

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2022] UKUT 331 (LC) UTLC Case Number: LC-2021-445

Royal Courts of Justice,
London, WC2A 2LL

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – PLANNING PERMISSION – certificate of appropriate alternative development – permission sought for residential development in a Strategic Industrial Location, contrary to the policies in the development plan – housing need as a material consideration - appropriateness of tall buildings – housing density and the provision of open space – appeal allowed

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

BETWEEN:

SECRETARY OF STATE FOR TRANSPORT

Appellant

-and-

- (1) BLEEP UK PLC
- (2) MAURICE WALSH, PHILIP LAWRENCE ROBSON,
NIGEL O'DOHERTY and I.P.M. SIPP LIMITED
- (3) SLA PROPERTY COMPANY LIMITED
- (4) GILLHAMS SOLICITORS PLC
- (5) COSTSIDE LIMITED

Respondents

Re: Rowan House, 9-31 Victoria Road,
London, NW10 6DP

Judge Elizabeth Cooke and Peter D McCrea FRICS FCI Arb

Heard on: 26-29 September 2022

Decision Date: 16 December 2022

Mr Andrew Tait KC and Ms Esther Drabkin-Reiter for the appellant
Mr David Elvin KC 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

Lisle-Mainwaring v Carroll [2017] EWCA Civ 1315

Leech Homes Ltd v Northumberland County Council [2021] EWCA Civ 198

Secretary of State for Transport v Curzon Park Ltd [2021] EWCA Civ 651

Introduction

1. Along the route of the proposed HS2 rail line, wending its way north out of London, many properties have been acquired by negotiation or by compulsory purchase for the line itself and for purposes ancillary to its construction. One such property was the site of Rowan House, a two-storey brick building on the corner of Victoria Park Road and Atlas Road, Ealing, north London (“the reference land”).
2. The freehold interest in the reference land was vested in the Secretary of State for Transport on 29 May 2018, which is therefore the valuation date for the purposes of this reference. The statute underlying the scheme, which authorised the acquisition, was the High Speed Rail (London to West Midlands) Act 2017.
3. The respondents to this reference, who have been referred to as the Rowan House Consortium, owned various freehold and leasehold interests in the reference land.
4. Following an application by the respondents under s.17 of the Land Compensation Act 1961, on 27 July 2021 the London Borough of Ealing issued a certificate of Appropriate Alternative Development in respect of a mixed-use development including 116 residential units in a building of up to 19 storeys in height. The effect of that certificate is that the reference land has to be valued for the purposes of compensation as if planning permission had been granted for that development. The Secretary of State now appeals against Ealing’s certificate, arguing that in allowing a large residential element the certificate was inconsistent with the development plan, in which the reference land falls within a Strategic Industrial Location (“SIL”). The respondents agree that the land is within an SIL, but maintain that material considerations meant that residential development was appropriate; they ask the Tribunal to issue a certificate for a development larger than that to which Ealing’s certificate referred. There was further disagreement between the parties as to whether permission would have been granted for such a tall building. As we shall explain, we have found that residential development would not have been permitted, and that development would have been limited to between eight and ten storeys; accordingly we have issued a certificate for the development for which the appellant contends.
5. We heard the appeal at the Royal Courts of Justice between 26 and 29 September 2022. The appellant was represented by Mr Andrew Tait KC and Ms Esther Drabkin-Reiter, the respondents by Mr David Elvin KC, and we are grateful to them all.
6. On the afternoon of 27 September, we made an unaccompanied inspection of the location of the reference land and the surrounding area.

The reference land

7. The reference land was an irregular shaped plot of 0.14 ha with a frontage of 75 metres to Victoria Road and Atlas Road. Rowan House itself was a two-storey brick building of 1980’s vintage, used primarily for offices. 26 car spaces and a servicing area were accommodated in a rear car park, accessed from Victoria Road. At the valuation date it was

occupied by three companies: Bleep UK Ltd in Unit 1, Robson Walsh LLP Building Surveyors in Unit 2 and Gillhams Solicitors in Unit 3. It faced a roundabout where Old Oak Common Lane intersects with Atlas Road and Victoria Road, known as Atlas Junction. Its location is shown on this plan:



8. To the north-west of the reference land (in the blank area of the plan) was a food processing plant owned by Maple Fine Foods; to the south-west a small office block, Tudor House, and beyond that a mixed-use large brick building known as Plantagenet House. Across Victoria Road, to the south east, was a medium-sized residential development known as Shaftesbury Gardens, comprising two and three storey dwellings. Across Atlas Road to the north there is a large new/refurbished block, Nash House, currently used by The Collective as a co-living complex for students, employed graduates, and professionals under the age of 35. At the point nearest to the reference land it is nine storeys high, rising to 11 storeys at its northern

end. Across the roundabout from Rowan House, on the corner of Old Oak Lane and Old Oak Common Lane, there is a row of two storey houses known as Victoria Terrace, which are locally listed.

9. Old Oak Common Lane forms a road bridge over the railway line, and on the opposite side of the line, to the south east, there is a large development called Oaklands House comprising 605 residential units, and 3,500 square metres of commercial space. Some 120m distant from the reference land, it has a taller element ranging from 18 to 27 storeys, with five 'shoulder height' buildings from 6 to 12 storeys.

