Neutral Citation Number: [2022] EWHC 1774 (Admin)

Case No: CO/3328/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

11th July 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of HELEN KINSEY)	**Claimant**
- and -	
LONDON BOROUGH OF LEWISHAM	**Defendant**
-and-	
CITY OF LONDON CORPORATION	**Interested Party**
(No.2)	

- -
- -

Richard Harwood QC (instructed by Hodge Jones & Allen LLP) for the **Claimant**
Saira Kabir Sheikh QC and **Charles Merrett** (instructed by Womble Bond Dickinson (UK) LLP) for the **Defendant**
Sasha White QC and **Matthew Henderson (**instructed by City Solicitor) for the **Interested Party**

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Hearing date: 9/6/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Part 1. Introduction

1. This judicial review case is a sequel. On 18 May 2021 Lang J gave judgment [2021] EWHC 1286 (Admin) (the "First Judgment") in favour of the Claimant. She quashed (see First Judgment §158) a decision reached by the Planning Committee (the "Committee") of the Defendant (the "Council"). That decision had granted an application for planning permission made by the Interested Party (the "IP"). The matter was 'remitted' to the Council by Lang J, so that the application for planning permission could be considered again, in accordance with the law. At a meeting on 29 June 2021 the Committee resolved to grant the IP's application for planning permission. Planning permission was formally granted on 18 August 2021. The questions in this sequel case are about whether the Defendant has acted lawfully in granting planning permission, the second time around. Following an exchange of pre-action correspondence (on 17 and 27 September 2021) the Claimant (on 29 September 2021) commenced this claim. The pleaded claim impugned the decision granting planning permission on three grounds. By an application for permission to amend (dated 1 June 2022), the Claimant seeks to add a fourth ground. On 10 February 2022 Sir Duncan Ouseley directed a "rolled up" hearing. That hearing took place before me in-person, in open court. Prior to the hearing, I granted an application made by the Claimant's representatives – unopposed – for a hybrid hearing to allow members of the public with an interest in the proceedings to observe the hearing remotely. The Court had evidence that an active member of the Sydenham Hill Residents Steering Group ("RSG") could not – in light of a severe medical condition and the pandemic – attend the hearing, as they wished to do, unless able to attend remotely. That was a good reason for remote-observation arrangements which, since they were to be in place, I extended to others who wished to observe remotely. At and for the hearing, I was assisted by the industry and skill of Counsel for the Claimant (Mr Harwood QC) for the Council (Ms Kabir Sheikh QC and Mr Merrett) and for the IP (Mr White QC and Mr Henderson), and by all other members of their teams, to whom I express the Court's appreciation.

Background

2. I gratefully take this "Background" section – almost in its entirety – from passages in the First Judgment (especially §§1-3, 13, 16, 19, 22-33). The grant of planning permission is for the demolition of Mais House and Otto Close garages, and for redevelopment to provide 110 residential units in a part four, six and seven storey building and a part two and three storey terrace building, and associated development, at Sydenham Hill Estate, London SE26 ("the Site"). The Council is the local planning authority for the Site. The IP is the owner of the land and the applicant for planning permission. The Claimant lives with her family in a rented flat in Otto Close which is particularly affected by the proposed development. She is a member of the RSG established by the IP in December 2018 to ensure meaningful resident consultation and effective participation in all aspects of appraising and implementing the proposals for the Site. The Site is 1.35 ha in size, on the Sydenham Hill Estate.

3. The land on which the Sydenham Hill Estate stands is on the eastern side of Sydenham Hill. It was granted to the IP in 1819. Part of the land was appropriated to the IP's local authority housing function in 1953, under statutory powers. Sydenham Hill Estate is 2.67 ha in size. It comprises Lammas Green, Mais House, Otto Close, a Community

Hall, and a hardstanding ball court/play area. It is set in landscaped wooded grounds, on a steep slope. Lammas Green was constructed between 1955 and 1957. It comprises three terraces set around a village green, with views of the North Downs, and two blocks of flats to the west and north which enclose the green and serve as a buffer to the road. In 1998 it was listed Grade II, as being of special architectural and historic interest. The Sydenham Hill Community Hall and Retaining Walls were also listed Grade II at that time. Mais House was constructed in 1973 and is a part two, three and four storey block. It comprises 63 sheltered housing units for older people. A Sheltered Housing Review carried out by the IP between 2014 and 2016 indicated that the limited accommodation offered at Mais House did not meet modern requirements and was unpopular with the older people for whom it was designed. The option of refurbishing Mais House was considered to be uneconomic. The IP decided to close Mais House in 2016, with a view to re-development, and re-housed all residents. The block was empty by June 2018. Otto Close had been constructed in 1976. It comprises 30 two storey residential units, which are in use. Nearby there are 38 single storey residential garages set in 7 rows, of which only about one third are in use. Lammas Green and Mais House are located within the Sydenham Hill/Mount Gardens Conservation Area ("the CA"). Most of the dwellings and garages in Otto Close fall outside the CA. Thus, the western uppermost part of the Site is within the CA. Lammas Green is an Area of Special Character, characterised by large detached houses with gardens. There are many mature trees which provide a visual and historic link with Sydenham Hill Wood, a large and important remnant of the former Great North Wood which formerly stretched across this part of south London. To the west is Dulwich Wood which is designated as Metropolitan Open Land and a Local Nature Reserve ("LNR") of Metropolitan Importance.

4. The IP had undertaken wide pre-application consultation with the Greater London Authority, the Council's Design Review Panel ("DRP"), local residents, residents' associations, amenity groups and elected representatives. Following discussions with the Council, the IP had received pre-application advice from the planning officer, Mr David Robinson, who is a Principal Planning Officer in the Council. The DRP had considered a series of draft proposals, and made critical comments on them. As a result of the responses which it received, the IP made a number of amendments to its pre-application proposal. The IP had applied for planning permission on 3 January 2020. In the public consultation, some 209 objections were recorded as received. They included representations from local residents and residents' associations, the Forest Hill Society, the Sydenham Society, the Council for the Preservation of Rural England (CPRE) London, the Sydenham Hill Ridge Forum, and the Twentieth Century Society ("TCS"). The number of objections had met the threshold in the Council's Statement of Community Involvement ("SCI") for a local meeting to be held. It had taken place on 27 August 2020, virtually (because of the pandemic). On 28 January 2020, the Council's Senior Conservation Officer (the "SCO"), Ms Joanna Ecclestone, had sent to the planning officer a document headed "Conservation comments" ("the SCO Document": Apx 1 to the First Judgment). It described the CA and the listed buildings, and non-designated heritage assets, and the impact of the proposal. The SCO's formal recommendation stated:

> ***I have objections due to the harm caused to the CA, the setting of listed buildings and the setting of locally listed buildings, chiefly caused by the height and position on site of the proposed buildings. I do not consider that the harm is adequately justified by the aim for highly dense scheme or its viability.***

5. An Officer Report ("OR"), drafted by the planning officer, had summarised the application and the consultation responses and recommended the grant of planning permission. The OR had contained these conclusionary paragraphs:

> ***641 The Proposal would provide a substantial quantum of socially rented residential units to help meet the Borough's housing needs. This is a significant benefit to be weighed in the planning balance as the proposal will assist in addressing its housing need which is set to increase substantially under the draft London Plan housing targets.***
>
> ***642 The proposals reflect the principles of the highest quality design, ensuring an exemplary built environment for visitors and residents. The impacts upon heritage assets in the vicinity of the application site have been fully considered and it is concluded that less than substantial harm will be caused. The officer assessment has also identified some impacts upon occupants of neighbouring residential properties in relation to loss of light and overshadowing. However, on balance the benefits and planning merits of the scheme are considered to substantially outweigh any harm identified.***
>
> ***643 The proposed development would also result in the delivery of significant public realm enhancements, specifically through the delivery of the communal amenity space. Improvements to the existing highways network would also be secured by legal agreement.***
>
> ***644 In conclusion, the proposed development is considered to be in accordance with the relevant national planning policy guidance and development plan policies. The proposals are wholly sustainable development in accordance with the NPPF and will make an important contribution to the borough, in respect of housing supply and importantly the wider borough community. The proposals are therefore considered to be both appropriate and beneficial. Therefore, on balance, any harm arising from the proposed development is considered to be significantly outweighed by the benefits listed above.***

6. On 27 August 2020, the Planning Committee had resolved to grant planning permission, subject to conditions. On 20 November 2020, the Council had granted the IP planning permission in the following terms:

> ***Demolition of existing buildings at Mais House and Otto Close garages SE26, and redevelopment to provide a part four, six and seven storey building and a part two and three storey terrace building providing a total of 110 residential units (use class C3), community room and estate office; together with alterations to the existing ball court; associated works to vehicular and pedestrian access from Sydenham Hill, Lammas Green and Kirkdale, provision of car and cycle parking, refuse storage and landscaping including amenity space and play area.***

Under the grant of planning permission, all of the residential units were to be affordable housing, let by the IP as social rented housing to persons on the waiting lists of both the Council and the IP. The 110 new larger units will comprise 47 x 1 bedroom units, 41 x 2 bedroom units, 11 x 3 bedroom units, and 11 x 4 bedroom units.

7. When the Committee had considered the application for planning permission at its meeting on 27 August 2020, certain documents had been listed as "restricted enclosure" and were not made available to members of the public. That was on grounds of their being information relating to the financial or business affairs of any particular person. These documents had comprised the Officer's presentation on the application and six "public comments packs", being some 420 pages of consultation responses and other comments by individuals and organisations. In the first judicial review proceedings, the Council (on 1 February 2021) disclosed to the Claimant and her representatives the documents (with redactions) which had been made available to Members of the Committee.

