**IN THE HIGH COURT OF JUSTICE**
**CO/ref QUEEN'S BENCH DIVISION**
**PLANNING COURT**
**BETWEEN:**

**THE MAYOR OF LONDON/GREATER LONDON AUTHORITY**

**Claimant**

**and**

**SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT**

**Defendant**

**LONDON BOROUGH OF TOWER HAMLETS**

**First Interested Party**

**WESTFERRY DEVELOPMENTS LIMITED**

**Second Interested Party**

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**WESTFERRY PRINTWORKS**

**STATEMENT OF FACTS & GROUNDS**

**On behalf of the Mayor of London/Greater London Authority**

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*References to documents within C's bundle are in the form [**Document/paragraph**], to the Defendant's decision: **DL/paragraph** and to the Inspector's Report: **IR/paragraph**.*

List of essential documents for reading by the Court:

(i) This Statement of Facts & Grounds
(ii) The DL and **IR/404-616** (conclusions)
(iii) The Closing Submissions of the Claimant, First Interested Party and Second Interested Party

## A. INTRODUCTION

1. This is an application under section 288(4A) of the Town and Country Planning Act 1990 ("the TCPA") for permission to bring a challenge to the decision of the Secretary of State for Housing, Communities and Local Government ("the Defendant") by a decision letter dated 14 January 2020 ("the DL"), to grant planning permission in relation to development of this description:

"A comprehensive mixed use development comprising 1,524 residential units (Class C3), shops, offices, flexible workspaces, financial and professional services, restaurants and cafes, drinking establishments (Classes B1/A1/A2/A3/A4), community uses (Class D1), car and cycle basement parking, associated landscaping, new public realm and all other necessary enabling works in accordance with application reference PA/18/01877/A1" **[DL/48]**.

2. The application is made by the Mayor of London/Greater London Authority ("the GLA"). The GLA had been given Rule 6 status, was represented and called witnesses at the appeal inquiry, objecting to the grant of planning permission. As is detailed below, the GLA claims that the Defendant's decision was not within the powers of the Act, and that the requirement to give reasons has not been complied with.

## B. OVERVIEW

3. The Defendant's decision has caused serious concern to the GLA. It will be apparent from this Statement of Facts and Grounds why this is so.

4. This application is accompanied by the witness statement of Richard Green, who is a Town Planner and the Special Projects Manager at the GLA. The Court is respectfully asked to read his statement in full.

5. The claim concerns a decision of the Defendant to grant planning permission for a scheme which caused harm to heritage assets of the very highest importance and value, harm to the character and appearance of the area, was worse in various respects than a consented scheme which had been implemented, and although providing additional housing, did so without making an appropriate affordable housing contribution. Adding insult to injury, the Defendant accepted a s.106 planning obligation although he seems to acknowledge that it was unlikely to be effective in securing additional affordable housing over the lifetime of the development. The justification for the Defendant's decision, such as it is, involved attributing such substantial

weight to the provision of housing and affordable housing that it outweighed all the various harms. Weight is, of course, a matter for the decision maker, but the decision in this case was not a lawful one. The grounds below include a number of criticisms of the legality of the Defendant's approach. These fall under four headings: failure to apply section 38(6) of the Planning and Compulsory Purchase Act 2004 lawfully; treating a planning harm as a planning benefit; the decision was irrational; and there was a failure to provide lawful reasons.

6. Given the matters set out in this Statement of Facts and Grounds, this claim is undoubtedly a "significant" claim for the purposes of the Planning Court's procedural rules.

## C. THE FACTS

7. This factual summary gives an overview of the background in relation to the decision under challenge.

### Appeal site

8. The appeal site is the old Westferry Printworks on the Isle of Dogs [**IR/18**], its general location can be seen on the location plan included within the claim bundle. It was the site of the printing works for the Daily Telegraph and Daily Express. It is c.5.08 hectares, the buildings on it have been demolished. It is bounded by the Millwall Outer Dock, beyond which are predominantly residential areas in the southern part of the Isle of Dogs. The area to the north of the site is also predominantly residential [**IR/18**]. On the west of the site is Westferry Road, the main route around the Isle of Dogs. Greenwich View Place (an estate including data centres and commercial buildings) is to the east [**IR/19**].

9. The Isle of Dogs is within the administrative area of the First Interested Party ("the Council"). The Council's area is one in which there is an acute need for affordable housing **[DL/32]**.