Brief legal framework

10. The respondents are of course entitled to be compensated for the reference land being acquired. In assessing the amount of compensation payable in accordance with rule 2 of section 5 of the Land Compensation Act 1961, section 14(2)(a) requires that account may be taken of any planning permission in force on the valuation date of development on the reference land or other land. Section 14(3) provides that 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). This means 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.
11. The assumptions to be made under section 14(5) are that the scheme was cancelled on the Launch Date (agreed to be 26 November 2013); that no action has been taken, including acquisition of any land, and any development or works, by the acquiring authority wholly or mainly for the purposes of the scheme; and that there is no prospect of the same scheme, or any other project to meet substantially the same need being carried out in the exercise of the statutory function or by the exercise of compulsory purchase powers.
12. Section 17 of the 1961 Act enables the acquiring authority or the landowner to apply to the local planning authority for a "certificate of appropriate alternative development" (often referred to as a CAAD) stating that there is, or is not, development that is appropriate alternative development in relation to the land acquired, and describing such development if there is any. The respondents' certificate was granted by the London Borough of Ealing, even though since April 2015 the real-world decision-maker for planning applications in the area has been the Old Oak and Park Royal Development Corporation ("OPDC"), because the statutory instrument under which OPDC was formed did not give it the functions of a local planning authority for the purposes of s.17 of the 1961 Act. Those functions remained with the London Borough.
13. In summary, Ealing's certificate indicated that the authority would, in the cancelled scheme world, have accepted a scheme comprising a mixed-use development of two blocks of nine and nineteen storeys with residential units and commercial (A1, A2, A3 and B1a) space, with rooftop gardens and play provision and amenity space. It would encompass 116 residential units (equating to a density of 829 units per hectare), 50% of which would be

affordable housing, and 1,273 sqm of commercial space, with the potential to provide active frontages to Victoria Road and Atlas Road.

14. Section 18 of the 1961 Act provides that either party may appeal such a certificate to the Tribunal, as the appellant has done. In such an appeal 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. So we are to consider the matter afresh, rather than reviewing Ealing's certificate.
15. It is common ground that the Tribunal has to decide the appeal in accordance with ordinary planning principles. Our starting point is that our determination must be in accordance with the development plan unless material considerations indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004).
16. In *Lisle-Mainwaring v Carroll* [2017] EWCA Civ 1315 at [11] Lindblom LJ explained that s.38(6) of the Planning and Compulsory Purchase Act 2004 embodied the presumption in favour of the development plan. Any consideration relating to the use and development of land is *capable* of being a planning consideration, but the question of whether a particular matter is material will depend on the circumstances.
17. In *Leech Homes Ltd v Northumberland County Council* [2021] EWCA Civ 198, Lewison LJ explained that the task for the CAAD decision maker is little different from that of the real world decision-maker:

“6. It is also common ground that in determining the hypothetical applications for planning permission, the local planning authority (or on appeal the UT) must make its decision in accordance with the development plan unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004. This reflects long-standing government policy that planning should be genuinely plan led. The development plan includes the regional strategy (if there is one): section 38(3)(a). But the decision-maker must correctly understand policies contained in the development plan. The interpretation of such policies is a question of law rather than one of planning judgment: *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983. Material considerations include national planning policy.”

The alternatives before the Tribunal

18. The appellant contends that appropriate alternative development would be limited to a mix of industrial uses with offices, together with retail and café/restaurant uses on the ground floor, with an overall height of no more than ten storeys – the form and height dependent on design considerations. The appellant has provided an illustrative scheme, ranging from five to ten storeys, featuring a café and light industrial uses at ground and mezzanine level, with B1 workspace on the upper floors. The development coverage is 45%, with a ground floor of 584.6 sqm, and various upper levels of 485.97 sqm, with a rooftop garden and planting area.

19. The respondents' primary case before the Tribunal is that a certificate should be granted for a scheme larger than that granted by Ealing ("the respondents' alternative"), in which the height of the taller element would be increased from 19 to 26 storeys to accommodate 157 residential units (the density increasing to 1,114 units per hectare), and commercial space of 1,541 sqm, comprising ground floor space of 181 sqm and first floor of 1,179 sqm, all in A1, A2, A3 and B1a uses. Alternatively, they contend for a certificate in the same terms as that granted by Ealing, for a 19-storey mixed use development.
20. So there is some common ground – the nine storey element of both schemes is agreed as appropriate – but the higher elements, and the use of the buildings for residential, remains in dispute. In each case, the parties have agreed the suite of conditions that would be included in the certificate, relating to demolition and construction methods, materials, sustainability and so on.
21. As we have already indicated, the crucial issue between the parties arises from the conflict between the development plan and the protection it gives to SIL, and the matters which the respondent says are material considerations indicating that despite the reference land being within SIL a certificate should be issued for residential development. The parties are also in dispute about the appropriate height for the development.
22. In the paragraphs that follow we first look at the parties' arguments and evidence about the development plan on the one hand, and the claimed material considerations on the other. We then take a look around the locality at other buildings nearby, bearing in mind that our decision is taken in the "cancelled-scheme world" and that while actual planning permissions are facts in the real world, with nothing to "magic them out of existence", some caution should be taken if they were influenced by the scheme. Then we summarise the evidence of the design experts, before setting out our conclusions.
23. In examining the evidence we refer to the reports of the expert witnesses; on planning matters the appellant relied on the evidence of Mr Gregory Dickson, the respondents on that of Ms Katherine Else; on design, the appellant's expert was Mr Peter Newton, the respondents' was Mr Adam West.

The development plan and material considerations

24. Under this heading we first identify the development plan, and we then establish what planning policies have to be disregarded on the assumption, as directed by section 14(5) of the 1961 Act, that the scheme was cancelled on the launch date.

What is the development plan?

25. The composition of the development plan at the valuation date is agreed. The relevant documents are:
 - The London Plan 2016,
 - the Ealing Core Strategy (2012), and

- Ealing’s “Development Management” document (2013).
26. A supplementary planning document at the valuation date was the Old Oak and Park Royal Opportunity Area Planning Framework 2015 (“OAPF”).
 27. Paragraph 216 of the 2012 National Planning Policy Framework (“NPPF”) indicates that we may also give weight, unless material considerations indicate otherwise, to relevant policies in emerging plans depending on the stage of preparation, the extent to which there are unresolved objections to relevant policies, and the degree of consistency of the policies with the NPPF. Emerging policy documents at the date were the draft London Plan 2017, and various iterations of the Draft Old Oak and Park Royal Local Plan (“Draft OPDC Plan”).

