bridge railway station and is served by several bus routes passing along Chiswick High Road.

39. Three parcels of land were acquired from the claimant of which the largest extended to a little over 6,000 sq m on which was constructed the office building known as Capital Court (the other parcels totalling about 45 sq m are not included in the CAAD appeal).

40. Capital Court was an "L" shaped building on ground and three upper floors constructed in the 1980s with a gross internal area of 3,298 sq m (35,504 sq ft) and surrounded by car parking and landscaping. It had been demolished by the time of our inspection, but it was described in the CPO Inspector's report as being of dated and nondescript appearance.

41. The three upper floors of the building were occupied by the book seller Waterstones between 1998 and 2013 under a number of different leases. The ground floor was occupied between 2007 and July 2015 by American Medical Systems. Efforts by the claimant's predecessors to market the building for occupation after the departure of these tenants proved unsuccessful.

42. The site itself has an irregular shape with a curved western boundary adjoining a railway cutting and a curved eastern boundary to Capital Interchange Way linking the A4 with Chiswick High Road. It was in the course of development when we inspected it from the adjoining public highway after the hearing.

43. The site is surrounded by other current or prospective development sites. Its northern boundary adjoins 1-4 Capital Interchange Way where industrial units have been demolished and a planning application for residential and commercial development in 3 buildings up to 16 storeys has been pursued (so far unsuccessfully). Immediately to the south, on the corner of Capital Interchange Way and Chiswick High Road, is Kew House, a former office building which remained vacant for a number of years before being converted for use as a private school in 2013. On the opposite side of Capital Interchange Way a large site currently occupied by a Citroen vehicle dealership has also been the subject of a planning application for a mixed-use scheme including 441 dwellings in buildings of up to 18 storeys.

44. To the west of the site a triangle of land bounded by railway lines accommodated various waste transfer activities until it was identified as the new home of Brentford FC. The new stadium being built on that triangle was partially complete at the time of our site inspection.

45. The experts were generally in agreement on the undistinguished character of the site and its immediate surroundings, which have little or no visual appeal. Mr Bashforth quoted a description of the mixed character of the locality from the Mayor of London's Office which referred to its "coarse and incoherent grain [..] framed by large scale road infrastructure". Mr Baker cited the Hounslow Character and Context Study 2014 which described the area as being of "low design quality" with a "low sensitivity to change" and as having "some suitability for tall buildings".

46. Further afield, at a distance of about 400 to 700 metres and dominating the skyline to the southwest, stand the six Brentford Towers, 23-storey residential blocks of the late 1960s. The A4/M4 corridor runs to the north and west carrying the elevated section of the motorway about 150 metres from the site. Some substantial commercial buildings line the motorway, including a 12-storey office building known as Vantage London. To the east, at 650 Chiswick High Road, a new 9-storey mainly residential development known as Wheatstone House is under construction. To the south and east are residential areas. Chiswick High Road leads to the river Thames, passing Kew Bridge station and a modern development of up to 9 storeys known as Kew Bridge West Residential.

The scheme underlying the compulsory purchase

47. Although it must be assumed to have been cancelled in December 2014, the CPO scheme is relevant to this appeal for the light it sheds on the approach taken by the respondent to the development of the reference land on a scale comparable to that envisaged by the claimant's scheme. It demonstrates the weight given to the regeneration of the area and the provision of housing as material considerations in the planning balance, and provides some indication of the anticipated impact of the scheme as a whole on the heritage assets in issue in the appeal.

48. The core of the CPO scheme is the construction of the new stadium on what was referred to as "the central site", with accommodation for 20,000 spectators and hospitality facilities for 1,500. Accommodation will be provided in and around the stadium for Brentford FC's management functions and related activities including its Community Sports Trust and an education centre. 910 new dwellings with associated parking and amenity spaces will be created on land surrounding the central site, including the reference land, arranged in 10 primarily residential blocks of varying heights up to 17 storeys. A hotel, retail and leisure uses and car parking will also be provided. A pedestrian link will run through an underpass to Kew Bridge Station and a new pedestrian and vehicular bridge will be built over the railway line linking the stadium to Capital Interchange Way.

49. Planning permission was granted for the CPO scheme on 12 June 2014. In his December 2013 report to the respondent's planning committee the planning officer reminded councillors that this part of Brentford, which had historically accommodated commercial and industrial activity, had been identified for regeneration in a number of iterations of the Borough's local plan. The relocation of the football stadium from its current location to the application site was already an objective of the Brentford area action plan.

50. The planning officer emphasised the important role the football club played in the community and explained that the existing ground at Griffin Park is inadequate and incapable of being significantly extended, thus limiting the scope for the Club to increase its revenues and jeopardising its future. He advised that a key component of the proposal to retain the club in the Borough was the enabling development required to generate capital receipts, including up to 205 dwellings then anticipated on the reference land which was later increased to 253. Without this contribution (which was to be maximised by the exceptional steps of omitting any requirement for affordable housing) the construction of the new stadium at a cost of over £71 million would not be viable.

51. The development on the Capital Court site was to be of very high density in three blocks of nine, thirteen and fourteen storeys, connected by a podium at ground and first floor level. The podium would include 195 car parking spaces and some commercial units. Because of the height of the buildings the planning officer advised that they would exceed the density ranges in the local plan. There would also be adverse impacts on the townscape including on conservation areas, which again represented a breach of planning policy, although much of the

potential impact was expected to be mitigated by detailed design and the use of appropriate materials. As Mr Roots pointed out, it is not clear from the officer's report that the buildings proposed to be constructed on the Capital Court site were the cause of the impacts which were regarded as harmful. Harmful impacts not able to be mitigated to an acceptable degree were identified as likely to affect Kew Bridge Conservation Area, Wellesley Road Conservation Area, Strand on the Green Conservation Area, Kew Green Conservation Area and Kew Gardens World Heritage Site.

52. The planning officer explained that it was permissible for councillors to take the financial viability of the stadium into account in weighing the social, economic and environmental benefits of its construction against the harm resulting from the construction of the enabling residential buildings. The provision of new housing on previously developed sites was supported by the development plan and Brentford was identified as a housing growth area for the Borough. Although the Borough was able to meet its current minimum housing target of 470 dwellings a year, and its five-year housing supply target of 2,468 dwellings, these were likely to increase soon with the introduction of a new local plan. In any event the targets were not maximums and local authorities were encouraged to exceed them. The draft local plan estimated a 12% increase in population over the next 20 years creating a significant need for additional housing which the Council would seek to meet by making better use of accessible brownfield sites like the application site.

53. The planning officer's overall conclusion was that although the CPO scheme was not in accordance with the development plan, there were material considerations that indicated that planning permission was nevertheless justified in the light of the considerable public benefits that the CPO Scheme would deliver. The planning officer's recommendation was therefore for approval of the application.