Old Grounds

8. In the first judicial review proceedings, 7 grounds for judicial review were advanced by Mr Harwood QC on behalf of the Claimant. In this section of this judgment, I will seek to encapsulate their essence and what became of them (all of which can be seen in much greater detail in the First Judgment itself). For ease of cross-referencing, I will label them as "Old Grounds" 1-7. Three of them, and part of a fourth, did not prevail. They were (in the same sequence in which the substantive conclusions appeared in the First Judgment):

   i) Old Ground 3. The claim contended that the Council had failed to take into account the objection of the TCS. This ground was abandoned following the disclosure (1 February 2021) of the documents made available to members of the Committee, which included that objection (First Judgment §13).

   ii) Old Ground 7. The claim contended – by way of an application for permission to amend the pleaded grounds of claim – that the Council had failed to make all of "the report" to the Committee available to the public in breach of ss.100B and 100C of the Local Government Act 1972 ("the 1972 Act"). The contention was that "the report" included "any material provided to the Committee by officers for consideration of [an] item [on the agenda]" including the "public comments packs". This was rejected by Lang J for two reasons. First, it was unsustainable. It was unarguable that the public comments packs were part of the officer's "report" or that consultation responses and other comments on the planning application were themselves "reports" (First Judgment §18). Secondly, there had been unreasonable delay in making the application to amend (7 April 2021, in the context of a hearing fixed for 28 April 2021): it should have been much earlier (during February 2021) after the disclosure of documents (1 February 2021); and, if granted in the run up to the hearing or at the hearing, it would have necessitated an avoidable adjournment, prejudicial to the parties and wasteful of court time (First Judgment §§19-20).

   iii) Old Ground 1 (part: TCS letter). The claim contended that the Council breached public law duties in failing to give close consideration to the TCS letter of objection. This was a distinct part of Old Ground 1. It was rejected by Lang J because, although the TCS letter was "necessarily material" to the determination of the planning application, and although as a matter of good practice the key points from the TCS letter "ought" to have been summarised in the OR, the failure to do so did not amount to a public law breach, in circumstances where (see Old Ground 3) the TCS letter itself had been included in the "public comments packs" provided to Committee members (First Judgment §§91-95).

   iv) Old Ground 5. The claim contended that one conclusion in the OR (that the development "would make a positive contribution to the character and appearance of the surrounding area") was not reasonably open in light of another (that it was "preferable that the proposed development should not appear from Dulwich Park above the tree canopy"). This ground was rejected by Lang J. There was no conflict between the two conclusions, the first being a reasonable exercise of planning judgment as part of an "overall" balancing exercise relating to the character and surrounding area "as a whole" (First Judgment §§110-112).

9. The other Old Grounds all succeeded (including the other distinct part of Old Ground 1). In those circumstances, the grant of planning permission was quashed. Lang J rejected an argument by the Council and the IP that relief should be refused pursuant to the test (First Judgment §155) in s.31(2A) of the Senior Courts Act 1981 ("the 1981 Act"): that it "appears to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (the "HL:NSD test"). That argument failed because, if the legal errors had not occurred, it was "possible that members of the Committee would have concluded that the IP ought to reconsider the height and scale of the proposed development and submit a more acceptable proposal" (First Judgment §157). These were the grounds which succeeded (again, in the same sequence as the substantive conclusions in the First Judgment):

    i) Old Ground 2. The claim contended that public law duties had been breached in the failure to take into account the objection and significant parts of the advice of the SCO, found in the SCO Document, which the OR had omitted. That succeeded, for these reasons (First Judgment §§57-66). There were significant omissions in the OR, in failing to mention the SCO's detailed comments, formal objection and reasons. That was in circumstances where the SCO Document was not referenced in the OR as a "background paper", was not among the documents made available to Members for the meeting and was not posted on the Council's website, the SCO's advice and formal objection being considerations which ought to have been taken into account and members having been "materially misled" on some aspects of the heritage issues because of the withholding of the SCO's comments from them, which could have made a difference to their assessment. This involved applying the principles articulated in R (Mansell) v Tonbridge and Malling BC [2017] EWCA Civ 1314 [2019] PTSR 1452 at §42 (First Judgment §§36 and 69). The relevant legal framework – relating to judicial review, planning decision making and planning officer reports – was set out and discussed in the First Judgment at §§34-38, which I do not need to repeat or summarise.

    ii) Old Ground 1 (remainder). The claim contended that public law duties had been breached in failing to apply the approach required by the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the LBCA Act"), the National Planning Policy Framework (the "Framework" or "NPPF") and the national Planning Practice Guidance ("PPG" or "NPPG") (First Judgment §§6, 71). As has been seen a distinct strand of argument (the TCS letter) failed. But this contention succeeded, for these reasons. The OR had correctly summarised the relevant sections of the LBCA Act (§§39-40, 75) and had referred to the policies in the Framework (§§41-44, 75). This supported an inference of compliance, absent a "positive indication" to the contrary demonstrating a "substantial doubt" (§§80, 45-46). However, a "substantial doubt" arose, because: there was a failure in the OR to advise Committee members to apply §194 of the Framework; there was a failure to advise them that they were required to apply a "weighted" or "tilted" balancing exercise giving considerable importance and weight to the assessed degree of harm to heritage assets; an "unweighted" balancing exercise was reflected in the OR, on a "fair reading" of the OR "as a whole"; the OR did not disclose to members the SCO's classifications of the level of harm; and the OR failed (Old Ground 2) to give due consideration to the SCO's expert advice in the SCO Document (§§80-90). Relevant provisions

of the LBCA Act, the Framework, the PPG and case-law relating to the approach in heritage harm cases (required of the planning authority and of the judicial review Court) was set out and discussed in the First Judgment at §§39-49, which I do not need to repeat or summarise.

iii) Old Ground 4. The claim contended that the Council failed to make "background papers" available – and "in particular" the SCO Document – in breach of duties arising under the 1972 Act (First Judgment §9). This succeeded in relation to the SCO Document, for these reasons (§§107-108): the officer had decided that the SCO's comments were not a "background paper" on the basis that the SCO was an officer in the planning service providing him with advice; that was a misdirection in law; the 1972 Act definition of "background paper" did not exclude documents because produced within the same council department as the final report; and the misdirection in law vitiated the officer's exercise of judgment in determining whether the SCO Document constituted a "background paper". The legal framework relating to the 1972 Act, access to "reports" and "background papers" and case-law regarding circumstances in which failure to disclose information in accordance with the statutory duties would or would not warrant quashing a decision were set out and discussed in the First Judgment at §§99-103, which I do not need to repeat or summarise.

iv) Old Ground 6. The claim contended that the Council had breached its public law duties in failing to refer the amended application for planning permission to the DRP in breach of a legitimate expectation arising by virtue of the SCI §6.9. This claim succeeded (First Judgment §§143-153). That was because the non-referral was an unjustified and unfair departure from the legitimate expectation arising from SCI §6.9 which identified planning applications which "will be referred to the Design Panel" (First Judgment §137). The legal framework relating to the SCI and legitimate expectation was set out and discussed in the First Judgment at §§119-129, which again I do not need to repeat or summarise.

After the First Judgment

10. After Lang J quashed the 2020 grant of planning permission, there was no appeal by the Council or by the IP against the First Judgment. The planning application was referred to the DRP in accordance with SCI §6.9 (after the success of Old Ground 6). The DRP held a meeting on 25 May 2021 and issued a report on 10 June 2021 to which the IP responded on 14 June 2021. A new officer report ("NOR") was produced dated 21 June 2021, for a Committee meeting scheduled to take place on 29 June 2021. The NOR was accompanied by various documents: a Map; minutes of a Local Meeting (4 August 2020); and TEMPO (Tree Evaluation Method for Preservation Orders) Assessment Sheets. There were also Officer's Presentation slides. The NOR was later supplemented by an Addendum Officer Report ("AOR"), dated 29 June 2021. The NOR (with appendices) was a 249-page document. The AOR was a 5-page document. All of these documents can be found online (by searching "Land at Sydenham Hill Estate SE26" and "DC/20/115160"). In the description below, I will include paragraph numbers of the NOR, even where I am not setting out the relevant contents. I give those references for informed readers – including the parties – and in case any reader wishes to trace the analysis through to the relevant parts of the AOR.

11. The NOR identified, in the opening pages, what the relevant officer had assessed were the "background papers" (after the success of Old Ground 4). These were: "(1) Submission drawings; (2) Submission technical reports and documents; (3) Internal consultee responses; (4) Statutory consultee responses; (5) [DRP] responses". The NOR summarised (NOR §§454-463) the contents of sections 66 and 72 of the LBCA Act and (after the success of Old Ground 1) certain paragraphs from chapter 16 of the Framework (in particular Framework §§193, 194 and 196, together with other relevant policy instruments relating to the impact on heritage assets. It set out, in detail (NOR §§63-105), the comments of the SCO from the SCO Document (after the success of Old Ground 2). It did so, within a section (NOR §§62-263) which referenced the notification of internal consultees and their responses. Also within the NOR was a section on pre-application engagement (NOR §§26-51), a reference to the 211 representations recorded as received in objection to the proposed development (§54), a section describing contents of objections (§§55-58) and a reference to the Local Meeting (§§59-61). There was a section on statutory consultees who had been notified and their responses (§§227-263). There was a section on the 4 occasions when the development had been considered by the DRP (§§264-268), including a summary of the DRP's comments from its 10 June 2021 report together with officer responses (§268). A chapter on planning considerations (§§278-842) was in 9 sections: (i) principle of development (§§279-307); (ii) housing (§§308-387); (iii) social infrastructure (§§388-400); (iv) urban design (§§402-535); (v) transport impact (§§536-601); (vi) living conditions of neighbours (§§602-704); (vii) sustainable development (§§705-748); (viii) natural environment (§§749-831); and (ix) public health, well-being and safety (§§832-842). There were chapters on local finance, equalities and human rights (§§843-861), and legal agreement (§§862-865). At the end of the NOR, chapter 12 contained the conclusion (§§866-875), followed by a recommendation in Chapter 13 to grant planning permission on 35 conditions.

12. Alongside the NOR (21 June 2021) the Council published various documents online. On 17/18 June 2021, 39 documents were published. 26 of these (published on 17 June 2021) were the internal consultee responses and statutory consultee responses, which Mr Robinson had identified in the NOR as "background papers" (3) and (4). These were discussed at NOR §§62-263 (internal consultees) and §§227-263 (statutory consultees). The other 13 documents (published on 18 June 2021) fell into two categories, which I will call "Pre-Existing" and "New". The Pre-Existing documents were: the first three DRP Responses (identified in the NOR as "background papers") (November 2018, March 2019 and July 2019); comments of the Lewisham sustainability manager (undated) and the IP's response (undated); a green retaining wall document (February 2020); an Ecology Technical Note (7 May 2020); and a demolition site plan (February 2020). The New documents were: the latest (9-page) DRP Response (identified as a "background paper") (10 June 2021) and IP's (6-page) response (14 June 2021); an urban greening factor score (June 2021); an IP (8-page) Heritage Statement and TVIA (Townscape and Visual Impact Assessment) Addendum (June 2021); and a further (14-page) Ecology Technical Note (17 June 2021). Other documents were published after the NOR. Another New document – a (19-page) revised Social Infrastructure Study (June 2021) – was published on 23 June 2021. On (Friday) 25 June 2021, another Pre-Existing document was published: IP's (14-page) response (3 March 2020) to the SCO Document (28 January 2020).

13. The Committee met on the evening of Tuesday 29 June 2021. It was an in-person meeting, although the IP's representatives appeared remotely, and was webcast. I was provided with the 64-page transcript of what was said at the meeting. The webcast can (at present) be found online by searching "Lewisham webcast planning 29 June 2021". The meeting lasted 2 hours 18 minutes. This was the only item of business. The six Committee members present voted (5-1) in favour of granting the IP's application for planning permission. That was after they had been addressed by: Mr Robinson (as principal planning officer) with Q&A; Mr Anderson and Mr Rush (on behalf of the IP) with Q&A; the Claimant and Mr Harwood QC (speaking as objectors) with Q&A; and a Councillor (speaking under standing orders). There was then discussion (beginning at 1 hr 41 mins into the transcript) and finally the Committee voted (at 2 hrs 17 mins).