What policies are we required to disregard?

28. In considering what would constitute appropriate alternative development in the cancelled-scheme world, some parts of the development plan and of or emerging policy must be disregarded. But that exercise requires us to maintain as far as possible the background of the real world, except where specific assumptions demand otherwise. It is, as far as possible, a real-world consideration, as Lewison LJ explained at [40-49] of *Secretary of State for Transport v Curzon Park Ltd* [2021] EWCA Civ 651.
29. In this reference there were two significant infrastructure schemes, one of which – HS2 - we are to assume was cancelled in November 2013 but the other - Crossrail – is assumed to remain both in the real and notional worlds. In the real world, the combination of the two schemes resulted in proposals for a transport superhub at Old Oak Common not far from the reference land, described by Mr Tait KC as being the size of London Waterloo, but in the cancelled-scheme world that site would have been part of a depot and 26 railway sidings.
30. Several policies that refer to the transport superhub therefore fall to be disregarded. The OAPF in 2015 trendily identified eight ‘places’, for each of which a ‘vision’ had been developed. The transport superhub was within the “place” described as Old Oak Common Station, firmly based in the scheme world. Similarly, Policy P1C1 of the emerging Draft OPDC Plan proposed the Oak Common Station Cluster. Ms Else accepted that those policies had no relevance in the cancelled scheme world.
31. The Draft OPDC Plan described, in Policy P1, a ‘vision’ for Old Oak South around the Station Cluster, where towards the end of the plan period (10-20 years hence) in a new commercial hub a range of tall buildings would deliver employment spaces over or adjacent to the station, together with new town centre uses and new residential uses on the upper floors. That is also a policy that depends upon the scheme and is to be disregarded.

The Development Plan and policy relating to SILs

32. For the appellant, Mr Tait KC submitted that both Ealing’s certificate and the larger development now proposed by the respondents alternative were inconsistent with the

development plan, supplementary planning guidance, and emerging policies, and that there were insufficient material considerations to overcome that problem.

33. The development plan identifies the reference land and the area to its south-west and north-west as Strategic Industrial Land (“SIL”), which (as Mr Tait KC put it) engages the strong protection for development plan policies including Policy 2.17B of the London Plan:

“Development proposals in SILs should be refused unless:

- a) they fall within broad industrial type activities within para 2.79;
 - b) they are part of a strategically co-ordinated process of SIL consolidation through an opportunity area planning framework or borough development plan document;
 - c) the proposal is for employment workspace to meet identified needs for small and medium sized enterprises (SMEs) or new emerging industrial sectors; or
 - d) the proposal is for small scale ‘walk to’ services for industrial occupiers such as workplace creches or cafes”. (our emphasis)
34. Policy 2.17C directed that development proposals within or adjacent to SILs should not compromise the integrity or effectiveness of these locations in accommodating industrial type activities.
35. Paragraph 4.8 of the Mayor of London’s Supplementary Planning Guidance on Land for Industry and Transport provided that applications for non-industrial uses on SILs “should be determined rigorously in accordance with London Plan Policy 2.17B.”
36. In the early stages of this reference the respondents contended that the draft OPDC Plan proposed the removal of the reference land from the SIL designation. Their statement of case and Ms Else’s and Mr West’s first reports proceeded on that basis. However, that view was based on figure 9.2 of Policy E1 of the draft OPDC Plan, which erroneously indicated that the reference land was included in a small section to the west of Old Oak Road that was non-SIL land. The appellant produced a letter from the Head of Planning Policy and the Principal Planning Policy Officer at the OPDC confirming that that was an error and that the intention had always been for the reference land to remain within SIL. In the face of that letter it became common ground between the parties that the reference land was within SIL; it was also agreed that residential development on the reference land would be incompatible with its SIL designation.
37. So those were the parties’ positions about the development plan and the designation of the reference land as part of (although on the edge of) an SIL. Counsel and the expert witnesses discussed further aspects of the relevant planning policies as follows.

Residential development and SILs

38. Residential development is not wholly impossible within SILs. Whilst Policy 3.3 of the Ealing Core Strategy sought to retain business and industry throughout the Park Royal estate, Policy 4A of Ealing’s Development Management document indicated that where retaining

a building or site in employment use was not viable, the council would seek mixed use development which maximised the number of jobs provided. However, Ms Else accepted that the retention of the current use on the reference land was viable, and so the respondents' schemes would not trigger policy 4A. She also accepted that in any event, policy 2.17B of the London Plan (paragraph 33 above), being the later document, would trump policy 4A in the Development Management document..

39. Policy 2.17C of the London Plan, concerning development proposals adjacent to SIL, was reiterated in policy 4A of Ealing's Development Management Plan which directed that, outside of SIL locations, redevelopment of sites for non-employment uses may be permitted where, inter alia, the proposal does not constrain or undermine neighbouring employment uses. It went on to give the example of residential development undermining neighbouring employment uses where that would necessitate reductions in operating or delivery hours.
40. This must be a difficulty for the respondents. As we indicated above, the reference land adjoined the site of Maple Foods; it was common ground that the Maple Foods planning consent had no conditions limiting its use as to, for instance, hours of work, so that it could operate on a 24-hour basis. Mr Tait referred to a decision of the Planning Inspectorate in respect of Manhattan Business Park, West Gate, Ealing. In upholding Ealing's decision to refuse planning permission for a residential development within the Park Royal SIL, the Inspector had regard to the site's location near to railway lines, the A40, and industrial premises which enjoyed unrestricted hours of operation or delivery and loading times. He was not satisfied that noise mitigation measures would be sufficient to mitigate the noise and disturbance from nearby industrial operations, and that there would be a risk of residents seeking an abatement notice against the adjacent occupiers, putting the viability of individual premises in the SIL at risk, limiting their economic potential and thus compromising the overall integrity of the SIL.
41. Ms Else said that every site was considered on its merits and remained confident that residential development would have been able to mitigate noise issues.