54. The respondent's acceptance of the planning officer's recommendation represented a departure from the previous pattern of planning permissions. Permission has been granted since April 2010 for a number of predominantly residential, mixed use schemes on redundant commercial and industrial sites, but none of these has included buildings of more than nine storeys. Examples are Wheatstone House at 650 Chiswick High Road (a building of nine storeys), 963 Great West Road (a self-storage building and a residential building, both of seven to nine storeys), Heritage Walk on Kew Bridge Road (three mixed use blocks of between five and nine storeys with 91 dwellings) and St George adjoining Kew Bridge (a mixed-use development of four and nine storeys including 308 dwellings). Before the valuation date the only example of permission being granted for a scheme exceeding nine storeys was the CPO Scheme itself.

55. Since the approval of the CPO scheme a number of unsuccessful applications have been made for buildings exceeding nine storeys. Permission for a building of up to 32 storeys at Chiswick roundabout, known as Chiswick Curve, was refused in February 2017 and (as we were told after the conclusion of the hearing) was refused again on appeal in July 2019. Immediately adjoining the Capital Court site to the north consent for a building of up to 20 storeys at 1-4 Capital Interchange Way was refused in December 2017. An application for a

building of up to 18 storeys on the Citroen showroom site on Capital Interchange Way was refused by the respondent before being called in and recommended for approval by the Mayor of London, and then called in again by the Secretary of State, whose own decision is awaited.

The competing schemes

56. The claimant's original scheme comprised 309 apartments in two blocks; Block 1, to the north of the site, accommodated 105 apartments over fifteen storeys. Block 2, to the south, was in two parts – the element nearer to block 1 comprising 132 apartments over twelve storeys, with the southernmost element, nearest to the school, having 72 apartments over eight storeys. Each block had undercroft parking, cycle storage, and plant rooms, so the total height of the buildings was sixteen, thirteen and nine storeys respectively. This stepping down in height was to reflect the lower height of the school building to the south.

57. Having reviewed the scheme, Mr Bashforth suggested that negotiations with the planning authority would have resulted in some amendments to the layout and configuration of the buildings. In his amended scheme the number of apartments fell slightly to 303, with Block 1 comprising 103 apartments, and Block 2 200 apartments. The density mix (i.e. the relative proportions of apartments of different sizes) was altered to 3% studios, 40% one bed apartments, 55% two bed apartments, and 6% three bed apartments. These ratios are not in accordance with the respondent's normal requirements but had been accepted by the Greater London Authority in relation to the Citroen site. Mr Bashforth also introduced 521sqm of commercial space on the ground floor, in the form either of offices or A1-A5 retail uses. The heights of the blocks were reduced to fifteen, twelve and eight storeys. There were some other, minor, modifications in style.

58. By comparison, the development outlined by the respondent in the CAAD certificate is modest, comprising only 80 units and an alternative scheme described in its evidence would provide only 98 in three blocks of five, eight and nine storeys, of which 40% would be affordable.

The heritage assets

59. Although the Capital Court site and its neighbours contain no buildings of distinction, there are a number of listed buildings and conservation areas in the wider vicinity which are relevant to this appeal. The parties agree that it is necessary to assess the effect of the claimant's scheme on these "heritage assets", which might be adversely affected if the claimant's scheme were to be developed (which, of course, it will not be). This requirement is imposed by sections 66(1) and 72(1) of the 1990 Act to which we have already referred.

60. There are 116 designated heritage assets within 1 km of the Capital Court site and 20 within 500 m. Of these we received detailed evidence concerning the following buildings, groups of buildings and conservation areas:

a. Kew Bridge Station, a Grade II listed building, built in 1850 in a domestic style to a design by Sir William Tite, the architect of the Royal Exchange in the City.

b. Kew Bridge itself, an elegant Grade II listed structure built in 1903, with three elliptical arches best viewed from the banks of the river.

c. The London Museum of Water and Steam group, comprising seven Grade I or II listed buildings including the landmark Standpipe Tower; all were constructed between 1835 and 1867 to pump and filter water from above Teddington Lock using steam engines which are retained in its modern museum context.

d. The Kew Bridge Conservation Area, principally comprising the waterworks, railway station, bridge, and the busy road junction around which they are arranged.

e. The Wellesley Road Conservation Area, lying to the south east of the Capital Court site on the opposite side of Chiswick High Road and comprising an area of late 19th century two storey semi-detached and terraced housing arranged in a street pattern derived from former rural roads, lanes and paths.

f. The Gunnersbury Park Conservation Area, a Grade II* registered park, and the 19 Grade II* or II listed buildings within it, all lying to the north of the M4 (shortly before the hearing it was agreed that the claimant's scheme would cause negligible harm to these assets, and they did not feature in the oral evidence or cross examination).

g. The Strand on the Green Conservation Area and the 23 Grade II* or II listed buildings within it, all lying to the east of Kew Bridge and running along the river bank.

h. The Kew Green Conservation Area and the 36 Grade II* or II listed buildings within it.

i. The Royal Botanic Gardens group on the southern side of the river, comprising the Royal Botanic Gardens Conservation Area; the Royal Botanic Gardens Kew World Heritage Site; the Royal Botanic Garden Kew listed parks and gardens; one scheduled monument and ten Grade I, II* or II listed buildings including the Grade I listed Orangery.

61. Following completion of the evidence we undertook an unaccompanied inspection of each of these locations, with the exceptions of Gunnersbury Park and Kew Gardens (a consensus having emerged in the course of cross examination that, although these are designated heritage assets of the highest significance, little or no harm would be caused to them).

62. We were also provided with helpful photographic representations of the anticipated relationship between the claimant's scheme and the settings of the relevant heritage assets. There was some debate about the most appropriate technique for representing proposed development and some criticism from each side that the approach taken by the other was inadequate or partial. It is not necessary for us to refer to those points in any detail other than to assure the parties that we made use of all of the material provided. In viewing this material,

and in the course of our inspection, we also bore in mind that some views change depending on the season – with trees in leaf during the summer and without foliage during the winter.

The degree of harm likely to be caused to heritage assets by the claimant's scheme

63. On our inspection we were assisted in locating the Capital Court site both by the photographic representations and by the lift cores of one of the three tall buildings which had been completed to a sufficient height to be visible from a distance, providing a useful point of reference.

Strand on the Green Conservation Area

64. There was agreement between Mr Bridgland and Mr Doran that the claimant's scheme would cause less than substantial harm to the significance of the Strand on the Green Conservation Area and the listed buildings within its river frontage by reason of the appearance of the proposed tall buildings on the skyline when viewed from the southern bank of the river, east of Kew Bridge. There was also agreement that this harm would be reduced to a negligible level if the height of the buildings constructed at Capital Court was reduced from a maximum of sixteen to only nine storeys.