10. At the time of the decision, which was on the 14 January 2020, the statutory development plan for the area included the Council's Core Strategy 2010 and its Managing Development Document 2013. Both were superseded by the Council's adoption of its Local Plan 2020 on 15 January 2020. The appeal site was allocated in the development plan **[IR/42]** and relied upon by the Council to deliver affordable housing. The then applicable policies included Core Strategy policy SP02, which provides that on sites of 10 units or more, subject to viability, there was a requirement for 35-50% affordable housing **[IR/407]**. London Plan policy 3.12 (**[IR/406]**) reads as follows:

> "The maximum reasonable amount of affordable housing should be sought when negotiating on individual private residential and mixed use schemes, having regard to:
> a. current and future requirements for affordable housing at local and regional levels identified in line with Policies 3.8, 3.10 and 3.11 and having particular regard to the guidance provided by the Mayor through the London Housing Strategy, supplementary guidance and the London Plan Annual Monitoring Report (see paragraph 3.68)
> b. affordable housing targets adopted in line with Policy 3.11,
> c. the need to encourage rather than restrain residential development (Policy 3.3),
> d. the need to promote mixed and balanced communities (Policy 3.9),
> e. the size and type of affordable housing needed in particular locations,
> f. the specific circumstances of individual sites,
> g. resources available to fund affordable housing, to maximise affordable housing output and the investment criteria set by the Mayor,
> h. the priority to be accorded to provision of affordable family housing in policies 3.8 and 3.11."

11. The appeal site, and the Isle of Dogs as a whole, lie within the Isle of Dogs & South Poplar Opportunity Area, designated in the London Plan as a location for significant growth. The Isle of Dogs & South Poplar Opportunity Area is relied upon to deliver a significant number of new homes and jobs, "optimising" the use of land **[IR/406]** whilst ensuring that development achieves proper place making. An Opportunity Area Planning Framework (supplementary planning guidance **[IR/28]**) was developed by GLA and

Transport for London officers in consultation with the Council, reflecting careful thinking about "good growth".

**Planning history**

12. The former printworks was constructed in the mid-1980s. Before the appeal application was made, a planning application for the redevelopment of the site was submitted in 2015 and was approved on 4 August 2016 by the Mayor of London. It was implemented in 2017 [**IR/21**]. That scheme included 722 residential units, of which 20% was to be provided as affordable housing [**IR/21**]. When considering the application, the Mayor/GLA judged it:
    a. To achieve good design, optimising the site's potential [GLA Stage 3 Report/2(iii)].
    b. To provide a policy compliant level of affordable housing, the "maximum reasonable amount" that could be provided on site bearing in mind its viability constraints [GLA Stage 3 Report /2(ii)].
    c. To provide a policy compliant mix of market housing [GLA Stage 3 Report /2(ii)].
    d. Not to harm heritage assets [GLA Stage 3 Report /2(iv)].

**Appeal proposals**

13. The appeal proposals included more than double the amount of housing within the consented scheme: 1,524 units [**IR/51**]. The main differences between the appeal scheme and consented scheme in terms of built form was the introduction of an additional 32 storey tower T5 in the north east corner of the site and a general increase in building heights across the scheme (each of the other 4 towers gained storeys) [**IR/52-53**]. An appeal was brought for non-determination. The Council resolved that it would have refused planning permission, for five reasons [**IR/3**], including poor design and heritage impact; conflict with affordable housing policy; and conflict with policy in relation to the proposed dwelling mix.

**The inquiry**

14. The appeal was called in for the Defendant's determination. An inspector was appointed to report to the Defendant and a public inquiry was held by him. It sat for 12 days: 11 – 22 August and 9 September 2019 [**IR/1**]. The Council was represented and called expert evidence in support of its reasons for refusal (so too the GLA, see above). The Council and GLA sought to avoid duplication and therefore concentrated their efforts on different aspects of the case [**GLA closing/4**]. As explained in its submissions, the GLA's participation in the appeal inquiry reflected its strategic responsibilities. It sought to resist the application of an out of date approach to the affordable housing offer, which incorporated unjustified assumptions. The GLA was concerned that if the Appellant's approach was accepted by the Secretary of State, it had the potential to undermine local planning authorities' ability to secure compliance with strategic affordable housing policies in London. The GLA's written evidence explained that as the affordable housing offer did not meet the policy requirement, it was contrary to policy and thus did not attract positive weight in the planning balance [**Mr Green's POE/ p.45 para. 9.2** (& pp.7-8 of his rebuttal evidence is consistent)]. The same point was pursued in cross examination (of the then appellant's planning witness Mr Goddard [**CG XX notes**]). In closing, the point was maintained, as follows:

> **"Is providing "any" affordable housing to be treated as a benefit?**
>
> 44. In short, no. The failure to provide policy compliant affordable housing is a planning "harm" (see ***R. v. London Borough of Tower Hamlets, ex parte Barratt*** [2000] WL 281291 at [27-30] per Sullivan J (as he then was)); and as such, providing non-policy compliant levels of affordable housing cannot also be beneficial at the same time. Thus, as put to CG in xx (by the GLA), and confirmed by RG in x-in-c, it is simply not correct to say that even if the SofS were to find that the appeal proposal has failed to provide the maximum reasonable amount of affordable housing, it is nonetheless beneficial that it provides some additional units over and above those provided in the consented scheme."