Part 2. Ground 1

14. Ground 1 concerns the phrase "optimum viable use" in the context of detrimental impact on heritage assets (which I will call "Heritage-Harm"). Mr Harwood QC for the Claimant submits that the decision to grant planning permission was vitiated by a statement in the NOR (NOR §873) about "optimum viable use". Ground 1 contends that this entailed: (i) a material misinterpretation of relevant and applicable planning policy; (ii) a conclusion for which there was no evidence, or which was unreasonable in public law terms; and/or (iii) a statement which had the consequence that the NOR materially misled members on a matter bearing upon their decision which error went uncorrected before the decision was made (applying the principle in Mansell at §42: First Judgment at §36). In my judgment, at the heart of Ground 1 is a question about whether NOR §873 communicated to Members that planning officers had concluded that no less Heritage-Harmful scheme would be economically viable.

Report Conclusion (NOR §§866-875)

15. I need to set the scene. I start by setting out the "Conclusion" section of the NOR (§§866-875), in which NOR §873 appeared. As will later be seen, this section was described at NOR §508 as the "report conclusion". It was:

> ***CONCLUSION***
>
> ***866 The application has been assessed against the adopted Development Plan, as required by Section 38(6) of the Planning and Compulsory Purchase Act.***
>
> ***867 The proposals have been developed in the context of extensive pre-application consultation with Council Officers, the Greater London Authority and following two presentations to Lewisham's Design Review Panel. The applicant has also held three public exhibitions to which local residents and stakeholders were invited.***
>
> ***868 The proposal would provide a substantial quantum of socially rented residential units to help meet the Borough's housing needs. This is a significant benefit to be weighed in the planning balance as the proposal will assist in addressing its housing need which is set to increase substantially under the draft London Plan housing targets.***
>
> ***869 Whilst the scale of the proposed development has been acknowledged, the proposals reflect the principles of the highest quality design, ensuring an exemplary built environment for visitors and residents. The proposed development would also result in the delivery of significant public realm enhancements, specifically through the delivery of the communal amenity space. Improvements to the existing highways network would also be secured by legal agreement.***

870 In accordance with Paragraph 196 of the National Planning policy Framework the harm to heritage assets has been weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use. Officers must also give great weight to any identified harm to heritage assets.

871 Less than substantial harm to heritage assets ranging from moderate to high is recognised and great weight has been given to this identified heritage harm in accordance with Paragraph 193 of the NPPF. This harm is summarised as follows:

- ***A moderate to high degree of less than substantial harm to the Sydenham Hill Conservation Area,***
- ***A moderate degree of less than substantial harm to the Grade II Listed buildings at Lammas Green***
- ***A moderate degree of less than substantial harm to Non-Designated Heritage Assets on Sydenham Hill.***
- ***A low degree of less than substantial harm to the setting of the Dulwich Woods Conservation Area***

872 The public benefits presented by the proposed development, summarised below, have been weighed against the heritage harm identified:

- ***Delivery of 110 additional homes including 20% family homes (3 bed and 4-beds) as part of the overall mix. The existing Mais House block provided primarily bedsits and no larger or family sized units were accommodated.***
- ***Provision of 100% affordable homes for social rent.***
- ***Provision of 10% M4(3) compliant units not currently provided within Mais House***
- ***Provision of community space and communal facilities within Blocks A and B***
- ***Provision of younger children's playspace and refurbishment and improvement to the existing ballcourt.***
- ***Extensive landscaping including 45 new trees to replace the 19 loss and planting and landscaping features that support biodiversity improvements at the estate and an improvement to existing Urban Greening Factor.***
- ***Relocation of rear Otto Close footpath to the front of the proposed terrace units which will offer more security and active surveillance for users.***
- ***Net increase in biodiversity and an improved Urban Green Factor score***
- ***Provision of a Local Labour and Business Strategy and Contribution***
- ***Improvements to the existing highways network including:***
  - ***Improvement works to the vehicular access points to the site, including the provision of tactile paving.***
  - ***Improvement works to the existing crossing facilities at the Kirkdale / Thorpewood Avenue junction including improvements to the existing tactile paving.***
  - ***The provision of a new informal crossing on Kirkdale (refuge and tactiles) close to the Kirkdale / Otto Close junction to improve access to the southbound bus stop on Kirkdale.***
  - ***Improvement works to the existing zebra crossing on Sydenham Hill.***
  - ***Cycle lane improvements to Kirkdale and Sydenham Hill.***

873 Officers consider that the proposed development secures the optimum viable use of the site and that whilst great weight has been afforded to the heritage harm, the significant public benefits presented by the scheme outweigh the less than substantial harm that has been identified.

874 The officer assessment has also identified some impact upon occupants of neighbouring residential properties in relation to loss of light and overshadowing. However, on balance the benefits and planning merits of the scheme are considered to substantially outweigh any harm identified. The assessment has also noted impact with regard to existing trees and biodiversity at the application site but officers consider that the proposed landscaping provides a high quality replacement scheme (full details captured by condition) with replacement trees captured in excess of a two to one by way of reprovision. The proposed

> ***biodiversity mitigation and enhancement measures are supported and overall considered to provide a net gain in this regard.***
>
> ***875 In conclusion, the proposed development is considered to be in accordance with the relevant national planning policy guidance and development plan policies. The proposals are wholly sustainable development in accordance with the NPPF and will make an important contribution to the borough, in respect of housing supply and importantly the wider borough community. The proposals are therefore considered to be both appropriate and beneficial. Therefore, on balance, any harm arising from the proposed development is considered to be outweighed by the benefits listed above.***

The focus of Ground 1 is on the words at the start of NOR §873 ("Officers consider that the proposed development secures the optimum viable use of the site …"), read alongside NOR §870 ("In accordance with paragraph 196 of the [Framework] the harm to heritage assets has been weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use").

Impact on Heritage Assets: Policy (NOR §§454-463)

16. I will next set out the "Policy" subsection (NOR §§454-463) from the section on "Impact on Heritage Assets" (NOR §§454-508), within the chapter "Urban Design" (NOR §§402-535):

> ***Impact on Heritage Assets***
>
> ***Policy***
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> ***454 Section 72 of the of the [LBCA Act] gives LPAs the duty to have special regard to the desirability of preserving or enhancing the character or appearance of Conservation Areas.***
>
> ***455 Section 66 of the [LBCA Act] requires an LPA in considering whether to grant planning permission for development which affects a listed building or its setting, to 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.***
>
> ***456 Relevant paragraphs of Chapter 16 of the NPPF set out how LPAs should approach determining applications that relate to heritage assets. This includes giving great weight to the asset's conservation, when considering the impact of a proposed development on the significance of a designated heritage asset.***
>
> ***457 Paragraph 193 of the NPPF states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.***
>
> ***458 Paragraph 194 of the NPPF states that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.***
>
> ***459 Further, Paragraph 196 states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.***
>
> ***460 The NPPG advises that the degree of harm within "less than substantial harm" should be identified as follows: "Within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated."***

> ***461 LPP HC1 Heritage conservation and growth states that development proposals affecting heritage assets, and their settings, should conserve their significance, by being sympathetic to the assets' significance and appreciation within their surroundings. The cumulative impacts of incremental change from development on heritage assets and their settings should also be actively managed. Development proposals should avoid harm and identify enhancement opportunities by integrating heritage considerations early on in the design process.***
>
> ***462 CSP 16 ensures the value and significance of the borough's heritage assets are among things enhanced and conserved in line with national and regional policy.***
>
> ***463 DMP 36 echoes national and regional policy and summarises the steps the borough will take to manage changes to Conservation Areas, Listed Buildings, Scheduled Ancient Monuments and Registered Parks and Gardens so that their value and significance as designated heritage assets is maintained and enhanced.***

As can be seen, "optimum viable use" appears at NOR §459. I should explain (as NOR §275 did), that: "LPP" is the March 2021 London Plan; "CSP" is the June 2011 Core Strategy; "DMP" is the November 2014 Development Management Plan; and they are all part of the Development Plan.

Impact on Heritage Assets: Conclusion (NOR §§501-508)

17. Next, I set out the subsection "Impact on Heritage Assets Conclusion" (NOR §§501-508), from the same section "Impact on Heritage Assets" (NOR §§454-508), again within the chapter "Urban Design" (NOR §§402-535):

> ***Impact on Heritage Assets Conclusion***
>
> ***501 Paragraph 193 of the NPPF states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.***
>
> ***502 Paragraph 194 of the NPPF states that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.***
>
> ***503 Further, Paragraph 196 states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.***
>
> ***504 The Council's Senior Conservation Officer has raised objections to the proposed development due to the harm caused to the Conservation Area, the setting of listed buildings and the setting of locally listed buildings. This is cited as chiefly being caused by the height and position on site of the proposed buildings. The Senior Conservation Officer has also commented that she does not consider that the harm is adequately justified by the aim for highly dense scheme or its viability.***
>
> ***505 As outlined above, officers consider that the current proposal would lead to a moderate to high degree of less than substantial harm to the Sydenham Hill Conservation Area, a low degree of less than substantial harm to the Dulwich Woods Conservation Area, and a moderate degree of less than substantial harm to the Grade II Listed buildings at Lammas Green and Non-designated Heritage Assets on Sydenham Hill.***

> ***506 Comments made by the Senior Conservation Officer in relation to reduction of scale of the proposed buildings are noted. Specifically the Senior Conservation Officer has commented that the buildings should be stepped back from Sydenham Hill in order to retain existing mature trees and allow potential additional tree planting. It is noted by officers that this would result in eleven three-bedroom family units being lost and that replacement tree planting at the development site is proposed on a two for one basis, with particular focus along the Sydenham Hill frontage of the development. Similarly, if the Otto Close terrace was to be reduced by omitting a unit, this would result in the loss of a four bedroom family unit in this location. Comments made by the Senior Conservation Officer in relation to the proposed development not being fully justified are also noted. However, this balancing exercise falls outside of the remit of the Conservation Officer's role and is undertaken in this assessment, taking into account all relevant planning considerations. In any event, officers disagree with the Senior Conservation Officer's balancing exercise for the reasons outlined in the report conclusion and urban design conclusion below.***
>
> ***507 The applicant has provided evidence of the wider public benefits of the proposal including most significantly, the provision of 110 socially rented new homes, which meet an evidenced and clear identified need in place of the existing Mais House building which is again clearly evidenced as not serving local need or demand.***
>
> ***508 As such, officers must give great weight to the harm identified to heritage assets as identified above and weigh this against the public benefits of the scheme. This balancing exercise is outlined in the report conclusion and urban design conclusion below.***

As can be seen, "optimum viable use" appears at NOR §503.