Opportunity Areas

42. Policy 2.13 of the London Plan designated Opportunity Areas and Intensification Areas, with 2.13B stating that development proposals within these areas should a) support the strategic policy directions set out in Annex 1 and b) seek to optimise "residential and non-residential output and densities, provide necessary social and other infrastructure to sustain growth, and, where appropriate, contain a mix of uses, and c) contribute towards meeting (or, where appropriate, exceeding) the minimum guidelines for housing and/or indicative estimates for employment capacity set out in Annex 1".
43. Two of the Opportunity Areas set out in Annex 1 to the London Plan were Park Royal, where the reference land is located, and the adjoining Old Oak, in which the Oaklands development lies.
44. Park Royal, covering 713 hectares, was described as one of London's key industrial areas, in which 'a range of opportunities exist for industrial related development and in selected

locations outside of SIL for mixed use intensification where there is good transport accessibility.’ These locations included a series of ‘gateway’ sites identified in the Park Royal OAPF comprising the Eastern Gateway at Willesden Junction, the Southern Gateway around North Acton Station, the Western Gateway around the Diageo First Central site, and the Northern Gateway centred around the Northfields industrial estate. 1500 new homes were anticipated, outside SILs.

45. Old Oak, covering 155 hectares, was described as having significant regeneration potential for new housing and jobs. Regeneration would centre on a new strategic public transport infrastructure hub at Old Oak Common on the HS2 line, with an interchange with Crossrail 1, other national main lines and the London Overground. Provision of public transport on this scale was supposed to drive substantial development which could yield 24,000 new homes. As we have said, we have to disregard the transport hub because it does not belong in the no scheme world. And of course the reference land lies within Park Royal, not Old Oak.

Old Oak and Park Royal Opportunity Area Planning Framework 2015

46. As supplementary guidance, Policy PR1 and Principle L2 of the OAPF, which Ms Else agreed would be afforded significant weight, reinforced the reference land as SIL, indicating that the GLA would continue to support Park Royal as London’s leading industrial area by protecting existing SIL, and promote development and intensification on SIL land. New employment proposals in SIL locations should deliver new workspace that maximised and intensified the use of the site to support the delivery of 10,000 new jobs in Park Royal, and to deliver new employment workspace that meets identified needs for micro, small and medium enterprises and studios with higher employment densities in locations within easy distance to public transport. New residential uses should be directed to non-SIL areas where they could be delivered so as not to impact on the functioning of surrounding SIL. Ms Else accepted that the residential elements of the respondents’ schemes would not be compliant with the OAPF.
47. The OAPF described its “vision” for Old Oak Lane as a line of transition between the protected SIL of Park Royal, and the mixed use regeneration area of Old Oak. The second key objective was that the industrial land to the west of Old Oak Lane (where the reference land sat) would continue to be protected as SIL. Ms Else agreed that the residential elements of the respondents’ proposals did not accord with the vision but pointed out that Shaftesbury Gardens and some of the Victoria Road frontages did also inform the context to the site.

Emerging policy

48. Emerging policy documents took a similar line. Ms Else accepted that the emerging December 2017 Draft London Plan was a material consideration and would be given at least some weight, despite not being adopted until 2020.
49. Policy E4 concerned land for industry, logistics and services. The aim of the Plan was to achieve no net loss of such land. On a borough level, areas were designated as either ‘provide capacity’, ‘retain’ or, in three cases, ‘limited release’. Both Ealing and the OPDC’s area were

designated to ‘provide capacity’, where strategic demand for industrial, logistics and related uses was anticipated to be strongest, and in which planning authorities should seek to deliver intensified floorspace capacity in existing or new locations.

50. Policy E5 indicated that SILs should be managed proactively through a plan-led process to sustain them as London’s main reservoirs of industrial, logistics and related capacity for uses that support the functioning of London’s economy. Policy E5C directed that development proposals in SIL should include light industrial (the then Use Class B1c), general industrial (B2), storage and distribution (B8), flexible B1c/B2/B8 premises suitable for occupation by SMEs, and small scale ‘walk-to’ services for industrial occupiers such as workplace creches or cafes. Policy E5D indicated that residential development proposals ‘should be refused except in areas released through a strategically co-ordinated process of SIL consolidation’; E5E said that development proposals within or adjacent to SILs should not compromise the integrity or effectiveness of these locations in accommodating industrial-type activities and their ability to operate on a 24-hour basis. Residential development adjacent to SILs should be designed to ensure that industrial activities are not compromised or curtailed.
51. Policy E7 again stressed the importance of not undermining or compromise the integrity or effectiveness of SIL, and any approach should only be considered as part of a plan-led process, and not through ad hoc planning applications.
52. In Ms Else’s view, policies E4, E5 and E7 should be given only limited weight, particularly since in her view the existing uses of the reference land did not comply with the uses identified for SIL designations. It was in B1a (office) use and did not provide a SIL function. Ealing’s certificate, and the respondents’ alternative, would be simply a continuation of non-SIL use and an enhancement of existing employment opportunities by the provision of a new building.
53. The second iteration of the OPDC Local Plan was published a year before, and its revised draft for Regulation 19 consultation a month after, the valuation date. It was common ground between the planning experts that the Plan was informed by a wide body of opinion and should be given significant weight. Policy P8 dealt with Old Oak Lane and Old Oak Common Lane. Policy P8b) supported the functioning of SIL by delivering “i) SIL compliant broad industrial type uses, and ii) within sites facing onto Victoria Road and Old Oak Lane, active and positive frontages that help to activate the public realm”. Policy P8C1c) specifically mentioned Rowan House, indicating that proposals should...[support] the functioning of SIL by delivering high density high quality industrial uses within the active frontages at the Rowan House site on the western corner and south of Goodhall Street including opportunities for small walk-to services – as part of the SIL. Ms Else accepted that residential development would involve a degree of conflict with policies P8 and P8C1, but said that it did comply with the requirements for active frontages and for interaction with the town centre, and would provide improved employment floorspace.