15. The GLA sought, in addition, to protect the significance of the iconic Tower Bridge; and to ensuring proper place-making in the South Poplar and Isle of Dogs Opportunity Area.

**The Inspector's conclusions**

16. Relevant to the grounds of claim (as to which, see below), in summary, the Inspector reached the following conclusions:

    a. The scheme would be harmful to the character and appearance of the area **[IR/436-438]**, because:

        i. It would represent a marked step up in height, mass and scale at the southern end of the southern end of the Millwall Inner Dock Tall Building Zone. It would not step down, as required by the Core Strategy, nor would it support the central emphasis of the Canary Wharf cluster **[IR/436]**.

        ii. It would fail to create a satisfactory transition in scale to the adjoining residential areas to the north of the site and to the south of Millwall outer Dock **[IR/436]**.

        iii. It would not be well related to the street scene of Westferry Road **[IR/436]**.

        iv. It would not be of an appropriate scale, height, mass, bulk and form and would not enhance the local context **[IR/437]**.

    b. The scheme would cause harm to heritage assets of the highest national and international value **[IR/472]**, because:

        i. The proposal would fail to preserve the setting of the Old Royal Naval College because it would distract from the ability to appreciate the listed building in certain views from Greenwich Park. The resulting harm to the significance of the Grade I listed building would be less than substantial **[IR/477, 451, 454, 455]**.

        ii. As the Old Royal Naval College is an important component of the Maritime Greenwich World Heritage Site, the harm to its setting also represented harm to the setting of the World Heritage Site and to attribute 1 of its Outstanding Universal Value (the architectural ensemble that includes the Old Royal Naval College) **[IR/447, 456]**. The harm resulted in conflict with development plan policy **[IR/472]** and emerging policy **[IR/473]**.

        iii. The appeal scheme would be "readily distinguishable" in the setting of Tower Bridge, as seen from London Bridge (that had

been accepted by the Second Interested Party's expert witnesses) [**IR/463**]. The appeal proposal would cause harm to that setting by harming the ability to appreciate the view of Tower Bridge from locations around the centre of London Bridge through competition with and distraction from the listed building [**IR/464**]. The consented scheme would have significantly less impact than the appeal scheme because the buildings would not be so tall [**IR/465**]. Tower Bridge is a striking structure which draws the eye. Even so, the height and bulk of the appeal scheme would be such that it would have a harmful effect for much of the time [**IR/466**]. The harmful effect would be particularly apparent from locations to the north of the centre of London Bridge where the distinctive profile of the two towers, the upper walkway and the deck of Tower Bridge can be seen against a backdrop of clear sky and a distant wooded ridge. This was a particularly important viewpoint in terms of the ability to experience and understand the listed building in its physical and historical context. It was the only viewpoint in which the asset could be experienced in that way [**IR/467**]. Overall, the proposal would fail to preserve the setting of Tower Bridge because it would distract from the ability to appreciate the listed building in views from London Bridge. The resulting harm to significance was less than substantial [**IR/469**] and brought the proposal into conflict with development plan policy [**IR/472**] and emerging policy [**IR/473**].

c. In a very detailed section of the IR [**502-532**], the Inspector considered whether the scheme's affordable housing offer constituted the maximum reasonable amount of affordable housing that could be provided. That necessitated consideration of contested viability evidence. In relation to every disputed matter, the Inspector rejected the evidence of the Appellant's viability witness Mr Fourt, and accepted that of the GLA's witness Ms Seymour [**IR/512-528, 531-532**]. Overall, the Inspector concluded that it was likely that the scheme could provide more affordable housing and that the offer of 21% did not therefore

represent the maximum reasonable amount **[IR/532]**. That was contrary to then extant development plan policy and to emerging policy **[IR/548]**. That overall conclusion was informed by the following:

i. Mr Fourt took account of the site value fixed in the consented scheme s.106 planning obligation, of £45m, in setting his Benchmark Land Value of £45m **[IR/512, 513]**. The Inspector rejected that approach, noting that the £45m value was established at a time when the 2014 National Planning Practice Guidance took a different approach to establishing a Benchmark Land Value. The national guidance now requires comparable evidence to be based on developments which are fully compliant with emerging or up to date policies including affordable housing requirements at the relevant level set out in the plan **[IR/514]**.