Urban Design Conclusion (NOR §§527-535)

18. Next, I set out the section "Urban Design Conclusion" (NOR §§527-535), at the end of the chapter on "Urban Design" (NOR §§402-535). It is this section, together with the "report conclusion", which were referenced at the end of NOR §508:

> ***Urban Design Conclusion***
>
> ***527 Paragraph 193 of the NPPF states that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.***
>
> ***528 Paragraph 194 of the NPPF states that any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.***
>
> ***529 Further, Paragraph 196 states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.***
>
> ***530 Whilst harm to heritage assets has been identified, and it is acknowledged that the proposed development is on the upper end of the scale of what could be considered acceptable; officers consider that overall the design approach has ensured that in urban design terms, the scheme would result in a form of development that sits relatively comfortably the wider character and appearance of the local area and architecturally, is of an exemplary standard.***
>
> ***531 Officers note the visibility of the proposed buildings at Sydenham Hill and that these are largely taller than the existing built context on Sydenham Hill, but consider that overall the proposal is of a high quality and the architectural treatment of the proposed building would result in a positive contribution to the area with regard to urban design. The proposals***

achieve a high quality design in both the proposed building and public realm, and the scheme overall presents significant planning benefits as outlined in detail above, and summarised as follows:

- ***Delivery of 110 additional homes including 20% family homes (3 bed and 4-beds) as part of the overall mix. The existing Mais House block provided primarily bedsits and no larger or family sized units were accommodated.***
- ***Provision of 10% M4(3) compliant units not currently provided within Mais House.***
- ***Provision of 100% affordable homes for social rent***
- ***Provision of community space and communal facilities within Blocks A and B***
- ***Provision of younger children's playspace and refurbishment and improvement to the existing ballcourt.***
- ***Extensive landscaping including 45 new trees to replace the 19 loss and planting/ landscaping features that support biodiversity improvements at the estate and an improvement to existing Urban Greening Factor.***
- ***Relocation of rear Otto Close footpath to the front of the proposed terrace units which will offer more security and active surveillance for users.***
- ***Provision of a Local Labour and Business Strategy and Contribution***
- ***Improvements to the existing highways network.***

532 In accordance with Paragraph 196 of the National Planning policy Framework the harm to heritage assets has been weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use. Officers must also give great weight to any identified harm to heritage assets.

533 Officers consider that the proposals would lead to a moderate to high degree of less than substantial harm to the Sydenham Hill Conservation Area, a low degree of less than substantial harm to the setting of the Dulwich Woods Conservation Area, and a moderate degree of less than substantial harm to the Grade II Listed buildings at Lammas Green and Non-designated Heritage Assets on Sydenham Hill.

534 Whilst less than substantial harm to heritage assets has been recognised above and great weight has been given to this identified heritage harm, the public benefits presented by the proposed development, most notably in the provision of 110 new social rented homes as well as other planning merits noted in the conclusion of this report are considered in this instance, to outweigh this harm. The impacts of the proposal have been fully assessed in relation to the relevant Tall Building criteria set out in the London Plan and Lewisham Local Plan in how the buildings appear in long, mid and immediate views, the architectural quality of the buildings, the significance of harm to heritage assets, lighting (assessed below and controlled by condition), as well as functional and environmental impacts assessed elsewhere in this report. Officers consider the proposals to be acceptable in this regard.

535 Given the above, it is considered that the proposal is acceptable with regard to urban design and impact upon heritage assets, and accords with the Development Plan.

In this section, "optimum viable use" appears at NOR §§529 and 532.

"Optimum viable use" as a policy concept in the context of Heritage-Harm

19. The next step, in setting the scene, involves identifying the nature and function of the concept of "optimum viable use" – in the context of Heritage-Harm – where it appears in relevant policy. That includes Framework §196, referenced at NOR §§459, 529, 532 and 870. It also includes the PPG (or NPPG), which addresses aspects of "optimum viable use" in the context of Heritage-Harm, in particular at ID18a-015-20190723 ("PPG §15") and ID18a-016-20190723. Relevant case law on "optimum viable use", in the context of Heritage Harm, is discussed in the judgment of Sir Duncan Ouseley in Juden v Tower Hamlets LBC [2021] EWHC 1368 (Admin) at §§63-66. Two key sources suffice. First, there is Framework §196 itself, which says (emphasis added):

> ***Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.***

Secondly, there is PPG §15, which says this (emphasis added):

> ***It is important that any use is viable, not just for the owner, but also for the future conservation of the asset: a series of failed ventures could result in a number of unnecessary harmful changes being made to the asset. If there is only one viable use, that use is the optimum viable use. If there is a range of alternative economically viable uses, the optimum viable use is the one likely to cause the least harm to the significance of the asset, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes. The optimum viable use may not necessarily be the most economically viable one. Nor need it be the original use. However, if from a conservation point of view there is no real difference between alternative economically viable uses, then the choice of use is a decision for the owner, subject of course to obtaining any necessary consents.***

20. For present purposes, what arise from those two key sources are four distinctive features of "optimum viable use" in the context of Heritage-Harm. I will label these features – for ease of later cross-referencing- as "Applicability", "Method", "Idea" and "Consequence". Here they are:

i) Applicability. Optimum viable use in Framework §196 is an idea which is Applicable only where consideration is being given to a development which would entail a proposed use of a designated heritage asset. This can be seen from the wording I underlined above, in setting out text from Framework §196.

ii) Method. Optimum viable use in Framework §196 involves a Method. The Method starts by taking any "less than substantial harm" to the significance of a designated heritage asset: the designated heritage asset whose proposed use by the development triggers Applicability. This has been seen above. The Method then weighs in the balance, against that species of Heritage-Harm, a 'balance-sheet' list of any "public benefits of the proposal". It is within that Method that securing the optimum viable use of the designated heritage asset is – where "appropriate" – included within the 'balance-sheet' list of the public benefits of the proposal. Inclusion, in the 'balance-sheet' list of public benefits, will be "appropriate" where the development proposal would involve "securing" the optimum viable use of the designated heritage asset. All of this can be seen from the wording of Framework §196, which I have set out.

iii) Idea. The Idea of optimum viable use is a distinctive one. It means the economically viable use which is likely to cause the least Heritage-Harm. This can be seen from the wording underlined above in PPG §15. The "use" is the

use of the "designated heritage asset" entailed by the development (Applicability).

iv) Consequence. The Consequence – under Framework §196 read with PPG §15 – of identifying that a development proposal under consideration entails securing the optimum viable use is therefore as follows. The use of the designated heritage asset entailed by the development (Applicability) secures the economically viable use likely to cause the least Heritage-Harm (Idea), which stands in the 'balance-sheet' as one of the public benefits weighing against any less than substantial harm to the significance of the designated heritage asset which the development involves (Method).

The Idea had no Applicability in this case

21. In the light of these four distinctive features – none of which were disputed – the following point was common ground: the Idea had no Applicability in the present case. That is because the IP's development proposal did not entail the future "use" of a "designated heritage asset". The less than substantial harm identified (NOR §§505 and 871) is not harm to the significance of a designated heritage asset whose use is the subject of the development proposal. The IP's development proposal did not entail using a designated heritage asset. The Idea had no Applicability. The Method was not an applicable Consequence. This is a case of assessed "less than substantial" harm to the significance of designated heritage assets (see NOR §§505 and 871). It is also a case where it is necessary to weigh against that Heritage-Harm public benefits. But it is not a case where the Method of including the Idea of optimum viable use within that balancing exercise would arise.

A proper basis for 'the scheme is viable'

22. I turn to another point was also agreed between all Counsel. Everyone agrees that it was, and necessarily would have been, part of the IP's case – in making and maintaining the application for planning permission – that the development proposal for the Site was one which was a "viable" proposed development: an economically viable use of the Site. It was common ground that it would have been entirely appropriate, and unobjectionable, for the NOR to be describing the development proposal as one which officers were treating as "viable". There is no vice in the use of that word, in that way.

No proper basis for 'no smaller scheme would be viable'

23. Next, the following were also all agreed between all Counsel: (a) there was no documented or evidenced case put forward by the IP, or assessed by planning officers, which purported to demonstrate that the IP's development proposal for the Site constituted the least Heritage-Harm which an economically viable development proposal could entail; (b) there was no reasoning within the NOR which gave a reasoned evaluative basis for such a conclusion; and (c) in those circumstances such a view expressed by officers in the NOR could not have been a reasonable one in public law terms. Unlike certain other situations where a portion of affordable housing may form part of a development and the planning authority may be considering what the appropriate portion should be, by reference to a "viability study" which looks at the viability of the scheme by comparison with alternatives, no "viability study" had been necessary or appropriate or provided in the present case. In short, officers could not

reasonably have reached the view that no less Heritage-Harmful scheme would be economically viable.

The Claimant's argument

24. I have taken some time to set the scene. Having done so, I can now turn to identify the essence – as I saw it – of Mr Harwood QC's argument on Ground 1. It runs as follows. In the first part of NOR §873, officers communicated to Committee Members the very view for which – as has rightly been accepted (§23 above) – there was no proper basis. This view was communicated within the, all-important, Conclusion Section of the NOR. It was, moreover, a prominent part of that important section. What was expressed was an evaluation by officers ("Officers consider that …"). That was the clear communication of a considered view. What was expressed was a significant public benefit, in an evaluative balancing exercise. The use of the phrase "optimum viable use" was, unmistakably, a reference back to that very same phrase as described in Framework §196. This was the identical phrase ("optimum viable use") which appeared in the description of the contents of Framework §196, as a public benefit: see NOR §870. The language is identical. The paragraphs (NOR §§870 and 873) are closely proximate. They each appear in the Conclusion Section. The link is obvious and would have been obvious to any reader. On any view, the officers writing the NOR were in error about "optimum viable use". That Idea had no Applicability in the present case (§21 above): this Site did not comprise a designated heritage asset; and no use of such an asset would be entailed by this development. That is why, in defending this claim, the Council (supported by the IP) has characterised the phrase "optimum viable use" as involving "stray words". But that characterisation, of "stray words", effectively concedes that there was an error of approach, and a miscommunication. The fact is that a public interest benefit – a specific virtue – of the development was clearly being communicated at NOR §873. And what was being communicated was the Idea of "optimum viable use", as applied to this Site in the context of this development. Members were being told that no smaller development would be economically viable. That was an unsustainable view.

25. It is appropriate that Committee Members should be taken to have a sufficient policy-appreciation of what the Idea of "optimum viable use" is, in the context of Heritage-Harm. The Idea is the least Heritage-Harm that an economically viable development could do (§20iii above). To a Member having that policy-appreciation, NOR §873 would have read in the way identified in the pre-action letter before claim (17 September 2021), namely (emphasis added):

> ***The point which officers seemed to be making was that whilst the scheme was harmful, a less harmful scheme would not be viable.***

That reflects the nature of the Idea, derived from the policy (Framework §196) to which officers had referred. There is no other concept – no other Idea – of "optimum viable use" in relation to Heritage-Harm and applicable planning policy. There were heritage assets which were relevant in the present case. There were relevant harms to those heritage assets from the proposed development in the present case. Committee Members were reliant on officers to understand and apply the relevant planning policies correctly. Heritage-Harm and the Framework were at the heart of the case. The case had been remitted for consideration, in accordance with the law. Junior Counsel was also on hand to assist. But the misappreciation at NOR §873 was left uncorrected.