65. In his closing submissions Mr Mould suggested that Mr Bridgland had accepted in cross examination that the claimant's scheme would cause a significant level of less than substantial harm. We do not consider that that was the effect of the relevant exchanges. Mr Bridgland agreed that by describing harm as "less than substantial" there was a risk of underestimating the importance of affording protection to heritage assets; he volunteered that "less than substantial" was not to be equated with insubstantial, and that it always represented harm which was significant. He did not accept the proposition put to him by Mr Mould that the harm in question in this instance was "at the high end of less than substantial".

66. The Strand on the Green conservation area, designated in 1968, extends in a ribbon along the north bank of the River Thames between Kew Bridge and Chiswick Bridge. Although it runs north from the river towards the railway line only that portion comprising the tranquil river frontage itself between the Bridge and Oliver's Island is potentially affected by the claimant's scheme. This comprises an attractive selection of buildings (many of them listed) including fishermen's cottages, boat builders' sheds, public houses and maltings, as well as larger and more elegant private houses including the home of the eighteenth-century society painter and co-founder of the Royal Academy, Johan Zoffany.

67. The experts agreed that, so far as relevant, the significance of the Conservation Area and the listed buildings as a group is in their coherence as a historic river settlement retaining characteristics from its fishing industry past as well as its later gentrification. The river frontage is highly picturesque, especially when viewed from the river or the opposite bank and features a large number of listed buildings of high architectural quality, especially towards the eastern end. It possesses characteristics which make it rare or unique among Thames waterfront areas,

in particular that it is developed on an unembanked stretch of the river. The western end of the Conservation Area features some much larger and less distinguished buildings including Rivers House, a bulky modern apartment building of nine storeys with gleaming white facades, and the reconstructed former Star and Garter Hotel.

68. The Conservation Area Character Appraisal which we were shown identifies a number of pressures on the area, including its vulnerability to inappropriate changes to the skyline when viewed from the Surrey side of the river looking towards Brentford.

69. The claimant's scheme would not be visible from within the conservation area itself but it would be seen from the Surrey bank. We think it unlikely that it would be visible to a significant extent from the river, although an eagle-eyed rower might spot it. Because of the presence of trees on the river bank, views along the Thames path are transitory and change with the seasons. On our inspection the trees were in leaf, but the visual representations in evidence were based on photographs taken in winter and show the maximum visibility of the claimant's proposals.

70. As the experts were not in complete agreement on the degree of less than substantial harm it was necessary for us to form our own view, aided additionally by the observations of Historic England and planning officers in their reports on various other applications. Two general points influence our appraisal of the impact the claimant's scheme would have on these views.

71. First, the cluster of new buildings would appear as a group at the western end of the vista, between Rivers House and Vantage West, both of which already appear on the skyline. The three new towers would be of comparable prominence to these existing tall buildings, but would close the gap which currently lies between them. The cluster of buildings on the skyline would increase significantly in mass but would not be broadened. In that respect the claimant's scheme is unlike the proposed development of the Citroen site at Capital Interchange Way where planning permission was refused for buildings of up to 18 storeys following objections from Historic England; the respondent's planning officers reported that that proposal would extend the taller skyline eastwards towards the stretch of listed buildings and be visible behind one Grade II listed example.

72. Secondly, the zone in which the skyline is significantly breached by modern development is concentrated at the western end of the conservation area, away from the collection of listed buildings which lie mostly at the centre and towards the eastern end. The view of the western end from the Surrey side is already undistinguished; in summer a group of trees on the riverside path create a visual buffer separating that end of the view from the much more picturesque frontage to the east. Even when out of leaf these trees create a break in the panorama which helps mitigate the discordant and incongruous impact of the existing and contemplated modern development. The visual impact of these buildings on this area to the east is limited.

73. In our judgment, while the impact of the claimant's proposals would be detrimental to an appreciation of the conservation area from a distance, the harm would be quite modest. We have no difficulty in agreeing with the experts that this would represent "less than substantial harm" to the significance of the conservation area, but that designation covers quite a broad spectrum. Mr Doran further calibrated the impact of the claimant's scheme as being at a "high level of less than substantial harm" but we share Mr Bridgland's view that this was an overstatement. We note also that no similar calibration was suggested in the heritage sections contributed by Mr Doran to the planning officers' report to the planning committee in respect of the harm to be caused by the taller buildings consented as part of the stadium enabling works.

74. The visual impact of the proposed buildings would be capable of being ameliorated to some extent by careful design, as suggested by the planning officer in his report on the stadium scheme. Nevertheless, the adverse impact means the claimant's scheme would breach relevant policies of the development plan and would be impermissible unless it was judged that the resultant harm would be outweighed by the public benefits of the proposal.

75. A similar view was taken by the respondent's planning officers when considering the impact of the new stadium and its enabling development, including the three tall buildings on the Capital Court site. These were expected to cause less than substantial harm to the setting of the conservation area and were therefore required to be justified by counterbalancing public benefits.

76. There was less agreement concerning the other heritage assets in issue.

The Orangery and the Kew Gardens World Heritage Site

77. Mr Doran's written evidence anticipated harm "at the lower end of less than substantial" to the setting of the Orangery in Kew Gardens, and suggested that any intrusion about the tree line from within the World Heritage Site amounted to harm and was therefore of concern. The suggested intrusion was very difficult to discern on the visual representation tendered to illustrate it, and at worst, in winter, a very small sliver of the top of the development would be visible above the listed building from a particular angle and at a considerable distance. Anyone viewing the Orangery from that location would have an uninterrupted view of four of the Brentford Towers clearly within their field of vision. No mention had been made by Mr Doran of harm to the Orangery itself in his report on the more prominent stadium scheme (although he did refer to harm to Kew Gardens generally). Nor did either English Heritage or the Royal Botanic Gardens make any such specific reference in their representations (although they did consider harm to other specific buildings). On the basis of all of this material and our own observations we agree with Mr Bridgland's assessment that the almost imperceptible change to the setting of the Orangery would have a negligible effect, and does not require to be weighed in the planning balance.

The Wellesley Road Conservation Area

78. The Wellesley Road Conservation Area is on the opposite, south-eastern side of Chiswick High Road from the Capital Court site. It is an area with a strong character comprising good quality compact Victorian housing arranged in a street pattern largely following historic rural lanes. It is spanned by the elevated M4, with only the western part having the potential to be influenced by development on the other side of the High Road, a firm boundary which marks a change to very different land uses.