ii. The market evidence which was also relied upon by Mr Fourt in setting his £45m Benchmark Land Value had not been adjusted in a transparent way **[IR/516]**. The Inspector regarded Mr Fourt's approach to market evidence to be flawed **[IR/517]** and said that very little weight should be attached to it **[IR/517]**, or to any of the factors relied upon by Mr Fourt in adopting a Benchmark Land Value than his residual valuation of the site's Alternative Use Value **[IR/518]**.

iii. Conclusions (i) and (ii) above reflected the GLA's submissions that the then appellant's case relied upon market evidence which suffered the same fault of "circularity" as was deprecated in the ***Parkhurst*** case (see the GLA's submissions at **[DL/333-337]**).

iv. As to that Alternative Use Value, again, the Inspector rejected Mr Fourt's evidence. On each of the disputed inputs to the AUV scheme, which included professional fees, the Inspector accepted the evidence of Ms Seymour (capital value of the affordable rent units **[IR/520]**; revenue from private residential ground rents **[IR/521]**; and disputed cost inputs including professional fees **[IR/522]**).

v. As to the disputed inputs to the assessment of the appeal scheme, the Inspector's conclusions were consistent with his conclusions in relation to the disputed inputs to the AUV scheme. Again, he rejected Mr Fourt's evidence [IR/524] and rejected the criticisms made of the evidence of Ms Seymour, in fact, the Inspector felt that various changes she had made to her assessment when presented with substantial additional information by the then appellant, "adds to the credibility of her evidence rather than diminishing it" **[IR/525]**.

vi. Overall, the evidence of the GLA was to be preferred to that of the then appellant **[IR/531]**. The GLA's assessment of the appeal scheme concluded that with 21% affordable housing, it would achieve an internal rate of return of 20.83%, well above the target rate of 14%. The Inspector concluded that on the balance of the available evidence, it was likely that the scheme could provide more affordable housing and that the offer of 21% did not therefore represent the maximum reasonable amount **[IR/532]**.

d. The GLA had submitted that the s.106 planning obligation did not contain effective review mechanisms. For that reason, it was argued that the appeal proposal was inconsistent with the Mayor's Affordable Housing and Viability SPG, which aims to secure the maximum reasonable affordable housing over the lifetime of the project by ensuring that if there is an improvement in viability, this contributes to the delivery of the maximum reasonable amount of affordable housing **[GLA closing/101]**. The Inspector agreed, for these reasons:

i. Whilst the obligation (unilateral undertaking "UU") made provision for an early stage review, the trigger it used (which could be varied) did not comply with the Mayor's SPG, reducing the chances of an early review taking place. That made it "unlikely that an early stage review would be triggered" **[IR/534]**.

ii. Even if an early review was triggered, it would be subject to principles which required the review to adopt inputs, such a site value (the s106 required £45m to be used as the site value, see

the s.106 Schedule 3 Part 2 at (5)) and similarly, other inputs such as professional fees at levels which the Inspector had found not to be justified [**IR/535**]. The Inspector found that Part 2 of the UU would "further reduce the prospect of the early review mechanism delivering any additional affordable housing [**IR/535**].

iii. The Inspector said that a late stage review was justified in this case [**IR/537**], but the late stage review provided for in the UU "would not be very effective" because "it would incorporate inputs that (in my view) are not justified [**IR/537**]". The site value for the purpose of the review was fixed at £45m (which the Inspector had rejected [**IR/518**]) and the professional fees were 12% of construction costs (the Inspector did not think there was justification for more than 10%, accepting Ms Seymour's evidence [**IR/522**]).

iv. In a section entitled "The Unilateral Undertaking", the Inspector further observed that "the early and late stage reviews would offer only a limited prospect of delivering any further affordable housing" [**IR/564**].

e. The scheme did not provide a policy compliant mix of dwelling sizes, with an overemphasis on two bedroom units and insufficient family homes, which the Council argued should reduce the weight that might otherwise be attached to the delivery of market housing in the planning balance [**IR/543**]. The Inspector found that the appeal scheme "would not maximise the provision of family homes as required by the draft Tower Hamlets Local Plan" and agreed with the Council that "this would be a significant disadvantage of the scheme. The benefit to be attributed to the delivery of market housing in the overall planning balance should reflect that conclusion" [**IR/547**].

f. In terms of open space, the Inspector concluded that the appeal scheme complied with development plan policy, the draft Opportunity Area Planning Framework and emerging plan policy [**IR/562**]. He went on to compare the consented scheme and the appeal scheme and concluded that the park proposed in the appeal scheme would be

smaller than that of the consented scheme and that the quality of the space and its recreational value would be reduced [**IR/559**]. Although the appeal scheme was beneficial, the consented scheme offered greater benefits in relation to the new public open spaces, dockside promenade and improvements to permeability and legibility. He said that the urban design quality of the appeal scheme's space would not be as high and its recreational value would be lower than that of the consented scheme [**IR/563**].