"Optimum viable use" – which means the economically viable development causing least Heritage-Harm – was paraded as a public benefit virtue, without justification or support, at the key point in the NOR. The decision cannot stand and must again be quashed, and the matter remitted. Once again (cf. First Judgment §69) members were materially misled on an important aspect relating to the heritage issues. The reconsideration in accordance with the law, mandated through the quashing in the First Judgment, did not therefore take place. What happened instead was a flawed consideration. Officers materially misled the members on a matter bearing upon their decision. The misleading content was not minor or inconsequential. It misdirected members in a 'material' way. Absent the flawed advice, the Committee's decision would or might have been different. There was a distinct and material defect. Accordingly, the principle articulated in Mansell §42 (First Judgment §36) was breached, the decision is vitiated by public law error, and a remedy is appropriate.

26. Not only did the error go uncorrected before the decision was made (Mansell at §42(2)), but the position was exacerbated. This is the proof of the pudding. It illustrates how Members were misled by NOR §873. Members plainly picked up on the point at the meeting, as the transcript shows. Mr Robinson, as the case officer who had written the NOR, made an oral presentation. In the course of it, he repeated that: "Overall, officers consider that the proposed development secures the optimum viable use of the site". The Claimant herself told Members: "We've not seen a viability report". After those speaking for the IP had made their presentation, one of the Committee Members asked: "Why not scale it back a bit further to pull people along with you? Particularly in respect of the height." The speakers on behalf of the IP responded, stating: "We have to balance what we are bringing forward with a viable and deliverable scheme and we feel that the scheme we have before you judge that". They added: "It's difficult. It been a challenge and we have attempted, where we can, to compromise and make changes…". The Committee Member pressed the point, asking straightforwardly:

> ***Well to put it more precisely then, would the scheme not be viable if it was reduced further?***

The IP's planning agent (Mr Rush) replied: "I'm not the viability expert… That's not trying to avoid the question. I think it would put it potentially at a challenging position to deliver". The IP's other speaker (Mr Anderson) said:

> ***We have the resources we have and they are not anything approaching infinite and to reduce it further, this as I have explained that public sessions with the residents, this is at the very edge of what we can afford for the units and to reduce it further really would make it non-viable for us.***

Mr Robinson, the planning case officer, listened to that discussion and did not at any stage clarify for Members that officers had not made any assessment – and had not had any evidential basis for an assessment – about a smaller scheme being non-viable.

27. All of this was highly material. Smaller alternatives were a key theme in relation to the key issue of Heritage-Harm as assessed through the prism of applicable planning policies. The size of the proposed development and the virtues in heritage-harm terms of scaling down the proposal was a central feature of the judicial review claim which had just succeeded. The application was remitted for reconsideration precisely because it was possible that the Council might decide that the IP ought to re-consider the height and scale of the proposed development, and submit a more acceptable proposal (First Judgment §157). The objectors were "not opposed to the redevelopment of the Site in

order to upgrade the existing social housing and increase the number of residential units" but the objection "related to the inappropriate height and scale of the new buildings, which would harm the setting of the Grade II Listed buildings and the Conservation Area" (First Judgment §156). Scaling back was the central point being made by the claimant and Mr Harwood QC at the meeting. It was a key theme in the articulated views of the SCO – in the SCO Document – which had been omitted and the original decision was taken. It was a key theme in the response of TCS. It was the key issue arising from the response by the DRP to whom it had been necessary to refer the proposal. It was right in the heart of the decision that members were making. It was highly material within the NOR. The "conclusion" section of the NOR (§§866-875) were the most crucial contents of the entire document. Any Committee Member relying on the NOR would have focused in particular on those ten paragraphs in these two pages. They would have focused in particular on the four key paragraphs (NOR §§870-873) which squarely addressed Heritage-Harm. The point made at NOR 873 about securing "optimum viable use" of the site was a key feature.

28. The misleading message in NOR §873 cannot be 'rescued' by a detailed forensic analysis which invokes other contents in the NOR. It is true that the relevant view ("Officers consider that the proposed development secures the optimum viable use of the site") was not a view expressed anywhere else in the NOR: not in the section on "Impact on Heritage Assets" (NOR §§454-508); nor in the subsection on Impact on Heritage Assets Conclusion (NOR §§501-508); nor in the section Urban Design Conclusion (NOR §§527-535). But there are two points. First, the "Conclusion Section" mattered. Committee Members would have looked to it as a key, standalone section, without needing to scour the rest of the NOR to see whether anything appeared to be out of place. Secondly, reading the NOR as a whole would reinforce the message that a new, key and freestanding point could be found in the Conclusion Section. As to that, NOR §508 stated, in terms, that the all-important "balancing exercise" could be found "outlined in the report conclusion and urban design conclusion below". It follows that the "report conclusion" was intended to add something to the urban design conclusion, in the articulation of the balancing exercise. The same follows from NOR §534, which spoke of the public benefits identified in that urban design conclusion "as well as other planning merits noted in the conclusion of this report". Even when the NOR is conscientiously read as a whole, and in detail, the conclusion at §873 would have been read by a Committee Member as adding a 'key point'; a key 'planning merit'. It is nothing to the point that this key benefit – public benefit – does not feature in lists of public benefits (eg. NOR §§531, 872), which precede NOR §873. The 'key point' which NOR §873 was adding was the communicated assessment of "optimum viable use", as that term would have been understood in the relevant Heritage- Harm policy source (referenced in NOR §§459, 503, 532 and 870), because that was assessed by officers as "appropriate" in Framework §196 terms. For all these reasons, and in all these circumstances, the decision cannot stand on this important issue. It must be quashed and the matter remitted, again, for consideration on a legally correct basis.

Discussion

29. This is a powerful and sustained argument. I am satisfied that it crosses the threshold of arguability. I am also satisfied of two further things. First, if the Claimant were right that NOR §873 was communicating to Members that planning officers had concluded that no less Heritage-Harmful scheme would be economically viable, that would be

materially misleading in Mansell terms. Secondly, in those circumstances the HL:NSD test could not avail the Council and IP, any more than it did in the first judicial review claim (First Judgment §§155-157). I will grant permission for judicial review. But I cannot accept the Claimant's argument. I have concluded that this ground for judicial review is not well-founded and does not succeed. I will explain the reasons why. First, it is a well-established principle that what is needed is "a fair reading of the report as a whole" (Mansell §42(2); First Judgment §36). That makes the focus whether – on "a fair reading of the report as a whole" – officers would or could have been understood by Members to be communicating their assessment that: (as it was put in the letter before claim) "a less harmful scheme would not be viable".

30. Secondly, if that was what was being communicated at NOR §873, it would mean that a point was being made – describing a position which officers considered was the case – which had no support anywhere in the NOR. The NOR recognised that the identified Heritage-Harm would be reduced if the size of the development were smaller. But there is no discussion, anywhere in the NOR, of a smaller and less Heritage-Harmful scheme not being viable. No reasons are given, anywhere, for an assessment by officers to that effect. No material or evidence is identified in the NOR, anywhere, by reference to which such an assessment had been arrived at. As the Claimant rightly submitted in the pre-action letter before claim, and in the grounds for judicial review: it had not been the position put forward by the IP as the developer that 'a less harmful scheme would not be viable'; and the first suggestion of this was made by the IP at the meeting in Q&A. In a very detailed NOR, a report with 875 paragraphs over 134 single-spaced pages, a point would have been communicated which had no support, anywhere else. It is right to remember, as I have explained (§22 above), that the development was being put forward as, and properly accepted by officers to be, a "viable" scheme. But there was no support or reasoning, anywhere in the NOR, as to comparative "viability", to link to a conclusion about a smaller scheme lacking "viability".

31. Thirdly, Mr Harwood QC says that the practical realities for Members can be seen from the discussion at the meeting, reflected in the Minutes. However, taking that approach, it is conspicuous that the question of whether a smaller development would be economically viable was raised with the IP, as a question which arose out of what the IP had said to Members. Mr Harwood QC accepts that it was open to a Committee Member to ask that question, for the IP to answer it (saying that no less Heritage-Harmful scheme would be economically viable), and for the Committee then to proceed to make a decision in light of the entirety of the discussion. Nothing said at the meeting suggests or supports any attribution to officers, in the NOR, or in Mr Robinson's presentation, of a conclusion on that point: that no smaller development would be economically viable. This was not put to Mr Robinson. And when it was raised and discussed, it was not said – by anyone – to be a view which officers had assessed, reached and expressed. It was simply a question being raised with, put to, and responded to, by the IP.

32. Fourthly, the NOR does not set out for Members what "optimum viable use" means as an Idea, in Framework §196. The PPG is mentioned throughout the NOR: references appear at NOR §§439, 441, 460, 694, 730, 750, 807-808, 832-833. But there is no discussion or summary of PPG §15. There is no description which would have told a reader that the Idea of "optimum viable use" means 'the least Heritage-Harmful economically viable use'. Mr Harwood QC's argument posits a Committee Member

who had a pre-existing appreciation of policy, making them familiar with the Idea. But a policy-appreciating Committee Member, who understands how Framework §196 and PPG §15 operate in practice, would also understand that "optimum viable use" as the Idea featuring in Framework §196 was Inapplicable in the present case. It was Inapplicable because this was not a development entailing the use of a heritage asset. It was that Inapplicability to which Sir Duncan Ouseley pointed in his observations at the paper stage of the present case. He did not see any vitiating flaw in the NOR. Rather, he identified as the question whether the Council may unreasonably have relied on what it was told at the meeting on behalf of the IP ("to reduce [the scheme] further … would make it non-viable"). As to that – as Mr Harwood QC accepts – the question-and-answer at the meeting cannot, of itself, constitute a vitiating flaw. The policy-appreciating Member would also understand the Method (§20ii above) and the Consequence (§20iv above). They would see from the NOR that officers' 'balance-sheet' lists of public benefits (NOR §§531 and 871) did not include "optimum viable use". They would see, in NOR §873 itself, what is said in the rest of that paragraph: the great weight that has been afforded to the Heritage-Harm; that it is "the significant public benefits presented by the scheme" which "outweigh the less than substantial harm that has been identified"; that those "significant public benefits" are a reference to the "public benefits presented by the proposed development" which had been "summarised below" in the list set out at NOR §872 and which had "been weighed against the heritage harm identified". No "optimum viable use" featured in that list. It would have done, had officers been applying the Method, familiar to a policy-appreciative Member.