79. The only views from the conservation area which could be affected by the claimant's scheme are those along Wellesley Road looking west towards Kew House school. Mr Doran considered that harm "at the lower end of substantial" would be caused to the character of the conservation area by the claimant's development, but the visual representation provided to illustrate his concern was a view from outside the conservation area taken on Chiswick High Road, looking across at the site with the viewer's back to Wellesley Road. As Mr Bridgland explained, historically, everything beyond the High Road has always been of a distinctly different character (originally rural, later commercial) and we do not consider that changes in the outlook from this view point are relevant to the character of the conservation area. Mr Doran's reliance on it as demonstrating a "major adverse impact" undermined our confidence in his assessment. Although he acknowledged in his oral evidence that the level of harm he perceived was at a very low level we were struck once again by the contrast between the views he expressed in the officers' report recommending approval of the much more prominent stadium scheme (which would have "a minor negative effect") and his more pessimistic assessment regarding the impact of the claimant's scheme.

80. From within the conservation area the only possible views of the claimant's scheme would be over the top of roof tops on the northern side of Wellesley Road. Because the road is relatively narrow and the houses are very close to the pavement any such views would be available from only a very small stretch of the footway. From our own observations and from the visual representations prepared for the stadium development, which is more extensive than the claimant's scheme, we conclude that a pedestrian walking west along the south side of the road might briefly become aware of the tallest of the claimant's proposed buildings. Awareness and visibility are not the same as harm, and we do not think that any fleeting view which might be available would detract to any significant extent from an appreciation of the conservation area. Such an appreciation must already cope with the presence of Kew House school marking the end of Wellesley Road, an ever-present reminder of the modern commercial development hemming in the residential area on its western boundary.

81. Mr Bridgland considered that the claimant's scheme would have a negligible impact on the Wellesley Road conservation area. We agree.

The Kew Green Conservation Area

82. The Kew Green Conservation Area on the south side of the river is divided by the main road leading to Kew Bridge. It has a traditional village character with substantial houses and other attractive period buildings surrounding the Green. It is agreed that the impact of the

claimant's scheme on the character of the eastern side of the Green would be minimal. Mr Doran accepted in his oral evidence that the new buildings would not be visible to any significant extent from the west side of the Green except for glimpses in winter from certain angles at the southern end where it would join other modern buildings in breaching the skyline above the (unlisted) Cricketers Pub in a gap between taller houses. In his report he had described this as "creating a larger obtrusive mass" and causing a "moderate level" of less than substantial harm, but he tempered that assessment in cross examination, where he also acknowledged that such visual impact as there was could be moderated by appropriate design. Once again, the view Mr Doran expressed in writing was discernibly more negative than his original assessment of the impact of the more prominent stadium development. We consider Mr Bridgland's opinion that the impact of the claimant's scheme on this important view across the conservation area would be negligible is the more reliable assessment.

The Kew Bridge Conservation Area and the listed buildings within it

83. The Kew Bridge Conservation Area comprises a small but distinct collection of landmark listed buildings clustered at the north end of the Bridge, including the railway station and the London Museum of Water and Steam. The significance of the conservation area was summarised by Mr Bridgland in terms which Mr Doran accepted, and resides in the relationship between historic transport routes by road, river and railway, the quality of its historic industrial architecture, and the planted edge of the river.

84. Mr Bridgland considered that no harm would be caused to the conservation area by the claimant's scheme. Mr Doran disagreed, and felt that the cumulative effect of the proposal on the Station and Museum buildings would cause a "higher mid-range level of less than substantial harm" to the conservation area. We will therefore address the impact on the listed buildings first before returning to the conservation area.

85. The difference between Mr Bridgland and Mr Doran concerning the effect of the claimant's scheme on the setting and significance of Kew Bridge Station was marked although they agreed that it was less than substantial. Mr Doran assessed the level of harm as at the "high middle scale" whereas Mr Bridgland said there would be no harm.

86. The two-storey station building dates from the era of railway expansion in the 1850s, when the surrounding area was largely open countryside, but it now stands in an extremely busy urban setting at the junction of Kew Bridge Road and Kew Road. It is an elegant, domestic style building, intended to be harmonious with its original rural setting and is listed Grade II for its special architectural and historic interest. Although access to the platforms is available through the building it is no longer in operational railway use; for a long period it was vacant, and was categorised as "at risk", but at the time of our inspection it was being utilised as a café.

87. The Capital Court site is more than 100 metres north of the station, on the other side of two railway lines. Any impact which the claimant's scheme would have on the building would

therefore be indirect, affecting its setting. That heavily trafficked setting is transformed from its original character. Mr Bridgland acknowledged that the presence of the claimant's scheme would reduce the prominence of the station, but in his opinion its significance did not depend on any notion of its prominence, but on its relationship with the railway platforms and on an appreciation of its design from relatively close quarters, despite the presence of a bus shelter immediately in front of the entrance. He acknowledged that the presence of the claimant's scheme would reduce the prominence of the station but suggested that, at that distance in a busy urban context, the setting of the listed building would not be impaired.

88. Mr Doran considered that the proposed buildings would dwarf and subsume the smaller station into a larger mass when viewed from Kew Bridge. A landmark group of buildings comprising the station, a prominent public house and some retail buildings in between currently terminate the view available to travellers crossing the Bridge going north and contribute to the significance of the Kew Bridge Conservation Area. That visual terminus would be compromised by a backdrop of buildings on a much greater scale which would dominate the view.

89. In his advice to councillors on the stadium scheme Mr Doran had not dwelt specifically on harm to the setting of the station but had described the harm which would be caused to the conservation area as a whole as "minor to moderate". This appeared to suggest a lesser degree of harm than the "high middle scale" harm Mr Doran now apprehended, despite the stadium and its associated buildings being more prominent. Mr Doran agreed in cross examination that the stadium buildings would extend behind the whole of the terminal group, whereas the claimant's scheme would appear only behind the station. When invited to explain his more negative assessment of the lesser scheme he suggested that the design of the stadium buildings would make a difference. He did not appear to allow for the possibility that a similar attention to design might also ameliorate the harm caused by the claimant's scheme.

90. Having visited the station and viewed it from different locations our overall impression was of its lack of separation or distinctiveness from the buildings adjoining it when seen from any distance. The sole exception is when the station is viewed from the west side of the bridge relatively close to its north end, when it becomes apparent that there is no other building adjoining it on the railway side. It is only at that point that attention is drawn away from the taller buildings around it. Whether a change caused by the appearance of a new building in and above this gap would amount to harm, or simply to a further evolution of the setting of the building having no real impact on its appreciation, is a very marginal decision. Given the inconsistency in the assessments made by Mr Doran we place greater reliance on Mr Bridgland's judgment and we accept his conclusion that, because of its distance from the station, the claimant's scheme would not appear overbearing and would not cause harm.