g. The Inspector referred to the case of ***Barratt***, which had been relied upon by the GLA [**IR/584**] (and see above). He indicated that he viewed the increase in the number of affordable units between the consented and appeal schemes as "beneficial" [**IR/584**], but acknowledged that "this is a large allocated site and it is therefore important to ensure that it makes an appropriate contribution to meeting housing needs. The appeal scheme would not do that." [**IR/584**]

h. The Inspector attributed "only moderate weight" in the planning balance to the delivery of housing, including affordable housing [**IR/585**]. Later, he made clear that this "moderate weight" included the benefit of employment during the construction period [**IR/593**].

i. When considering the application of the NPPF in the context of less than substantial heritage harm, the Inspector said that "in this case there is a fallback position which would deliver many of the public benefits that the appeal scheme would provide, without the harmful effects on the heritage assets" [**IR/596**].

j. The benefits arising from the appeal proposals were "not sufficient to outweigh the [heritage] harm" [**IR/598**].

k. The Inspector's overall assessment was that "the conflicts with the development plan that I have identified are of such significance that the proposal should be regarded as being in conflict with the development plan as a whole". The other material considerations he referred to included the provision of additional housing (including affordable housing) but these factors did not outweigh the conflict with the development plan [**IR/613-614**].

**The Defendant's conclusions**

17. Relevant to the grounds of claim, in summary, the Defendant reached the following conclusions:

    a. The Defendant accepted the Inspector's conclusions about the harm to the character and appearance of the area **[DL/18-19]**, and that the proposals conflicted with extant and emerging development plan policy aimed at securing good design [**DL/19**]. However, the Defendant seems to have concluded that particular aspects of the scheme served to mitigate that harm [**DL/20**]. Overall, the harm to the character and appearance of the area was attributed moderate weight in the planning balance (weighing against the grant of planning permission) **[DL/20]**.

    b. The Defendant accepted the Inspector's conclusions in relation to the impact of the proposals on the setting of the Old Royal Naval College and Greenwich World Heritage site, attributing considerable importance and weight to the harm to the former (without providing a specific conclusion in respect of the latter) [**DL/23**]. As the GLA did not lead evidence in relation to the World Heritage Site, this is not a matter considered further here.

    c. The Defendant accepted the Inspector's conclusions in relation to the impact of the proposal on the setting of Tower Bridge, giving considerable importance and weight to that harm [**DL/26-27**].

    d. The Defendant accepted that there is an "acute need for affordable housing in Tower Hamlets" [**DL/32**].

    e. The Defendant accepted the Inspector's conclusions that the scheme did not propose the maximum reasonable amount of affordable housing [**DL/32**], thereby accepting the GLA's viability case; and concluded that the scheme's failure in this regard was contrary to policy [**DL/32**]. He decided the matter on an assumed basis, that the scheme would provide 14% less affordable housing than it could viably have delivered [**DL/32**].

    f. The Defendant seems to have discounted the possibility that another scheme could have come forward on a policy compliant basis, saying, "there is no evidence before him of any other scheme which might

come forward or what level of affordable housing might be delivered by any such scheme" [**DL/32, 43**].

g. The Defendant omitted to make any reference to the early stage review mechanism within the s.106 planning obligation, despite the fact that this was an important issue for the GLA, and the Inspector had concluded that the early stage review mechanism was unlikely to be triggered (and if it was, adopted inputs which the Inspector found to be unjustified, see above).

h. In respect of the late stage review mechanism in the s.106, the Defendant seems to have accepted the Inspector's conclusions, but did not refer to the fact that the review mechanism would be based upon inputs rejected by the Inspector, saying only that "this would be of some benefit although its effect would be limited" [**DL/32**]. The Defendant said nothing about the possibility of issuing a "minded-to" decision letter, seeking a revised s.106 planning obligation, although that was a possibility raised in the then appellant's closing submissions [**IR/181**].

i. The Defendant agreed with the Inspector that the proposal would not provide the balance of market housing types sought by extant and emerging policy, nor would it maximise the provision of family homes [**DL/33**].

j. The Defendant omitted to refer to IR/584 in which the Inspector considered the GLA's reliance on ***Barratt***.

k. In **DL/34**, the Defendant attributed "significant weight" to the delivery of additional market housing compared to the consented scheme, and "significant weight" to the delivery of additional affordable housing, overall, "substantial weight" was attributed to the benefit arising from the housing component of the scheme.

l. The Defendant attributed moderate weight to employment during the construction period and operational phase [**DL/35**].