33. Fifthly, the point that was being communicated at the beginning of NOR §873 by the words "optimum viable use" was not a message about the non-viability of a smaller development. Rather, it was a message about the "optimum use" of the site delivered by this "viable" development. This, in my judgment, is clear from a fair reading of the NOR. The NOR was replete with contents which supported this as an important point:

    i) The "Conclusion Section" itself referred to the "substantial quantum of socially rented residential units to help meet the Borough's housing needs", as a "significant benefit" (NOR §868); to the proposals as reflecting "the principles of the highest quality design" (§869); and to the "delivery of 110 additional homes including 20% family homes", of which 100% would be "affordable homes for social rent" as "public benefits" (§872). What NOR §873 was adding – by reference to "optimum" – was that this use of the Site was securing "the optimum" use of the Site. That is a fair reading, even taking the Conclusion Section as a freestanding section and even positing a Committee Member reading that section and nothing else. Again, as I have recorded (§22 above), it is common ground that the development was being put forward by the IP as being, and taken by officers to be, economically "viable".

    ii) Then there is the rest of the NOR. In the rest of the NOR, the reader finds no reference to a smaller development not being economically viable: no evidence; and no reasons. By contrast, the reader would find in the rest of the NOR multiple references to "optimum" and "optimising" in the context of a development at a site, and applicable to this development as the "optimum use" of this site. These references link to the points at NOR §§868-869 and 872.

iii) In the section of the NOR which had addressed the "principle of development" (NOR §§279-307) officers had described the contents of policy LPP H1 on "increasing housing supply", a policy whose contents stated (NOR §281) that London boroughs:

> ***… should optimise the potential for housing delivery on all suitable and available brownfield sites through their… planning decisions.***

LPP D6 also featured, which (NOR §286) stated:

> ***… that development must make the most efficient use of land and be designed at the optimum density. It goes on to state that proposed development that does not demonstrably optimise the density of the site in accordance with this policy should be refused. The supporting text to D6 advises that a design-led approach to optimising density should be based on an evaluation of the site's attributes, its surrounding context and its capacity for growth …***

Significantly, officers communicated that they had assessed that this redevelopment proposal (NOR §301):

> ***… optimises the number of residential units that can be delivered on the estate.***

iv) In the "housing" section of the NOR (NOR §§308-387) officers told members that LPPs H1, H2 and D6 support the most efficient use of land and "development at the optimum density" (NOR §313), while LPP D3 on "optimising site capacity through the design-led approach" was a policy which stated (NOR §314) that:

> ***… all development must make the best use of land by following a design-led approach that optimises the capacity of sites, including site allocations. Optimising site capacity means ensuring that development is of the most appropriate form and land use for the site…***

The "housing conclusion" section (NOR §§386-387), significantly, included this view expressed by officers (§387):

> ***The proposals would optimise the site, providing an appropriate dwelling mix and tenure split with a high-quality standard of residential accommodation provided for all potential future occupiers providing a substantial number of high-quality new homes within the Borough. This material public benefit is afforded substantial weight by officers.***

This is unmistakeably an officer-assessment, as to 'optimum use' of the 'site', as a "material public benefit", to be "afforded substantial weight". It is a view which would need to flow into the Conclusion Section.

v) In the "urban design section" (NOR §§402-535) reference is again made (NOR §409) to LPP D3, repeating what was said at NOR §314. Significantly, in this section it is said (NOR §433) that this development was one:

> ***optimising the quantum of development on site.***

This section also said (NOR §418) that the design team had demonstrated:

> ***… that the layout now proposed is optimum for the site, providing a high quality of residential accommodation, attractive central communal space.***

vi) On a fair reading, overall, it is this 'optimised use of the Site' theme which was being reflected in the description of "optimum" when officers were describing "use" of the Site. That is a consistent theme throughout the NOR read fairly and overall. It is the only sense in which "optimum" is used. It is never said or developed by officers anywhere in the NOR that the proposal is "optimum" in the sense of least Heritage-Harmful.

34. Sixthly, given the importance of this theme – earlier in the NOR – about the use being the "optimum" use of the site (§33 above), the question is this: where else was this "optimum" point being communicated in the Conclusion Section, if it is not the point made at the start of NOR §873? As has been seen, the "optimum use" point is epitomised by NOR §387 which states that this "optimisation" of the site was a "material public benefit" afforded "substantial weight" by officers. I asked Mr Harwood QC where within the Conclusion Section (NOR §§866 to 875) this important "optimum use" point was to be found expressed. His answer was that it would be understood as 'feeding through into' the first two bullet points of NOR §872. As has been seen, those bullet points list as public benefits presented by the proposed development. Mr Harwood QC's submission is that those bullet points were communicating, and would be understood to be communicating, the points made elsewhere about "optimum use". On that basis, he is able to hold to the position that the view being expressed at the beginning of NOR §873 ("optimum viable use") was one which was not reflecting "optimum" use of the Site in the sense communicated in those earlier passages. I agree with Mr Harwood QC and Ms Kabir Sheikh QC that the "optimum use" flows with NOR §872 (and §868). But Mr White QC is right, in my judgment, that NOR §§868 and 872 do not communicate that the virtuous housing use is the "optimum" for the Site. The fact that "110" additional homes are being delivered – including 20% family homes – as a "substantial quantum" does not, of itself, communicate that the Site is being used in a way which is "optimum". That is an additional dimension. It is not found in NOR §872. It is found at the start of NOR §873.

35. Overall, a number of points support the conclusion that the NOR was not materially misleading at NOR §873. It is regrettable that the phrase was used, taken from Framework §196, to which there was a clear link (NOR §§870 and 873). Everyone agrees that the Idea had no Applicability. It follows that the officers' use of that phrase in NOR §873 was inappropriate. That use of that phrase did not – could not – reflect Framework §196. But what officers were clearly saying at NOR §873 was that they considered this to be a "viable" development which "secures the optimum use of the site". Officers did not introduce a conclusion for which there was no evidence, or which was unreasonable in public law terms. There was no statement which had the consequence that the NOR materially misled members on a matter bearing upon their decision. The substance of what was being communicated was not misleading. It identified a proper and relevant planning virtue. A number of points and perspectives support these conclusions. Different paths lead to the same destination. But that destination entails a straightforward reading of the NOR, and of the language used. That straightforward reading applies to the Conclusion Section, when read in isolation. It does not lose sight of the practical realities from the perspective of Committee Members, and others, reading the NOR. By way of an 'end-note', I add this. It is not unfair to note that, when Mr Harwood QC came to address Committee Members at the

meeting, he did not point to NOR §873 as a 'red-flag' paragraph which misleadingly told Members that officers had conducted an assessment – that 'no smaller development of the Site could be economically viable' – without any supporting reasoning or evidence. No contemporaneous document reflects anyone reading NOR §873 in that way at that time.

Part 3. Grounds 2 and 3

36. Grounds 2 and 3 relate to issues regarding publication of documents by the Council, and the implications of non-publication and the timing of publication. These Grounds overlap and it makes sense to deal with them together, as all Counsel did. Ground 3 is about documents that were not published. Ground 2 is about documents that were published but on dates close to the date of the meeting.

Section 100D(5) of the 1972 Act

37. Ground 3 is a non-publication ground. The contention for the Claimant is that it was a 'vitiating breach' of statutory duty, arising pursuant to section 100D(5) of the 1972 Act, for the Council to fail to publish – 5 clear days before the Committee meeting on 29 June 2021 – the other "consultation responses" discussed in the NOR (in a 5½ page section at NOR §§54-58). The essence of this ground for judicial review, as I saw it, was as follows. Parliament has imposed an important statutory duty to publish within "five clear days" the "background papers for the report" (s.500D(1)), which means "those documents relating to the subject matter of the report which (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and (b) have, in [the proper officer's] opinion, been relied on to a material extent in preparing the report" (s.500B(5)). Although those criteria require a judgment ("opinion") of the proper officer, it was necessarily the case that the consultation responses constituted "background papers", and the contrary conclusion was untenable and unreasonable. That is because, in principle, documents are necessarily background papers where they are "relied on" in a planning officer's report like the NOR. That includes consultation responses, "discussed" in the NOR. This is the principled approach to the statutory duty. It was, rightly, recognised by Mr Robinson in his identification of the "internal" and "statutory" consultation response documents as being "background papers". The consequence is that consultation responses – as are commonly 'gisted' for committee members in an officer's report – stand as "background papers". Publication is required. This reflects a practice of transparency adopted by many local authorities. Applying the principles identified in the case-law described by Lang J (First Judgment §§101-103): this approach to access to background papers promotes the statutory purpose of allowing the public to be informed; it allows effective informed participation through written representations in advance of the meeting; it allows the preparation of oral representations at a meeting; breach of the statutory duty is significant as undermining the purpose of the legal obligation conferring the right to know which puts members of the public in the position of making sensible contributions to democratic decision-making; and the failure is a significant one which in the circumstances of the present case has a vitiating consequence and warrants the quashing of the decision made at the meeting. The relevant case law comprises, in particular: R (Joicey) v Northumberland County Council [2014] EWHC 3657 (Admin) [2015] PTSR 622 at §47; R (Holborn Studios Limited) v London Borough of Hackney (No. 2) [2020] EWHC 1509 (Admin) [2021]

JPL 17 at §71; and R (McCann) v Bridgend County Borough Council [2014] EWHC 4335 (Admin) at §27.

38. A linked contention is made under Ground 2 (timing of publication), as follows. The IP's response (3 March 2020) to the SCO Document (28 January 2020) was a "background paper" for the purposes of the same statutory duty, because it was a document relied on in the NOR (in particular, at NOR §§480, 497). Although published on 25 June 2021, ahead of the meeting on 29 June 2021, that was not the "five clear days" required by the 1972 Act. The breach was significant, having regard to the purpose of the duty. It has a vitiating consequence and quashing of the Committee decision is appropriate.

39. I cannot accept these submissions. I will explain why. A useful and proper starting-point is the First Judgment. Mr Harwood QC submitted that his arguments about consultation responses as "background papers" under the 1972 Act fell within the scope of Old Ground 4, which Lang J upheld (First Judgment §§104-108). His difficulty in that respect is that, although Lang J referred to the fact that none of the consultation responses had been included in the published documents (§106), she referred only to the SCO Document in upholding Old Ground 4, a ground which she upheld only because of a misdirection in law (First Judgment §107). That misdirection of law was a point referable to the SCO Document, as an "internal" consultation response. It could not arise in relation to external consultation responses. So, insofar as Old Ground 4 argued that external responses were "background papers", it did not succeed. Lang J went on to say that it "seemed likely" that the SCO Document was a "background paper", given that Mr Robinson in the OR had "relied heavily" on "facts and matters contained in it", particularly in relation to the significance of the heritage assets (First Judgment §108). Even then, Lang J emphasised that it was Mr Robinson's function – as the proper officer – to decide what in his "opinion" constitutes a "background paper", and the judicial review court should not "supplant his role" (§108). That assessment, in my judgment, is inconsistent with the view that – as a matter of law, and in principle – any consultation response or any document which is "relied on" in an officer's report is a "background paper" and cannot reasonably be concluded to be otherwise. The First Judgment does not support Mr Harwood QC. But I will put that to one side, and turn to consider the argument on its legal merits, as they seem to me.