Material Considerations

54. We turn now to the focus of the respondents’ case. As we said above, the respondents do not dispute that both their proposal and Ealing’s certificate did not comply with the development

plan. Nor do they now dispute that the reference land is within an SIL (see paragraph 36 above).

55. Another point initially advanced by Ms Else, before being subsequently conceded as incorrect, was that the use of Rowan House as B1a offices would have enabled a change of use to C3 residential through permitted development rights under the GPDO 2015, so that residential use could have been introduced to the reference land despite its SIL designation. However, by the time of the hearing it was agreed that this was incorrect. The Development Corporation had adopted an Article 4 Direction which came into effect on 22 September 2017, removing permitted development rights from the reference land.
56. So the respondents' argument had to start from the difficult position that their proposed residential developments were in conflict with the development plan because the reference land stands within an SIL. Their argument was that nevertheless there are other material considerations of sufficient weight to overcome that difficulty.
57. The principal material consideration relied on was the need for housing in London. We referred above to the scale of new homes projected in the Old Oak Common and Park Royal areas in Annex 1 to the London Plan (paragraphs 44 and 45 above). The respondents rightly point out that that housing need would not just go away in the cancelled scheme world.
58. Mr Elvin KC submitted that all planning policy in London between the launch date and the valuation date – some four and a half years – was pointing to an increasing significance of the use of brownfield land for housing. The Old Oak and Park Royal opportunity areas were the third largest in London, and while he accepted that the development of these areas was in part due to the scheme, it was also due to Crossrail. While the transport interchange which included HS2 must be disregarded, in a cancelled scheme world there remained Crossrail (now the Elizabeth Line) and other overground main lines running through the area.
59. The GLA's 2011 Opportunity Area Planning Framework mooted possible transport nodes at Kensal Canal side, to the east of the area, and a possible interchange with the Heathrow Express and Crossrail to the south of Willesden Junction. Additionally, further stations, Reading and Twyford, were added to Crossrail after Royal Assent. So matters did not stand still. At the valuation date the scheme had been cancelled for nearly five years, but other infrastructure proposals were in train. The Mayor of London was pressing for vast amounts of extra housing, and with the scheme cancellation something would have had to be done to meet the policy requirements. The Mayor's foreword to the OAPF indicated that with current estimates of population expansion, housing provision was perhaps the biggest issue that London would face in the subsequent decades. Old Oak and Park Royal were said to play perhaps the most crucial role of any regeneration area in London over the next 20-30 years in delivering much needed jobs homes and jobs.
60. Ms Else said that in the cancelled scheme world, the housing need would be met by the provision of accessible sites, of which the reference land was one. Whenever significant infrastructure was proposed, such as the Crossrail depot in the cancelled scheme world, there would in any event be an impetus for development, which would have a knock-on effect for sites. She saw opportunities for ad hoc proposals ahead of the development plan correcting

itself – homes, jobs and regeneration would not have time to wait, and local planning authorities would see such applications as a way of delivering their requirements early. The housing need of 25,500 units would not just disappear and would need to be accommodated, probably within the opportunity areas which would still have been in place. The December 2017 Draft London Plan emphasised the role that opportunity areas would play in providing development capacity.

61. Ms Else thought that the reference land would be suitable for a mixed-use development. A wholly residential development would not be suitable because of the requirement for an active street frontage.
62. Mr Dickson accepted that the opportunity areas remain in the cancelled scheme world as major reservoirs for London’s development, and that if the policies relating to the scheme fall away, the need for housing, as well as employment land, would still need to be accommodated. He also accepted that during the 4.5 years between the cancellation date and the valuation date planning authorities would have to find other means of promoting housing development within those areas, and that the OAPF foreword described the challenge caused by London’s growing population. However, he did not agree that where elements of development plans become out of date, ad hoc planning applications are easier to achieve.
63. Mr Elvin KC acknowledged that in Annex 1 to the 2016 London Plan the Park Royal opportunity area was described as a key industrial location. But he pointed out that the document went on to say that planning for Park Royal should be integrated with Old Oak and take into account the relationships with White City and Kensal Canalside opportunity areas. Therefore, he argued, Park Royal should not be considered in isolation. He accepted that neither Ealing’s certificate and nor the respondents’ alternative were SIL compliant, but he argued that the situation was more nuanced. The reference land was on the very edge of the SIL designation, and in an area where there were, albeit to a limited degree, overlapping mixed-use policies. The Park Royal opportunity area, while industrial, sits cheek by jowl with the mixed uses in the same road. He pointed out the discrepancy, which represented a planning compromise, between the London Plan’s requirement, at Policy 2.17B, for “small scale ‘walk to’ services *for industrial occupiers* such as workplace creches and cafes”, and the need for publicly available active street frontages connecting to the Atlas junction, in P8C1 and P9 of the emerging OPDC Local Plan.
64. In summary, Mr Elvin KC submitted that the following were material considerations weighing in favour of residential development: an urgent need for the provision of additional housing, the increasing use of brownfield land in London to meet that need, the increasing opportunities for development through better infrastructure even in the absence of HS2, and the argument (see paragraph 52 above) that the use of Rowan House at the valuation date was not SIL compliant.

The locality

65. There are two significant, highly visible, and very tall residential developments in the vicinity of the reference land, Nash House to the northeast and Oaklands to the east.