m. The Defendant agreed with the Inspector's conclusions about the provision of public open space and did not regard that factor as weighing in favour of the proposal [**DL/36**].

n. The Defendant concluded that the proposal was in conflict with an extensive range of development plan policies, such that it was "not in accordance with the development plan overall" [**DL/41**]. The DL then says this, "he has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan" [**DL/41**].

o. The Defendant said that the consented scheme was a realistic fallback position and "as such, his assessment of the planning balance is carried out by comparison with the consented scheme" [**DL/42**].

p. Carrying out an "overall" balancing exercise, the Defendant said, "even according considerable importance and weight to the identified harm to the settings of the two listed buildings, the identified harms when taken together are outweighed by the benefits of the proposal in terms of additional housing units (including affordable housing units) and additional employment during construction to the extent that there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan" [**DL/47**].

## D. LEGAL AND POLICY FRAMEWORK

18. The GLA's claim relies upon familiar principles, which are set out here to assist the court.

### Planning applications and appeals generally

19. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA") provides:

> "In dealing with an application for planning permission or permission in principle the authority shall have regard to -
> (a) the provisions of the development plan, so far as material to the application,
> (aza) a post-examination draft neighbourhood development plan, so far as material to the application,
> (aa) any considerations relating to the use of the Welsh language, so far as material to the application;
> (b) any local finance considerations, so far as material to the application, and
> (c) any other material considerations."

20. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") goes further than s.70, containing a presumption in favour of the development plan:

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

22. Where a local planning authority refuses an application for planning permission, there is a right of appeal under section 78 of the TCPA. By section 79(4) of the TCPA the statutory tests are the same as those applied by the local planning authority.

**Listed buildings**

23. In the heritage context, there are specific duties imposed by the Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBCAA"). Section 66(1) of that Act provides that:

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

24. The section 66(1) duty was considered in detail by the Court of Appeal in ***East Northamptonshire DC v SSCLG*** [2015] 1 WLR 45. In that case, Sullivan LJ held at paragraph 24 that:

> "Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise."

25. In ***R. (Forge Field Society) v Sevenoaks DC*** [2014] EWHC 1895 (Admin) Lindblom J (as he then was) emphasised at paragraph 49 that:

> "... a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful

enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

**Section 288: general principles**

26. Section 288 of the TCPA makes provision for proceedings questioning the validity of certain orders, decisions and directions. By sections 288(4) and 284(1)(f) and (3)(b) a decision on appeal under section 78 may be challenged under the section.

27. By section 288(4A) an application under section 288 may not be made without the leave of the High Court.

28. By section 288(1)(b) the grounds of a section 288 challenge to an action such as a decision on appeal under section 78 are: (i) that the action is not within the powers of this Act; or (ii) that any of the relevant requirements have not been complied with in relation to that action.

29. "Relevant requirements" is defined under section 288(9) as follows, so far as material:

> "In this section...
> "the relevant requirements"-
> (a) in relation to any order or action to which this section applies, means any requirements of this Act or of the Tribunals and Inquiries Act 1992, or of any order, regulations or rules made under either of those Acts, which are applicable to that order or action;
> (b) ..."

30. The powers of the court on a section 288 challenge are governed by section 288(4C) and (5). Subsection (5) provides, so far as material:

> "(5) On any application under this section the High Court—
> (a) ...
> (b) if satisfied that any such order or action is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

31. Challenges under section 288 of the TCPA are akin to a judicial review and may be brought on standard public law grounds: ***Ashbridge Investments v Minister of Housing and Local Government*** [1965] 1 WLR 1320 at 1326.

32. In the context of section 288 TCPA challenges in ***Bloor Homes East Midlands Ltd v SSCLG*** [2017] PTSR 1283 Mr Justice Lindblom (as he then was) summarised the relevant principles as follows (at [19]):

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in ***Seddon Properties v Secretary of State for the Environment*** (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in ***South Bucks District Council and another v Porter (No. 2)*** [2004] 1 W.L.R. 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" [emphasis added] (see the speech of Lord Hoffmann in ***Tesco Stores Limited v Secretary of State for the Environment*** [1995] 1 W.L.R. 759, at p.780F-H). An application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in ***Newsmith v Secretary of State for [Environment, Transport and the Regions]*** [2001] EWHC Admin 74, at paragraph 6).
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper

interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in ***Tesco Stores v Dundee City Council*** [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, ***South Somerset District Council v The Secretary of State for the Environment*** (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in ***Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government*** [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. ***Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government*** [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in ***North Wiltshire District Council v Secretary of State for the Environment*** [1992] 65 P. & C.R. 137, at p.145)."