91. The more substantial listed buildings in the Kew Bridge Conservation Area comprise the London Museum of Water and Steam complex, originally a Victorian water treatment and pumping plant, which dates from the 1830s and features a series of pumping houses powered by substantial steam engines. Three buildings in the complex are Grade I listed, while others are Grade II, reflecting their status as an outstanding industrial heritage site. Its most

prominent feature is the 1867 standpipe tower, a brick built structure housing a cluster of vertical pipes designed to absorb the surge of water from each stroke of the steam pumps to prevent damage to the mains. The 60-metre tower is a refined but robust classical structure, reminiscent of the campanile of an Italian cathedral, whose location adjacent to the public highway pinpoints the complex and acts as a significant landmark in the Kew Bridge area. The former open setting, amongst market gardens, reservoirs and filter beds has now been entirely lost, and the standpipe tower has been supplanted on the skyline by the six residential towers of Brentford's Green Dragon Estate.

92. There was no real dispute that, seen from the roadside, the claimant's scheme would have a negligible impact on the setting of the Museum or the ability of a viewer to appreciate its significance. On the basis of our own inspection we concur in that assessment, especially in summer when any sight of the proposed building would be completed obscured by trees. An uninterrupted view of the claimant's scheme would be possible from a position away from the road, on a raised grassed area adjoining Heritage Walk, a footpath running beside a modern block of flats behind the Museum buildings. That location was historically occupied by filter beds but it now provides a good vantage point from which to appreciate the separation between the standpipe tower and the largest of the museum buildings, the Grade I listed Great Engine House. Views of the Engine House from that location also take in a modern residential building immediately adjoining the Museum complex.

93. Mr Doran attached importance to maintaining the visual gap between these buildings, and the prospect that it would be lost together with the effect on the setting of the engine house led him to assess the impact of the claimant's scheme as causing a "medium level" of less than substantial. We agree that the view from this location would be compromised to some very modest extent, but it is not a view which is readily accessible and it would only be encountered by someone who sought it out. In our judgment it makes only a very small contribution to the setting and significance of the complex as a whole or of the individual listed structures within it.

94. Once again, although the Steam Museum buildings were identified as listed buildings in the officer's report on the stadium scheme the impact on them of that proposal was assessed only in conjunction with the Kew Bridge Conservation Area. Despite the objections of English Heritage at that stage the impact of the proposal on the conservation area as a whole, including the Steam Museum, was considered by Mr Doran to be a minor to moderate degree of less than substantial harm. Various suggestions were made as to how appropriate design and the selection of materials would minimise the impact of the stadium on the conservation area. The now partially completed stadium is very much closer to the Steam Museum than the Capital Court site and one of the photographic representations prepared to show the impact of the claimant's scheme on the view from the former filter beds clearly shows how much more prominent the permitted stadium development will be, compared to the notional CAAD scheme. Having regard to the distance of the new buildings from the Museum complex and the potential for a sensitive use of materials such as have been used on the modern apartment building already adjoining the site, on balance we classify the harm which would be caused to the setting or significance of the Steam Museum as negligible.

95. As for Kew Bridge itself, Mr Doran's concern was not for the impact of the proposal on views of the Bridge, which can only really be appreciated from the River or the riverbank, but rather its impact on what a traveller would see in the distance as they crossed the River using the Bridge. In that respect his concern was for the conservation area and setting of the listed buildings within it. In his written evidence he assessed the adverse effect of the claimant's scheme as at the "higher end of medium less than substantial harm" and as "very near the threshold of substantial harm". He did not seek to maintain this assessment in cross examination, and volunteered that he had changed his mind about how this impact should be classified and that a well-designed development might reduce it to "moderate".

96. Regrettably, by this stage of Mr Doran's evidence we felt unable to place any confidence in his judgment. His original written evidence was so far from the view he had expressed when advising on the impact of the stadium scheme that we were driven to the conclusion that his capacity to arrive at an objective assessment was compromised by the outcome favoured by his employer, the respondent. Mr Doran's views have noticeably changed in a way which would support a lower award of compensation to the claimant. Mr Doran was clearly uncomfortable about the contrasting views he had expressed when they were pointed out and he made very little attempt to explain them. We were in no doubt that he is an experienced and knowledgeable expert on heritage issues, and that in his evidence to us he was honestly expressing views which he now holds, but we were so uncertain of his objectivity and of his ability to remain uninfluenced by the interests of his employer that we felt unable to rely on his opinions.

97. Mr Doran's concern about the impact on the view coming over the Bridge did not depend on any possible adverse effect on the setting of the Steam Museum. Its focus was entirely on the group of buildings at the end of the Bridge, which terminate the vista. We have already explained that we do not consider harm will be caused to the setting of the station building, but we appreciate that Mr Doran's concern is a wider one, since it also addresses the Conservation Area and the Bridge. We do not accept that the harm apprehended by Mr Doran would be caused by the claimant's proposals and prefer the evidence of Mr Bridgland that there would have been negligible impact on the setting or significance of the Bridge or the Conservation Area.

Conclusion

98. In summary, therefore, we conclude that less than substantial harm would be caused to the significance of the Strand on the Green Conservation Area by the claimant's scheme. We consider that harm to be at the lower end of the "less than substantial" range. We do not consider that harm of any significance would be caused to the setting of any other heritage asset.

99. We remind ourselves at this stage that a finding of harm to the setting of a listed building or a conservation area is a conclusion of great importance. The presumption against

development which would have that effect is a strong one, and considerable weight must be given to the desirability of avoiding it.

Other adverse effects of the claimant's scheme on townscape

100. It will be remembered that the respondent's reasons for rejecting the claimant's scheme as inappropriate were not solely focussed on heritage issues but relied on the view that it represented "overly tall and dense development that would be harmful to the townscape". The same reasons were relied on by the respondent in the appeal and we understood the impact of the suggested development on townscape, by reason of its height and bulk, to be a distinct ground of objection.

101. There is no doubt that the claimant's scheme, were it to be implemented, would represent a significant change to the built form of the Capital Court site, introducing three medium-tall buildings in a locality which borders a large residential area and which currently features only relatively low-rise development of two to four storeys with taller buildings a relatively rarity. Height or visibility by themselves are not necessarily objectionable, and may be positive features where they optimise the reuse of previously developed land, but where significant harm would be caused to residential areas the London Plan indicates that refusal of permission should result. Nevertheless, the Capital Court site is referred to in the 2014 Hounslow Character and Context Study as having "some suitability for tall buildings", an assessment which reflects its good transport links, and Mr Baker acknowledged in his evidence that the respondent's approach was to support high quality tall buildings in identified locations which accord with principles of sustainable development. In the locality of this site, however, the pattern of permitted development up to the valuation date had been limited to buildings of up to nine storeys with permission for taller buildings having consistently been refused.