Nash House

66. Nash House is a mixed-use development on the site of a former office building, between eight and 11 storeys high, and it dominates the Atlas junction. It is operated by The Collective as a co-living complex for students, with up to 30% of the space being for employed graduates and professionals under 35. The ground and first floors are in commercial use. The site area is 0.44 hectares. It is in the Park Royal SIL area but does not directly adjoin industrial use.
67. Mr Dickson said that the former office block on the Nash House site was, by the early 2000's, severely dilapidated. It was in the area covered by the SIL designation, and in granting permission the planning committee report acknowledged that student housing did not comply with existing or emerging land use policies. However, it noted that failed marketing since 2003 indicated that the existing building had reached the end of its useful life as offices; the financial appraisal submitted by the developer had been independently reviewed and concluded that a significant quantity of enabling development in the form of 323 student units was required to achieve development.
68. Mr Dickson concluded that the council's acceptance of non-SIL uses was in response to the exceptional circumstances of that particular site; Ms Else accepted that the circumstances of Nash House were sufficiently exceptional to overcome the SIL policy.

Oaklands House

69. Oaklands House is a very large mixed-use development, dominating the surrounding landscape. It was constructed under a 2016 resolution to grant planning permission for a mixed-use development, comprising 605 residential units, 3,500sqm of commercial space including A1-A4, B1, D1 and D1 uses. The development across 6-27 storeys equates to a density of 513 units per hectare. Mr West was the architect.
70. In planning policy terms, the site upon which Oaklands House was constructed was originally within the Park Royal SIL. But the 2015 OAPF identified the location as being within the Old Oak Common 'place', appropriate for higher density mixed use development to the immediate north of the transport hub at Old Oak Common. The 2017 draft of the emerging OPDC Local Plan identified the development within Oaklands North and South, providing capacity for up to 855 new dwellings and 6,500 sqm of commercial floorspace.
71. The planning committee report in respect of the Oaklands application noted that there was 'strong support and a clear direction of travel for the release of the Old Oak area from SIL in order to unlock the area's regeneration potential. As such, the redevelopment of the application site for non-SIL uses, consistent with planned residential-led regeneration, is supported.'
72. In terms of the height of the development, the officer's report to committee indicated that Oaklands was a "key site within Old Oak", stating that owing to its location at one of the primary entrance points into the area, and its prominence in views from across the area, the site was appropriate for accommodating taller buildings: "Tall buildings of 18- and 26-

storeys are located in an appropriate position at the entrance to the site which, in the longer term, will be a primary route into the core development area. The height of the development reduces either side of the main road to help create an attractive local environment and reduce the prominence of the building when viewed from the existing residential areas to the west.”

73. Ms Else accepted that the development of Oaklands, within the Old Oak Opportunity Area with a specific allocation for mixed use development, did not set a precedent for the release of the reference land from the SIL.

Neighbourhood Town Centre

74. The area immediately to the north of the reference land is designated in the Draft OPDC Plan as a Neighbourhood Town Centre. Some of the evidence focused on whether the reference land can be regarded as a “transition area” between the SIL and the mixed-use land of the Town Centre. There was some conflicting evidence about this but ultimately in cross-examination Mr West accepted that the OAPF referred to Old Oak Lane as forming a line of transition between the protected SIL of Park Royal, and the mixed-use regeneration area of Old Oak.
75. Common to the appellant’s and the respondents’ schemes is the proposal for an “active frontage” providing services such as cafes and so on; it was common ground that this was policy-compliant. We were shown drawings of what that might look like
76. We accept Mr Elvin KC’s submissions in closing that whether or not the reference land was formally within a transition area, it was in effect in one, because of the requirement for active frontages, and the various policies for the Atlas junction cluster. Nevertheless it remains within an SIL, albeit (as Mr Elvin KC pointed out) on the very periphery of SIL.

Design issues

Building heights

77. The design experts focused on a number of issues, of which probably the most important was height. The respondents’ two alternative schemes are both taller – one by nine storeys, one by sixteen – than the appellant’s, and we have to consider whether the addition of a conspicuously tall building to the existing mix would be appropriate.
78. The supporting text to Policy 7.7 of the London Plan 2016 defined a tall building as one which was substantially taller than its surroundings, would cause a significant change to the skyline, or was larger than the threshold sizes set for referral to the Mayor (30m or ten storeys high outside the City of London). It went on to say that tall buildings should be of the highest architectural quality and should not have a negative impact on the surrounding uses. The respondents’ two schemes are therefore tall buildings.
79. Within the Draft OPDC Plan the text supporting policy P8 at paragraph OOL1 said this:

“Across Old Oak Lane and Old Oak Common Lane there are a range of heights that reflect the existing industrial and residential land uses. The current tallest building is The Collective adjacent to the Grand Union Canal. Development sites provide the opportunity to help support local legibility to stations and both Atlas Junction and Old Oak High Street town centres and provide appropriate densities to optimise development. This potential needs to be considered in light of the sensitive locations of existing residential neighbourhoods and Wormwood Scrubs. Within the Atlas Junction neighbourhood town centre, the Willesden Junction Maintenance Depot and sites to the south provide an opportunity to deliver heights similar to The Collective in the north and lower heights to the south where they meet the Victoria Cottages...”.

80. Policy P8C1 provided specific guidance that development at Rowan House should be “of generally 8 to 10 storeys”. The supporting text to the Policy noted (at AJ.11) that “on the east and west corners of Atlas Junction, building heights provide the opportunity to help define the junction with Rowan House on the western corner providing 8 to 10 storeys to create a suitable enclosure to the junction and along Victoria Road.”
81. The Development Corporation published a Tall Buildings Statement in June 2018, which allowed more latitude by defining a tall building as being above 15 storeys or 48 metres above ground level. It also indicated the locations in which, in principle, tall buildings would be an appropriate form of development, as well as marking specific locations where tall buildings would be appropriate. The reference land fell outside the “in principle” locations, and was not one of the marked specific locations.
82. This was of course a supporting planning document to the emerging local plan rather than having policy status, and was of course in the scheme world, and had regard to the key transport hub.
83. Rowan House also fell outside the tall building area designated by the OAPF, but again this concentrated development around the proposed new HS2 station. While policy D3c stated that developments of greater heights and densities than the surrounding context might be acceptable, they should primarily be focussed on stations and other key destinations. There may also be opportunities for some taller elements in other locations so long as such proposals contribute to the creation of a coherent place and accord with other guidance. New development should be mindful of their context and in particular sensitive locations in the surrounding area. In these locations lower densities may be more appropriate.
84. In summary, the respondents’ proposals would any view constitute a tall building and would not accord with either existing or emerging planning policy. Ms Else said she did not consider this to be a restriction, but more a starting point for a gateway site providing an opportunity for densification at what could be a landmark building.
85. Mr West was the architect of Oaklands, which is of course a conspicuously tall building. He emphasised the function of tall buildings, to mark gateways to locations of national or regional significance and to make the landscape “legible” by signposting transport hubs, for example, as well as to provide a sense of enclosure for a junction. He also acknowledged the