40. A fundamental difficulty, in my judgment, is that it would have been very easy indeed for Parliament – in the design of section 100D(5) – to have prescribed that a "background paper" includes "any document whose contents are discussed in the report", or "any document on whose contents an officer has relied in preparing the report". Parliament did not do so. The phrase "relied on… in preparing the report" was used by Parliament. But that is within the second precondition in section 100D(5)(b): documents which "have … been relied on to a material extent in preparing the report". That brings in "to a material extent". And reliance, to a material extent, is not enough. It is also necessary ("and") that the documents – relating to the subject matter of the report – are documents which "disclose any facts or matters on which ... the report or an important part of the report is based" (section 100D(5)(a)). Added to all of this is the fact that Parliament spelled out that these tests involved judgment and appreciation. It is for the "proper officer" to form an "opinion" on each of the limbs (a) and (b). It is very clear from the structure of the statutory duty that the fact that a document is described in a report, or summarised (gisted) for the benefit of decision-making

members of a committee, or relied on, does not of itself trigger the statutory duty. The proper officer must direct themselves correctly in law – asking themselves the right questions – and Old Ground 4 succeeded because of a misdirection in law. In the context of the NOR, an exercise of evaluative judgment was plainly undertaken, by the proper officer. No misdirection in law – asking the wrong question – has been identified. There is no unreasonableness in the exercise of evaluative judgment. A witness statement from Mr Robinson is before the Court. He explains that the external consultation responses that they were not considered to be "background papers" as they did not disclose any facts or matters on which, in his opinion, the NOR or an important part of it was based; and nor, in his opinion, were they relied on to a material extent in preparing the report. Rather, they were summarised in the report for Members, as is usual practice. He says of the IP's response to the SCO Document that, in his opinion, this did not meet either of the criteria in section 100D(5)(a) and (b). Rather, the document was quoted in the NOR as a statement of response to the points made by the SCO Document, to provide Members with background on the differing views taken to the heritage impact of the development scheme. There is no misdirection in the approach described in that evidence. The evaluative judgments are plainly reasonable. I add this. Even if the IP's Response to the SCO Document had required characterisation – acting reasonably – as a "background document", that document was published some four days before the meeting. In my judgment, a breach of that kind standing alone could not in the circumstances justify the quashing of the decision, having regard to the significance of the failure and the purpose of the duty, applying the approach in the case-law (see McCann §27). In my judgment the section 100D(5) arguments are plainly unsustainable. They do not even cross the threshold of arguability, and I refuse permission for judicial review on Ground 3 and this part of Ground 2.

The SCI

41. A distinct aspect of Ground 2 (documents published close to the date of the meeting) is a contention which invokes the SCI. This was the policy instrument which was the subject of Old Ground 6 on a different point (legitimate expectation and non-referral to the DRP). The legal background in relation to the SCI is, as I mentioned earlier, discussed in the First Judgment at §§119-129. Some of the substantive contents of the SCI are discussed in the First Judgment at §§130-138. The Claimant's argument relating to publication and the SCI is, in essence as I saw it, as follows. SCI §6.7 refers to the stage when a planning application is submitted and the details of the application are entered onto the statutory register. The SCI earlier (§§4.1-4.2) describes "how the community can access planning information" and explains that information can be accessed in a number of ways, which include the application register but also accessing current planning applications". That clearly contemplates a distinction between "current planning applications" and information which is entered on "the application register". As a matter of the correct objective interpretation (a question for the Court) – or alternatively by way of legitimate expectation arising out of the clear and unambiguous statement, or alternatively by reason of the sole reasonable application of the SCI – the position, in principle, is this. Any 'developer-submitted material in support of a planning application' falls within the phrase "current planning application" for the purposes of SCI §4.2. It is true that all 'developer submitted material in support of this planning application' was published. It is also true that the "New" documents published on 18 June 2021 – such as the IP response to the DRP June 2021 report, the

IP's Heritage Statement and TVIA Addendum, and the new Ecology Technical Note – were all published promptly, the "Old" documents published on that date were not. Those "Old" documents included the IP's response to the sustainability manager's comments (undated) and the original Ecology Technical Note (7 May 2020). In Joicey at §§46-52, the Court explained that a technical document provided only 36 hours before a meeting constituted a breach of an undertaking in the local authority's SCI, because materials relevant to the taking of a decision publishable in accordance with the SCI "require timely publication", meaning publication "in good time" to members of the public to be able to digest the information and make intelligent representations, where the very purpose of the legal obligation was to put members of the public in a position where they could make sensible contributions to democratic decision-making, and where the question of timeliness turned on factors such as the character of the information, the audience and the bearing on the decision. Just as the late supply of the technical document in Joicey constituted a vitiating breach of the terms of the SCI in that case, so too does the late publication on 18 June 2021 and 25 June 2021 do so in this case.

42. Again, I can start with the First Judgment as a reference-point. The duty for which the Claimant contends is a duty in accordance with the SCI to publish all 'developer submitted material in support of the planning application'. Mr Harwood QC candidly accepted that this was not advanced among the Old Grounds for judicial review. Had it been a good ground of challenge it could have arisen in those proceedings, given the absence of publication of documents submitted by the developer in support of the planning application. Questions of publication and disclosure featured in the first judicial review. So did the SCI, which underpinned Old Ground 6 (referral to the DRP). At the very least, this brings into sharp focus whether the point is a good one. Having said that, I will again turn to focus on the legal merits of the point now advanced.

43. In my judgment, it is not arguable that the phrase "current planning applications" when it appears in SCI §4.2 extends to 'any developer-submitted material in support of a planning application'. Take the IP's response to the SCO Document. That response dealt with points which had been raised in the context of the local authority processes relating to planning decision-making. But, in my judgment, that does not make a document of that kind part of the "current planning application". I would accept that phrase "current planning applications" is capable of being broader than the reference to documents which appear on the register of applications. I would accept that there may be cases in which a judgment has to be exercised as to whether some document has so close a nexus and so integral a content, perhaps in the context of a relevant revision in what is being sought, as to fall within the phrase "current planning application", for the purposes of being within the listed information which the community can access within the terms of the SCI. To take another example, the 4-page Ecology Technical Note of 7 May 2020 described ecological measures to address the Council Ecologist's comments. It served to supplement an Ecological Assessment Report dated November 2019. It contained supplementary information to clarify indicative locations and types of bat roost features, bird nest boxes and swift call systems to be installed as part of the development, to safeguard protected species, mitigate ecological impacts and achieve ecological enhancements. In the witness statement of Mr Robinson, he explains that a document or response that comes forward as part of the planning assessment process does not, in his judgment, thereby form part of the "planning application" required to be published in accordance with the SCI. In my judgment, there is no arguable

misdirection in law, or misinterpretation the SCI, or breach of a clear and unambiguous and unqualified representation, or unreasonableness in applying the SCI. Had it been the intention of the SCI to provide a duty of publication in the case of all and any 'material submitted by developer in support of a planning application', it would have been very easy for the SCI to say so. It is not, in my judgment, arguable that the phrase "current planning applications" extends to all documents of that kind. In my judgment this aspect of Ground 2 is not arguable and I refuse permission for judicial review in relation to it.

44. In those circumstances, the argument cannot succeed. But there is another point. The 'developer-submitted material' was published on 18 June 2021. The Social Infrastructures Study was published on 23 June 2021. The IP response to the SCO Document was published on 25 June 2021. The SCI does not include a prescribed time-frame. But it is helpful to put the duty to publish in the SCI alongside the 1972 Act scheme, as it was in Joicey at §47. Even if a duty of publication had arisen by virtue of the SCI, the timings of these publications would not, in my judgment, serve to vitiate the decision made on 29 June 2021. I would reach that conclusion in the circumstances of the present case and having regard to the factors identified in Joicey at §47: the character of the material; the audience; and the bearing on the decision. I will return to other aspects regarding the timing of publication in the context of the procedural fairness issue, to which I now turn.

Procedural fairness

45. There is a remaining distinct strand of Ground 2. It concerns procedural fairness at common law. It involves looking at the position regarding the publication of materials, in the round, in the context and circumstances including as to: the publication of materials; the nature of those materials; the date on which they were published; the time-frame prior to the meeting; the implications for the Claimant and her representatives; the implications for the public more generally; and the implications for fair and informed decision-making, in the public interest. The Claimant's argument, in essence as I saw it, is as follows. After the hand-down of the First Judgment (18 May 2021) the Council proceeded, with conspicuous "haste", to refer the matter back to the DRP, who met just 7 days later on 25 May 2021 and reported on 10 June 2021; and then to summons on 21 June 2021 Members of the Committee to the meeting on 29 June 2021. After this Court had granted judicial review on no fewer than four grounds this, together with the timing of publication of materials and given the IP's action in providing updating and responsive further material, combined to produce a highly truncated timeframe. It was, in the event, too fast to be fair. There was no obvious reason why the timetable should have been so heavily expedited and so rigidly adhered to. Alongside the 249-page NOR (published on 21 June 2021), the Claimant and her representatives, the RSG and relevant members of the public, faced a wealth of materials being published at a very late stage. In addition, they faced the publication on 17, 18 and 25 June 2021 of materials which went back to 2018 – 2020. There is no reason why those could not have been published far earlier. The contents included technical documents which were not easily digested. The audience included ordinary members of the public. The subject-matter of this material was highly relevant. It included key aspects, including those relating to heritage assets and Heritage-Harm which had been the central focus in the first judicial review. There was also no reason why there could not have been a short period of deferment, to allow a further

opportunity for materials to be digested, so that members of the public and the Claimant and her representatives were all in a position to make intelligent representations, to make sensible contributions to democratic decision-making, including by written observations; and, in the case of the Claimant and Mr Harwood QC, in their oral representations. Those oral representations involved the rigours of a five-minute speaking slot. The IP, by contrast, was able to put in a sequence of documents and was far better informed and forewarned to make its representations. Whether or not there was compliance with the "five clear days" statutory duty under the 1972 Act, common law fairness stands alone and supplements the statutory scheme. It is not displaced by the statutory overlay. The question arises – which is always a question for the Court to decide – whether on the facts and in the circumstances of this individual case there was an unfair process. If so, the appropriate remedy is to quash the Committee's decision and require reconsideration in accordance with standards of procedural fairness, something which could have taken place at any time since July 2021.