102. There is force in Mr Roots submission that the evidence concerning harm caused by the size and bulk of the proposed buildings had focussed substantially on the adverse impacts on heritage assets without separate treatment of other townscape issues. Nevertheless, it is necessary to give some weight to the impact of the proposals on the townscape more generally.

Do the suggested benefits of the claimant's scheme justify the resulting harm to heritage assets and townscape?

103. The stadium scheme, which was considered as a package including the ten surrounding buildings, was of course a much larger development than the claimant's proposal. Its impact on heritage assets is likely to be much more extensive, and more harmful, than the development of the Capital court site alone. Nevertheless, having concluded as we have that harm would be caused to the setting of the Strand on the Green conservation area by the claimant's scheme, planning permission could not lawfully have been granted for it without the decision maker being satisfied that there was a clear and convincing justification for that harm, sufficient to overcome the strong presumption against it. As is apparent from paragraph 134 of the 2012 National Planning Policy Framework, where a development proposal will lead to less than

substantial harm to the significance of a designated heritage asset, the public benefit which may be weighed against the harm includes securing the optimum viable use of the proposal site.

104. The benefits on which the claimant relies as outweighing the harm caused to the setting of the conservation area, and as justifying permission for its scheme, were identified by Mr Bashforth. He principally relied on the delivery of much needed housing in high quality replacement buildings, with 40% of the new units being affordable housing as policy required. He also referred to the regeneration of the site acting as a catalyst for the regeneration of the surrounding area; the provision of modern commercial floorspace replacing the existing redundant office building; improvements to the public realm; the creation of employment opportunities during the construction and operational phases of the development; and contributions to future investment in infrastructure through planning obligations and CIL payments. A lesser consideration which he nevertheless thought would have some modest weight in discussions between a developer and the local planning authority was the availability of permitted development rights allowing conversion of the existing office building to residential use.

105. Mr Bashforth explained that, assuming the stadium scheme had been cancelled, an alternative use would have been required for the underutilised Capital Court site. Both existing and emerging planning policy emphasised regeneration. By September 2016 the Brentford "Golden Mile" had been identified by the respondent and the Greater London Authority as a particular target although its designation in the London plan as a specific opportunity area had not yet been confirmed. Mr Baker explained that at the valuation date the process of designation of opportunity areas was at an early stage, but it would still have been a factor to which weight would have been given. There was no dispute that in September 2016 permission would have been available for a residential led scheme, but Mr Bashforth considered that a reasonable planning authority would have sought to maximise the provision of housing on the site; in his judgment, by allowing only 98 units of accommodation the respondent's CAAD certificate failed to optimise the potential of the site. Whether that assessment was correct was the main point of difference between the parties.

106. It was common ground that, with the exception of the additional housing provision in the claimant's scheme, the benefits it would provide were not significantly different from those available through the respondent's smaller scheme. Nor was it in dispute that in 2016 the respondent was well able to demonstrate the five-year supply of sites deliverable for housing contemplated by national policy, without taking into account the contribution which would be made by the Capital Court site. Mr Bashforth acknowledged that these were both relevant considerations, although he pointed out that the five-year supply was a minimum requirement, not a target, and local authorities were encouraged to exceed it.

107. Although he accepted that the respondent's proposals would be viable (including with the provision of 40% affordable housing) and that they were within the housing density range provided for by the local plan, Mr Bashforth considered that planning permission would have been refused for the respondent's scheme because it represented an underutilisation of the site. He did not regard the indicative density ranges as a limit and said that they were commonly

exceeded, with the encouragement of the GLA. The local plan recognised that there was a need to intensify housing density at appropriate locations and identified Brentford as one of only two main housing growth areas in the borough. In that context Mr Bashforth did not consider that existing building heights would be a constraint on what was likely to be achievable.

108. Mr Baker's evidence on behalf of the respondent was that planning permission would be refused for the claimant's proposed development because its buildings would be seen as discordant and unduly dominant additions to the townscape. They would be up to a third taller than the tallest buildings approved in the locality between 2010 and the valuation date. In addition to their impact on the setting of heritage assets they would harm more general townscape views, and would overbear the high quality predominantly low rise residential areas to the south and south east. The site would be significantly over developed at a density greatly in excess of the appropriate density ranges laid down by the London Plan. These suggest a minimum target range of 70 to 170 units per hectare for sites with comparable levels of connectivity to Capital Court, whereas the claimant's scheme would achieve a density of about 508 units per hectare (the comparable figure for the stadium scheme was 494 units, allowing for the reduction in site area owing to the proposed footbridge to the stadium). Mr Baker acknowledged that these were minimum targets which local planning authorities were encouraged to exceed where that could safely be done without compromising quality.

109. Mr Baker was an impressive witness. He gave his evidence carefully, without exaggeration, making sensible concessions to the questioning of Mr Roots when appropriate and explaining his own position clearly to the Tribunal. Although we were particularly conscious that, as an employee of the respondent for 14 years, Mr Baker is not an independent witness, we nevertheless felt able to place some confidence in his objectivity. He impressed us, in particular, by the extent of his relevant experience. He had been involved in planning assessments in relation to the stadium site and its enabling sites, including Capital Court, as well as other development proposals in the Borough with the potential adversely to affect the areas with which we are concerned, including the Citroen site, Chiswick Curve and Capital Interchange Way. He told us that as a result of his involvement in these projects he has had to consider visual representations prepared by the promoters of a large number of different schemes, in different iterations, some larger, some smaller, and to discuss their impact with colleagues, developers and other interested groups including, in particular, Historic England. From this experience we were satisfied that he was able to express an authoritative view concerning the probable outcome of an application comparable to the claimant's CAAD scheme. His broad conclusion was that a threshold existed at about the level of 8 or 9 storeys above which a building was liable to contravene planning policy by causing unacceptable harm to its surroundings, and in particular to the setting of the Strand on the Green as observed from the Surrey bank of the river.

110. Despite the respect we accord to Mr Baker's view we agree with Mr Roots' submission that, in the light of the policy emerging by September 2016 and assuming the cancellation of the stadium scheme, the expectation that the historic pattern of development in the locality would have continued is not sound. The Golden Mile was identified in the London plan

published in March 2016 as a prospective opportunity area. Mr Baker emphasised that at the September 2016 valuation date that designation was still in the early stages, but the respondent's Golden Mile masterplan had been published in April 2014. The planning permissions relied on by Mr Baker as establishing a limit of 9 storeys were approved between April 2010 and June 2015, and only the applications for Wheatstone House and Heritage Walk (the former on appeal) were approved after the publication of the masterplan. That document took the stadium scheme with its tall buildings into account, but it was not suggested that the cancellation assumption required that it, or the relevant parts of the London plan, be ignored.