general principle that a tall residential building needs to have open space nearby. Oaklands, in the real world where the scheme involves a major transport hub at Old Oak, marks the gateway to that important area; and it incorporates its own open space.

86. Mr West argued that a tall building at the Atlas Junction would mark the entrance to the town centre, which he acknowledged was of local significance only, and would provide a sense of enclosure for the junction, while conceding that it was not necessary to extend to 19 storeys to accomplish a sense of enclosure. Mr Newton maintained that a tall building on the reference land would be inappropriate, overbearing and not in accordance with policy.

Development density

87. We noted above (paragraph 78) that the text to Policy 7.7 of the London Plan 2016 stated that tall buildings should be of the highest architectural quality. In light of that requirement there was discussion at the hearing about the density of the developments proposed by the respondents. Mr Tait KC argued that both would be unacceptably dense and therefore of poor quality.
88. It was common ground that the development authorised by Ealing's certificate provided for 829 units per hectare, and that the respondents' alternative would be at 1,114 units per hectare. By comparison, the Oaklands development equated to 508 units per hectare.
89. Policy 3.4 of the London Plan 2016 included a sustainable residential quality density matrix, consisting of central, urban and suburban settings on the one hand, and accessibility to public transport on the other. Ms Else agreed that the section of the table relevant to the reference land was the urban setting, with a high public transport accessibility rating. The matrix suggested densities from 45-185 units per hectare (where there were 3.8 to 4.6 habitable rooms per unit) to 70-260 units per hectare (where there were 2.7 to 3.0 hr/unit).
90. While it was common ground that this table should not be applied mechanistically, and account should be taken of other factors, including local context, design and transport capacity, social infrastructure, open space and play areas, at first glance both the respondents' schemes amounted to development which would be over three times denser than that of the upper parameter of the urban range in the London Plan.
91. It also seemed to be a considerably denser development than that of Oaklands, but Mr West cautioned that such a comparison was not entirely accurate, because the Oaklands scheme included internal estate roads which had been included in the calculation.
92. Principle 004 of the OAPF set out expectations of building heights and densities, in the scheme world, including the HS2 station. It noted that the London Plan density table should not be applied mechanistically, and identified the highest density areas as being appropriate around tube stations and key destinations at 550 units per hectare, and around the HS2/Elizabeth Line stations at high density commercial/highest density residential, more than 550 units per hectare.

93. Mr West accepted that while the London Plan matrix should not be applied mechanistically, levels of density well in excess of those in the table might be an indicator of over-development. However, it was a challenging site. His position was that residential development at the Atlas Junction cluster would make the location vibrant, and that absent residential development it would not be an active location. He argued that the density point needs to be considered having regard to the wider location, rather than just the reference land in isolation.
94. A further challenge for the respondents' proposals is the limited outdoor space; there is provision for the residents to have access to the rooftop, but even that provision was conceded to be under threat because of the requirement for solar panels to meet sustainability requirements. The nearest public open space is about a kilometre away.

Public open space

95. Policy 7D of Ealing's Development Management document stated that all developments that increase demand for open space will be expected to make an appropriate contribution, having regard to the standards detailed in table 7D.2. A contribution could include actual space provision or a monetary contribution.
96. Mr West complained that Ealing's borough-wide policy, requiring 15 sqm per flat, was restrictive, particularly for tall buildings. But he accepted that, under that policy, Ealing's certificate would provide 1,038 sqm, against a requirement of 1,740 sqm, and the respondents' alternative only 694 sqm, against a requirement of 2,340 sqm.
97. Ms Else said that due to the need to provide as many homes as possible, open space could be dealt with by s106 contributions. She understood that the local authority would aggregate various s106 payments to provide open space at other locations, and observed that unless the planning authority took that approach no high-density tall developments would happen.

Discussion

98. The respondents and their experts have made a number of concessions since the reference was made. We have recorded above the erroneous assumption that the reference land was to be de-designated as SIL, and the erroneous view that the use of Rowan House as B1a offices would have enabled a change of use to C3 residential through permitted development rights. As we explained above (paragraphs 54 to 56) that placed something of a wedge between the respondents' proposals and the policies of the development plan and left them heavily reliant upon material considerations to justify their proposals for residential development.
99. A further difficulty for the respondents is the need to justify the construction of a tall building at the Atlas Junction, which appears to fly in the face not of the development plan itself but of emerging policy in the form of the Draft OPDC Plan and the Tall Buildings Statement. Furthermore their proposed residential development exceeds local density requirements and does not provide much if any outdoor space for residents.

100. The issues before us boil down to two questions: should our certificate permit residential development on the reference land, in the SIL? And should our certificate permit a tall building?