33. The use of the word "may" in section 288(5)(b) of the TCPA confers a discretion whether to quash. However, where a decision-maker has erred, the Court should only refuse relief if the decision would inevitably have been the same had the error not been made: see ***Forest of Dean District Council v SSCLG*** [2016] EWHC 2429 (Admin) at [19], ***Simplex GE Holdings Ltd v Secretary of State for the Environment*** (1989) 57 P&CR 306 per Purchas LJ at pp.324-327, and ***Goodman Logistics Developments (UK) Ltd v SSCLG*** [2017] EWHC 947 (Admin) at [95]-[108].

**Specific principles relevant to the grounds**

34. Statutory presumption in favour of the development plan; and "other" material considerations. In ***Edinburgh City Council v Secretary of State for Scotland*** [1997] 1 W.L.R. 1447, the House of Lords considered the effect of the Scottish equivalent to s.54A (s.18A of the Town and Country Planning (Scotland) Act 1972, enacted by s.58 of the Planning and Compensation Act 1991; s.54A the forerunner provision to section 38(6)). Lord Clyde held from pp.1459D-G that the presumption leaves the assessment of facts and the weighing of considerations in the hand of the decision-maker, subject to certain constraints:

> "In the practical application of [section 38(6)] it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the **other material considerations** which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse." (Emphasis added.)

35. The failure to provide policy compliant affordable housing is a planning "harm" in that the development of the site without making an appropriate contribution to meeting affordable housing needs has an adverse impact on the local planning authority's ability to meet those needs (see ***R. v. London Borough***

***of Tower Hamlets, ex parte Barratt*** [2000] WL 281291 at [28-30] per Sullivan J (as he then was)).

36. Reasonableness/rationality: if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere, per Lord Greene M.R. ***Associated Provincial Picture Houses Ltd v Wednesbury Corpn*** [1948] 1 KB 223.

37. Irrationality threshold. An applicant alleging an Inspector has reached a ***Wednesbury*** unreasonable conclusion on matters of planning judgment faces a particularly daunting task: ***R. (Newsmith Stainless Ltd.) v. Secretary of State for the Environment, Transport and the Regions*** [2001] EWHC Admin 74 (at paragraphs 6 to 8).

38. In relation to the duty to give reasons, Lord Brown summarised the content of the duty at paragraph 36 of ***South Bucks v Porter (No 2)*** (above) as follows:

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

39. A new and improved scheme? There may well be cases where the degree of harm which would result from a proposal is such that it is decided that the benefits which the proposal would bring must await a new scheme with, for example, an improved design. The decision-maker may properly and lawfully reach that conclusion in appropriate cases. Whether a development falls into that category is a matter of planning judgment for the decision maker, only to be impugned on the usual ***Wednesbury*** grounds: ***MR Dean & Sons (Edgware) Ltd v First Secretary of State*** [2008] J.P.L. 973, per Keene LJ (at [37]).

40. The issue of a "minded to" decision. The Defendant has a discretion as to whether to issue a "minded to" decision: see ***Sainsbury's Supermarkets Limited v Secretary of State for Housing, Communities and Local Government, London Borough of Tower Hamlets*** [2020] EWHC 270 (Admin) at [93], citing, ***Eagle Star Insurance Co v Secretary of State for the Environment*** [1992] JPL 434 , per Sir Graham Eyre QC sitting as a Deputy Judge of the High Court, at 436 – 438, 441.

## E. GROUNDS OF CLAIM

### Ground 1: failure to apply section 38(6) lawfully

41. The Defendant failed to apply section 38(6) of the Planning and Compulsory Purchase Act 2004 in a lawful manner, in three respects:
    a. The Defendant found that the affordable housing offer was insufficient and thus contrary to policy **[DL/32]**. That conclusion was founded upon the Inspector's conclusions, reached having considered contested viability evidence. The Defendant then attributed significant weight to the same affordable housing offer when carrying out the planning balance **[DL/34, 43, 45]**. The Defendant's approach, in counting affordable housing on the benefits side of the planning balance, when it was an aspect of the proposal which was contrary to policy and was a crucial factor in the conclusion that the scheme was in overall conflict

with the development plan [**DL/41**], constituted an unlawful application of the statutory test.

b. In attributing the significant weight he did to the affordable housing offer, the Defendant treated the affordable housing offer as if it was an "other material consideration" (per the statutory formulation and ***Edinburgh City Council*** ), capable of outweighing conflict with the development plan, but it was not. It was a matter which had led to the proposal being found not to be in accordance with the development plan and was not a different material consideration at all.