111. We accept Mr Bashforth's evidence that by September 2016 a regeneration proposal would not have been rejected simply on the grounds that, at between nine and sixteen storeys, the development was significantly taller than had previously been permitted. We are satisfied that, making the cancellation assumption, the optimisation of the Capital Court site for the provision of high quality housing would have been regarded as a significant benefit in its own right. Moreover, having regard to the relatively modest degree of harm we consider would be caused by the claimant's scheme to the setting of the conservation area, we are persuaded that that benefit would have provided a sufficiently compelling justification for the grant of planning permission for buildings of up to the proposed height and mass, despite the resulting harm. Other considerations, to which we will now come, might cause the imposition of a different limit, but we do not consider that the claimant's proposals would have been defeated by consideration of their adverse impact on heritage and townscape.

Design considerations

112. The importance of good design and high quality architecture in mitigating adverse impacts on townscape is apparent from the officer's report on the stadium scheme. That application was for outline planning permission only, so far as it related to the residential buildings, but the absence of detailed design solutions was not an impediment to the success of the application. In the same way, for the purpose of a CAAD application, a detailed design is not a prerequisite. Mr Chapman, the respondent's architecture expert who drew up its alternative scheme, described a CAAD scheme as an application in "a skeleton form", with details comparable to the information the respondent would expect to see at the pre-application stage. We agree.

113. Mr Chapman raised a number of design issues concerning the claimant's scheme. He agreed with Mr Roots that it could be assumed that it was likely these were capable of being overcome in a development of up to 253 units, as that was the scale of development permitted as part of the stadium scheme. He did not believe that the claimant's scheme for 303 units on the site could be made compliant with minimum residential design standards including those relating to amenity space, circulation cores, car parking provision, sunlight and outlook.

114. Mr Chapman's view was that standards had been squeezed for the stadium scheme because of the scale of the mitigation represented by the retention of the football club; this was particularly the case in relation to the permitted mix of units, where the total number had been

increased from 205 originally proposed to 253 by allowing a greater number of smaller apartments than policy would ordinarily have required. In the stadium scheme one and two bedroom units represent 93% of the permitted total, whereas policy would ordinarily require that 30% should have three bedrooms or more. The inclusion of so many small dwellings had consequences for compliance with design standards.

115. Mr Baker confirmed that the density of units permitted in the stadium scheme, which he characterised as "city living", was driven by the need to maximise the capital receipts required to fund the construction of the stadium itself. It was not typical of Hounslow and in the absence of the very special context of the stadium scheme it would have been resisted.

116. Mr Bashforth's response to the design issues raised by Mr Baker and Mr Chapman made three broad points. First, that the degree of detail required of a CAAD application was at a fairly high level and need not resolve the sort of detailed design issues which had been identified. Secondly, that the design standards were a guide which was applied with a degree of flexibility so that compliance with each and every standard was not considered essential. Thirdly he placed reliance on the grant of outline planning permission for the three blocks to be erected on the Capital Court site in connection with the stadium scheme which infringed many of the design standards to which Mr Chapman had referred.

117. We agree that a CAAD does not require the same degree of detail as an application for a full planning permission, but it is for the claimant to establish that the scheme which it proposes would be likely to receive permission. If the proposed scheme contravenes normal design standards it is for the claimant to demonstrate that it would nevertheless be likely to obtain permission. It may readily be assumed that certain design issues would be capable of satisfactory resolution including, for example, issues concerning materials and aesthetic features. But where design standards impose real constraints on the scale of development which is likely to be permissible, the Tribunal has to be satisfied on the balance of probability that the claimant's proposal would not be rejected because it fell short of those standards.

118. We also appreciate that design standards must be seen in the context of other strategic planning objectives and that they are applied by local planning authorities with some flexibility, as is apparent from the planning permission granted for the stadium enabling development. No doubt such flexibility as is available will depend in part on an assessment of the proposal as a whole, including public benefits it is likely to produce and which may be sufficient to justify a departure from some aspects of policy. But an authority's ability to depart from standards reflected in the statutory development plan (the Hounslow local plan and the London plan in this case) is not unrestricted – the determination of a planning application is required to be made in accordance with the statutory development plan unless material considerations indicate otherwise. A core principle of planning policy is to seek to secure high quality design and a good standard of amenity for residents of new homes.

119. We do not consider that the infringements of design standards inherent in the claimant's scheme can be justified simply by reliance on the grant of consent for the three blocks on the

Capital Court site approved in connection with the stadium scheme. As the planning officer's report on the stadium scheme repeatedly emphasised, that was not a typical development. Its primary objective was to provide a new home for the football club in order to secure its future in the Borough. It would also enable the expansion of the work of the club's community sports trust which was recognised as having "great community value". The project would attract new economic development and make a major contribution to the regeneration of Brentford, creating many news jobs and increasing economic activity. The density of the scheme and building heights unprecedented in the locality were driven by the issue of viability, with an independent assessment having demonstrated that the amount of housing proposed was the minimum necessary to fund the stadium. It is clear that the decision to grant permission involved a balancing of the anticipated benefits on the one hand and the adverse consequences of the development on the other. As the officers, whose recommendation was accepted, advised, "the need for the housing and its role in funding the costs of the stadium is a consideration when deliberating on the quality of the design of the development …".

120. The claimant's scheme does not facilitate the retention of the football club in the Borough with the associated commercial and cultural benefits which flow from it. It must be assessed on its own merits, and it cannot be assumed that concessions or compromises which were made for the stadium scheme (for example in relation to unit mix, single aspect units and parking) would be available to the claimant or another developer of the Capital Court site.

121. In this case the Tribunal can be confident that the respondent's much smaller scheme would not be resisted on design grounds. It is also apparent that, with sufficient counterbalancing benefits, schemes involving 205 or 253 units are capable of achieving planning permission despite contraventions of design standards (those being the number of units in the original stadium outline permission and the revised scheme for which reserved matters approval has since been obtained). There is no comparable evidence demonstrating that a scheme involving 303 units would be acceptable to a reasonable planning authority without significant additional public benefits being provided. Moreover, the exceptional circumstances associated with the grant of permission for the stadium scheme weakens the reliance which can be placed on that development as a model of what might otherwise be permissible.