Residential development

101. The protection given in the development plan to SILs is strong and unequivocal.
102. We accept the huge need for housing in London, and the significance of brownfield land in providing it. We accept that there has been an increasing reliance on Opportunity Areas to deliver housing and that the combined Old Oak and Park Royal areas contained the third largest housing allocation in London, of 25,500 new homes.
103. But the difference between the two opportunity areas is crucial. 24,000 of those new homes were to be in Old Oak, and not in Park Royal where the reference land is situated. The point is well made in the OAPF which suggests (at its internal page 14) that “Park Royal could be regenerated to become one the UK’s most successful trading locations, while at the same time facilitating the relocation of businesses from Old Oak, so that both Opportunity Areas can realise their development potential.” (Emphasis added). So residential development was to happen primarily in Old Oak, with Park Royal remaining industrial in nature and indeed taking businesses out of Old Oak.
104. That adjustment is important. Residential development has an effect on businesses; we heard that permission had been refused elsewhere because of the potential inhibiting of business activity by the need for quiet around residential development (paragraph 40 above). The random departure from policy by putting residential accommodation on the reference land would have an effect upon the building’s industrial neighbours. Policy 2.17C of the London Plan and Policy 4A of Ealing’s Development Management document could not be clearer (see paragraph 39 above), and despite all mitigation measures that a residential development might include, there is in our view a real risk that the integrity and effectiveness of the SIL might be compromised by residential development on the reference land.
105. We are untroubled by the question whether the office use of the reference land by the respondents was compliant with the requirements for SIL; on balance because of the presence of SMEs it probably was, but even if it was not that does not enable us to ride rough-shod over policy. The reference land stands in an SIL, where permission should be refused for residential development. That policy has taken shape in the presence of London’s huge housing need. People need employment as well as housing, and SILs need to retain their integrity for that purpose; and by absorbing industry and providing an unthreatened space for industry they facilitate the provision of housing elsewhere.
106. The answer to this first question is that we are not satisfied that there were sufficient material considerations to outweigh the clear requirement of the development plan that permission for residential development should be refused in SILs and therefore on the reference land.

The form of the development.

107. During our site inspection we were struck with quite how tall both the respondents' proposed developments would be. We think there is significant force in Mr Newton's view that they would have an overbearing effect on the Victoria Terrace cottages. There is a variety of types and heights of buildings around the Atlas junction, and both the 19 and 26 storey proposals would have a dominating effect on the junction, particular the cottages. While it was agreed that the 19-storey development would not, in townscape terms, be harmful from some of the more distant views, the same could not be said from the junction itself. The 26-storey proposal would, we think, be incongruous.
108. By contrast the appellant's proposal, having similar typology and massing as the Collective, adds coherence to the area and does not further diminish the townscape characteristics of the Victorian cottages.
109. Policy P8C1 to the Draft OPDC Plan and its supporting text indicates, specifically, that development of the reference land should be 8-10 storeys (paragraph 80 above). We do not agree with Ms Else that this was, in effect, an opening gambit by the policy document; the policy means what it says. We think Mr Newton is right in his view that the more appropriate scheme would be of a height comparable to Nash House.
110. Both residential schemes would, in our view, amount to over-development (even if they would be permitted by policy). Both are unattractive in terms of their density (far in excess of the levels suggested in the 2016 London Plan as being sustainable) and their lack of outdoor space for residents, and their distance from public open space. Mr West argued that residential development would bring vibrancy to the junction, but we feel that the accommodation proposed in both the respondents' schemes – and particular the taller version – would be a bleak place to live, in an overbearing building backing on to an industrial estate and without access to outdoor space. We were struck by Ms Else's assertion that unless local planning authorities were prepared to compromise their requirements, tall and high-density buildings would not be built. But the purpose of plan-led development is to enable such buildings to be developed in appropriate locations and with access to spaces that make them acceptable places to live. The difficulty with ad hoc permissions, such as the respondents would be seeking, is that the clash with policy is likely to lead to unattractive living quarters and to unacceptable outcomes for the surrounding industrial occupiers.
111. Accordingly, our answer to the second question is that development should be limited to 8-10 storeys.

Determination

112. It follows from the above that we allow the appeal. We cancel the s.17 certificate issued by Ealing on 27 July 2021 and substitute for it the certificate attached in the Appendix, the essence of which is for a mix of industrial uses with offices, together with retail and café/restaurant uses on the ground floor. Provision of uses which replicated the existing uses would be acceptable to be included in this mix. The development would not exceed the equivalent of 10 storeys in height; the form and height of any particular proposal that would be acceptable will depend on design considerations.

113. We are satisfied that the appellant's Illustrative Scheme would comply with the replacement certificate.
114. This Decision is final on all matters other than costs. The parties are invited to agree a short timetable for submissions on costs.

Judge Elizabeth Cooke

Peter D McCreagh FRICS FCI Arb

16 December 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Appendix

Certificate of Appropriate Alternative Development Under sections 17 and 18 of the Land Compensation Act 1961

It is hereby directed that the Certificate of Appropriate Alternative Development dated 27 July 2021 by the London Borough of Ealing in relation to land known as Rowan House, 9-31 Victoria Road, London, NW10 6DP is cancelled, and substituted by the following:

Description of development

A mixed use development comprising commercial (Use Class A3 and B1) at ground level, with workspace (within Use Class B1) at upper floor levels, to comply with Policy E5.C of the draft London Plan (December 2017). The development not to exceed 10 storeys in height.

General indication of conditions

1. Time limits
2. Approved plans
3. Materials

4. Demolition and Construction Method Plan
5. Sustainability / Energy generation / assessment against Building Regulations
6. Details of the dynamic thermal modelling
7. BREEAM Assessment / Rating
8. Post-construction energy monitoring
9. Sustainable Design and Construction strategy
10. Whole Lifecycle Carbon Assessment
11. Detailed Drainage Design and Assessment Form
12. Deliveries and servicing plan
13. Cycle storage details
14. Refuse and recycling storage details
15. Details of odour abatement equipment and extraction systems
16. Site investigation report and remediation strategy/scheme (as where necessary)
17. Air Quality and Dust Management Plan
18. Secure By Design accreditation

Planning obligations

Highways improvements / mitigation

Apprentice and Local Labour Scheme

Post construction energy monitoring

Public Realm Enhancement works