c. The Defendant found that the market housing was delivered in a manner which harmed the character and appearance of the area, contrary to policy [**DL/19-20**], carrying moderate negative weight in the planning balance. He found that it would not provide the balance of market housing types sought by development plan policy and emerging policy, nor would it maximise the provision of family housing as required by the emerging allocation policy [**DL/33**]. Relying on the need arguments advanced by the then appellant [**IR191-194**], the Defendant attributed significant weight to the provision of additional housing by the proposal [**DL/34**]. Taken together with the non-policy compliant affordable housing offer, and the benefits of construction jobs, those matters outweighed the harm to heritage assets and other harm [**DL/45**]. The effect of the Defendant's decision to attribute substantial weight to the housing, including affordable housing, was to reverse the outcome of the planning balance (having broadly accepted the harms found by the Inspector). The decision to do so robs the provisions of the development plan of real force. In this case, there was overall conflict with the development plan, including in important respects: a failure to preserve the setting of a Grade I listed building and harm to a World Heritage Site [**DL/41, 45**]. If that conflict can be outweighed by the provision of some additional housing including affordable housing, which is itself in conflict with policy, then that materially and unlawfully dilutes the statutory presumption in favour of the development plan.

**Ground 2: treating a planning harm as a planning benefit**

42. Further, or alternatively, the Defendant's decision is contrary to ***R. v. London Borough of Tower Hamlets, ex parte Barratt*** [2000] WL 281291 at [28-30] per Sullivan J (as he then was). In that case, a failure to make an appropriate housing contribution was treated as having an adverse impact on the Borough's ability to meet its affordable housing needs and was therefore harmful. In this case, the Defendant has treated an affordable housing offer which fails to make an appropriate affordable housing contribution in line with policy as a significant benefit in the planning balance. The Defendant's approach is inconsistent with ***Barratt*** and unlawful.

43. Moreover, in both a national context (in the NPPF and NPPG) and in London, there have been strenuous efforts to ensure that affordable housing requirements are not thwarted by the application of market value based valuations, which import circularity into the valuation process (see above re the Inspector's conclusions on Mr Fourt's market based evidence). The Defendant's decision sets those efforts at nought, because if additional affordable housing can be a significant planning benefit, even if it is not the maximum reasonable amount a scheme can viably deliver, there is little purpose served in interrogating whether the maximum reasonable amount is proposed. See Mr Green's witness statement on this: it is a matter of real concern to the GLA.

**Ground 3: the decision was irrational**

44. Further, or alternatively, the Defendant's decision was irrational. The GLA acknowledges the high threshold (see above), but contends that it is surmounted in this case. In attributing such substantial weight to the provision of non-policy-compliant housing, including affordable housing that taken together with the benefit of construction employment, it outweighed the harm to heritage assets of the highest importance and value; and outweighed harm to the character and appearance of the area, in circumstances in which there was a fall-back scheme that delivered many of the benefits but none of the

disadvantages, the Defendant's conclusion was so unreasonable that no reasonable decision maker could ever have come to it.

**Ground 4: failure to provide reasons**

45. Further, or alternatively, the Defendant has failed to provide reasons to explain the following:

    a. Why he treated the provision of non-policy compliant affordable housing as a benefit within the planning balance, contrary to the approach taken in ***Barratt***. In that case, there was a need for affordable housing. That remains the position in Tower Hamlets (see above). In such circumstances, the failure to make an appropriate affordable housing contribution was regarded in ***Barratt*** as giving rise to an adverse impact on the Borough's ability to meet affordable housing needs. The GLA does not understand why a different conclusion would be reached in this case.

    b. Why the Defendant disagreed with the Inspector's conclusion that only moderate weight should be attributed to the delivery of housing in the planning balance **[IR/585]**. The Defendant attributed significant weight to that factor, but did not provide lawful reasons for his conclusion.

    c. Why the Defendant dismissed the possibility of a scheme which made an appropriate affordable housing contribution coming forward if the appeal proposal was refused planning permission, saying only that there was "no evidence... of any other scheme which might come forward" **[DL/43]**. The DL was based upon a conclusion that the appeal scheme itself was capable of delivering policy compliant affordable housing viably **[DL/32]**. In the circumstances, the GLA is unable to understand why a better scheme in this regard was not a readily foreseeable outcome if the appeal proposal was dismissed on that ground.

    d. Why, in circumstances in which the Defendant seems to have accepted that the provisions within the unilateral undertaking offered under section 106 of the Town and Country Planning Act 1990 were unlikely

to secure the maximum reasonable amount of affordable housing over the lifetime of the development, the Defendant concluded that it was inappropriate to exercise his discretion to issue a "minded to grant" decision, subject to the provision of a unilateral undertaking that would have been effective. That was a course which had been suggested to him [**IR/181**].

## F. DISPOSAL

46. In the light of the above, permission should be granted on all grounds, the DL should be quashed and the matter remitted back to the Defendant for a further inquiry and decision.

**Melissa Murphy**

**19 February 2020**

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