122. We are not satisfied on the evidence that permission would be granted for a development of 250 or more residential units. The 303 units proposed by the claimants would represent almost three times the upper end of the usual range and nothing persuaded us that, even in the interests of optimising the provision of housing, such a density would be likely to be permitted. We note, for example, that the respondent's reasons for refusing the application for development of the Citroen site, which adjoins Capital Court, included that it represented 500 units per hectare (as, approximately, does the claimant's scheme). The Citroen application was subsequently called in and approved by the GLA, but only at the expense of an increase from 40% to 50% in the proportion of affordable housing.

123. The Citroen example illustrates that density criteria are not applied mechanistically, and that in this location they are capable of being substantially exceeded. The GLA described that

site as suitable for high density development, having regard to its accessibility to public transport and location in the emerging opportunity area where residential densities are expected to be maximised. Nevertheless, in this case there is no exceptional counterbalancing factor as there eventually was on the Citroen site to justify the very high density permitted there, and the outcome of the Citroen application supports our view that the claimant's scheme is excessive.

124. We feel able to be more confident that the site could accommodate the 205 units initially permitted for the Capital Court site as part of the stadium scheme. This allocation was subsequently increased to 253 units but only on the basis that the increase was essential to the viability of the project. We appreciate that 205 units would represent a very dense scheme and, at approximately 337 units per hectare, would be almost double the upper end of the indicative range. Nevertheless, we are satisfied that this would have been acceptable in this location, given the emerging policy context and the evidence that even higher densities were not unachievable by the right scheme.

125. Reducing the density of the claimant's scheme would allow more opportunity for compliance with housing mix requirements, privacy considerations, the provision of additional recreation space, and some increase in ground floor employment space. As designed, the claimant's scheme provides more one and two bed units than the local plan suggests, and fewer larger units. Full alignment with the housing mix policy, both in terms of unit sizes and the quantum of affordable housing, would have improved the prospects of achieving consent. Adhering to policy in a development of 205 units would provide 61 one bed units (30%), 82 two bed units (40%), and 62 three bed or larger units (30%), all of good quality.

126. We are conscious of Mr Mould's warning that the claimant has advanced no evidence in support of any alternative to its own scheme, and that we should be wary of redesigning it. Nevertheless, we are satisfied that the evidence we were presented with, including evidence of the approval of the stadium scheme in its various iterations, provides a solid foundation for our conclusion that a scheme of 205 units would have achieved consent and would not have been defeated on design grounds. A somewhat larger scheme (though less ambitious than the claimant's proposals) might also have succeeded, but the evidence does not enable us to identify what it would have comprised.

127. We have already found that the claimant's scheme would not have been defeated by reason of excessive height. Our finding that it has not been shown that more than 205 units could be provided in a manner compliant with design requirements allows for a reduction in the height of the buildings which can be considered appropriate alternative development. The evidence allows a broad conclusion on what that height would be likely to be.

128. The amended version of the claimant's scheme provided by Mr Bashforth adopts floor areas of, in the main, 52 sqm, 70 sqm and 88 sqm for one, two and three-bedroomed units. As we will explain, we consider that the whole of the ground floor of block 1 would be required to satisfy the requirement for commercial space. The current layout of block 2 provides two one-bedroomed units, two three-bedroomed units, and three units of two bedrooms on each floor.

Allowing for those seven, the total floorspace required to accommodate the remaining 198 units, comprising 60 three-bedroomed units (at 88 sqm each), 79 two-bedroomed units (at 70 sqm), and 59 one-bedroomed units (at 52 sqm) would be in the order of 13,900 sqm. Allowing for central corridors and service cores, the floor areas on the upper floors of the amended scheme are approximately 454 sqm for the taller block 1, 688 sqm for the higher element of block 2, and 596 sqm for the lower element of block 2.

129. In very broad terms, 198 units could be accommodated in ten upper floors of block 1, and eight and six upper floors of block 2, the total residential floor area (excluding corridors and service cores) amounting to 13,620 sqm.

130. The precise arrangement of those blocks would be a matter for detailed consideration and would be likely to change from the indicative plans produced by the claimant. For the purpose of this exercise however, having determined the permissible capacity of the site in terms of scale and number of units, it is not necessary to descend to greater detail.

Employment component

131. We received detailed written evidence on the quantum of commercial space which would be likely to be required in a mixed-use scheme on the Capital Court site. The respondent's certificate required that employment uses should form a considerable proportion of the development to maximise regeneration of employment in this part of Brentford. Mr Baker interpreted this as requiring 1200 to 1500 sqm, whereas Mr Bashforth considered that 521 sqm would be sufficient. In both cases the calculation was relatively rough and ready.

132. It was common ground that the inclusion of employment space at ground floor level would assist in "place making" (as Mr Bashforth put it) and would be beneficial in providing an active frontage to the street scene (an objective of both the Hounslow local plan and the London plan). There was no suggestion that commercial uses should be introduced at first floor level or above; what was important was the retention of employment and the contribution commercial space could make to the quality of the development.

133. We can deal with what we consider would be required by reference to Mr Bashforth's revised version of the scheme initially drawn up by the claimant's architects. Mr Bashforth had created four units in the ground floor of block 2, two in each element, totalling 521 sqm. We agree that would be a sensible use of the space. However, we would add to his allocation of commercial space the three front ground floor residential units in block 1, which total 174 sqm. We agree with Mr Baker that that location was not ideal for residential units, given the car parking spaces immediately opposite.

134. Having converted those three units to commercial, space, in our view the two ground floor rear units in block 1 would not realistically be retained as residential. They differ from the ground floor units in the middle block, which face some landscaping, and from those in the south block, which have gardens. Adding those units, totalling 86 sqm, to the other commercial

space would create a very long thin unit which might have limited appeal, but might conceivably be an office or A2 use. Alternatively, the rear two residential units could themselves form a small commercial unit, but in either configuration there would be no residential units on the ground floor of block 1.

135. We therefore consider that the appropriate level of commercial space to comply with planning policy is about 780 sqm.

Conclusions

136. For these reasons we are satisfied that a mixed residential and commercial scheme, including 205 apartments in buildings of eleven, nine and seven storeys with ground floor employment space would have been likely to receive planning consent. In our judgment such a scheme would have balanced the Borough's need for regeneration and for high-quality housing with the need to avoid harm to heritage assets.

137. We allow the appeal and cancel the section 17 certificate issued by the respondent on 23 March 2018. We will substitute an alternative certificate reflecting the conclusions we have reached above. We have invited the parties to provide a draft of the appropriate certificate including such conditions as are agreed between them. If the material terms or conditions cannot be agreed the Tribunal will resolve any issues without a further hearing. The parties are also invited to agree a short timetable for the exchange of submissions on the costs.

Martin Rodger QC
Deputy Chamber President

Peter D McCrea FRICS
Member

24 October 2019