46. The serious concerns which arose in relation to procedural unfairness were resoundingly reflected in a number of sources brought to the Committee's attention. Points were made in response: by the Chair, referring to the timing of publication as linked to late representations having been received; and by the Council's junior barrister (Mr Merrett), to the effect that the 1972 Act had been complied with and, whether or not unfair, the problem lay in the design of that statutory scheme. These were not good answers. The Committee could have dealt with the matter fairly in a number of ways: (i) refusing the application; (ii) deferral with a direction that the IP should revise the application and reduce the size of the proposed development; or (iii) adjournment. In the event, the Claimant, Mr Harwood QC, and others who expressed procedural concerns, invited (i) or (ii) and did not invite (iii). But that does not alter the fact that there was procedural unfairness in proceeding to grant planning permission. Nor does it begin to constitute a "waiver". The Claimant wrote to the Committee Members on 27 June 2021, expressing her surprise that the same application had been submitted with such haste. Her solicitors wrote to Councillors, stating that bringing the application back to Committee when a large amount of material has been published "less than a fortnight" before the meeting and, in critical respects, "less than a week" before the meeting was "grossly unfair", there being no real opportunity for the public – even those very heavily engaged in the application – to consider the material and comment on it. The RSG emailed Committee members on 28 June 2021. The RSG asked why there had been no further "consultation" and pointed out that more than 40 documents had been published very late on the Council's website, with insufficient time for the RSG to consider them. That included – explained the RSG – extremely important documents such as: the conservation officer comments; the response from the DRP after its May 2021 meeting; the Social Infrastructure Survey; the IP's response to the DRP; and the IP's response to the conservation officer comments. As the RSG pointed out, this "cannot be considered fair to the public, nor compatible with [relevant] aspirations for ongoing community engagement to ensure public support". Helen Hayes MP wrote to all Committee Members expressing concern at the "extreme haste" in bringing the application back before the Committee and expressed her concerns that documents now included within the NOR had not been raised with "adequate time for any meaningful action to be taken in response to them". Caroline Pidgeon AM wrote to the Council's Director of Planning on 29 June 2021, expressing surprise that the planning application had returned to the Committee so soon after the judicial review and communicating having received representations from local residents who felt that their concerns were

not being listened to. At the meeting, the Claimant herself told the Committee that she had had to "absorb 42 new documents in just 12 days", as a member of the public. Mr Harwood QC told the Committee that the "background papers" had come "late", and some had not been produced at all, and said in the circumstances it would be "unfair" to objectors, who had had to deal with that, to "grant permission this evening". Questions were raised by Committee Members about the timing of documents. In response, Mr Harwood QC referred to the documents which had been published and the timing, saying: "a lot of material has come through late", meaning "the Committee doesn't have the benefit of comments on that material" and "the Claimant's team haven't had the chance to deal with it". The Councillor who spoke under standing orders stressed the importance of having time to interrogate the documents which had been produced. Mr Robinson addressed the Committee on the nature of the recently published documents, describing "most" of the documents as "consultation responses" which "we published as background documents" in light of the First Judgment, and other documents as including "addendums and updated reports". The Committee Member who ultimately dissented asked "why the meeting could not have been deferred for 14 days" and "why not just allow enough time" in the context of a very contentious application. That, then, is the argument.

47. In my judgment, this ground of challenge crosses the threshold of arguability, and I grant permission for judicial review. But it nevertheless fails on its legal merits. The key points are these. First, the Council was entitled, in principle, to deal with the matter promptly. The reasons were given by the Committee Member who moved that the Committee approve the recommendations as reported tonight, subject to changes that had been outlined at the meeting. That Member referred to the massive need for decent social housing in the borough and across London. He said: "yes, time must [be] taken, but there comes a point when a decision has to be made and for me, I think, that decision is tonight". The Committee proceeded to a decision. The expedition with which the matter was dealt did not undermine the Council's ability to deal with the flaws which had been identified by Lang J in the First Judgment, which was one of the question-marks raised about haste. None of the grounds for judicial review advanced in this sequel case involve contending that the Council failed to remedy a flaw identified in the First Judgment. None of them have been re-run.

48. Secondly, the 1972 Act is an illuminating contextual reference point. I would accept Mr Harwood QC's submission that the provisions of the 1972 Act and the "five clear days" applicable to "background papers" do not 'occupy the field'. By that I mean they are not exhaustive of applicable legally duty. They do not serve, in principle, to exclude any operation of common law procedural fairness. Nevertheless, the provisions of the 1972 Act – identified by Parliament – do, in my judgment, serve as a relevant reference point, when consideration is given to questions of timing and the publication of materials in the present context. Parliament's carefully considered view was that publication could be within a tight and disciplined timeframe, promoting efficient despatch of local authority business.

49. Thirdly, the position regarding the NOR is significant. The NOR was published on 21 June 2021. That is accepted to have been within the applicable statutory deadline for publication of such a report. It is no part of Mr Harwood QC's common law unfairness argument that the NOR itself was published too close to the meeting on 29 June 2021 – 8 days later – for the process to be fair. His focus, rather, is on other documents

published on 17 and 18 June 2021, and on 23 and 25 June 2021. The NOR, in my judgment, is of real significance when consideration is given to procedural fairness.

i) This is not a case where materials landed without any context or framework. On the contrary, this is a case where the NOR – the timing of whose publication is accepted to satisfy common law standards of procedural fairness – gave a careful and detailed framework of analysis and commentary. The NOR was available electronically. It was searchable. The other documents could be seen and considered against the detailed framework and commentary found in the NOR. That was true for Members. It was true for the IP, for the public, for the Claimant and for Mr Harwood QC. Supplementary documents could be seen against that detailed framework. Each document could be seen in the context of what had been said about it and about the topics which it was addressing. The reader would be able to see whether some key point had been omitted or misrepresented for Members in the NOR, or what critical point the document added to or subtracted from what was being said in the NOR.

ii) This point can be tested by looking at the practicalities of what was being published. The 26 documents published on 17 June 2021 were the "internal" responses and "statutory consultee" responses, all discussed in the relevant sections of the NOR itself. The NOR provided a route-map and gisting. It enabled a reader to identify any relevant internal or statutory consultee, to look at what that person had said, alongside what was being said about that person's response. Document 1, for example, is the consultation response of the "designing out crime officer", summarised (NOR §229) as having responded as follows: "no objections subject to Secured by Design condition". Document 2 was the Environment Agency's response. It had been summarised (NOR §230): "No comment to make given scale of proposals". Much more detailed comments were made – and summarised in the NOR – by statutory consultees such as Thames Water and Transport for London, in respect of whom the responses were Documents 20-23. The section in the NOR on "internal" consultation included the Ecological Regeneration Manager ("ERM"), whose response was set out at NOR §§106-116. That was Document 3. The "internal" response of highways was Documents 8 and 9, discussed in NOR §§121-135. The response of strategic housing (Document 19) was discussed at NOR §§141-159; the response of the tree officer (Documents 24-25) was at NOR §§160-183); the response of urban design (Document 26) was NOR §§207-226.

iii) Again, testing the matter by looking at the practicalities, the DRP's previous consideration were discussed in NOR §262 onwards, including the July 2019 meeting which had discussed the then 120 unit iteration of the proposed development (NOR §266). The NOR then discussed the further, recent report of the DRP (NOR §268) and that document was published. This combination enabled a reader could see what was said about the new document, alongside the document itself. All of the materials published on 17 and 18 June 2021 enabled a reader to consider what was being said in the very detailed NOR alongside those primary documents themselves. If there had been some point to raise, about the relevant contents of some document having been misrepresented or inadequately summarised or some keen key point as having been missed, those documents would reveal it. There is a linked point. Had there been some

identifiable prejudice in that respect, so those documents being produced only when they were, Mr Harwood QC would be able – a year later and after the careful and conscientious design that has necessarily gone into the grounds, evidence and arguments, to draw my attention to a problem of materiality of that kind. None was identified. That is also true of the IP response dated 3 March 2020 to the SCA Document of January 2020 which was not published until 25 June 2021.

iv) Once again, the practicalities can be illustrated by considering the Social Infrastructure Study, revised in June 2021. This was a 19-page document, published on 23 June 2021. In their letter to Councillors regarding process, the Claimant's solicitors described that as a "new and very important" document. In fact, as the skeleton argument filed by Mr White QC and Mr Henderson convincingly points out, that document in fact contained updates to 3 tables and by reference to relevant policy whose implications were reflected in the revision of school pupil data, all addressed in the AOR.

50. Fourthly, it is important to keep in mind those public law principles which are applicable to the question of "reconsultation": whether a further round of public consultation is required by a change of circumstances. Public consultation duties carry with them particular requirements relating to information to be provided, the time to be allowed for informed responses, and the steps requiring to be taken in the light of their receipt. As has been seen, one of the themes in the objections regarding haste and late publication of documents concerned further "consultation" stage. But that reconsultation issue was convincingly addressed for Committee Members in the AOR of 29 June 2021. As officers there explained, they had assessed the position as being that public "reconsultation" was not necessary or appropriate. It is common ground that they were right about that. Importantly, it is no part of the Claimant's judicial review grounds that this was a case in which a public law duty of "reconsultation" arose. That means the process needs to be considered in the context that this was not a reconsultation case, attracting the public law requirements applicable to consultation. Rather, it was a case where materials were being published including a very detailed officer report (the NOR), with the opportunity to make any written representation, and the Claimant and Mr Harwood QC having the opportunity to address committee members directly to make any headline point.

51. Viewed in the context of all this, I cannot accept that the process was procedurally unfair, to the Claimant or to others. I appreciate that relevant documents were published, close to the date of the meeting, which were multiple technical documents, in the context of an important decision, engaging the public interest. I do not underestimate the importance, even outside the question of consultation and reconsultation, of the purposes engaged by fair process, in terms of objectors and ordinary members of the public being in a position to make sensible contributions to democratic decision-making, seen in Joicey at §47. In Joicey, there was legally inadequate time when a new technical 74-page noise assessment had been disclosed with 36 hours to respond to it, in circumstances where more detailed representations could have been made and an expert instructed (§§52-53). In my judgment, in all the facts and circumstances of the present case there was no breach of the standards of common law fairness. Whilst Mr Harwood QC submits, and I would accept, that it is not a precondition for success in a procedural challenge for the Claimant to be able to

identify some material point that would and could have been made, it is nevertheless, in my judgment, fair to point out that he has not been able to draw to my attention any key point arising out of the published materials – in light of the discussion in the NOR – which he says could all words have been picked up by the Claimant or any other person which could have undermined the assessment being put forward in the NOR which members of the committee accepted. For all these reasons, I cannot accept the common law unfairness strand of Ground 2.

Part 4. Ground 4

52. Ground 4 is a belated ground for judicial review, in respect of which permission to amend is sought. At its heart is a 6-page letter (the "LWT Letter") dated 16 March 2020, written by the London Wildlife Trust ("LWT"). The letter contained LWT's "observations" of substance on aspects of the application for planning permission. Those observations were primarily in respect of impacts upon the Site and the nearby Site of Metropolitan Importance for Nature Conservation Dulwich and Sydenham Hill Woods, in circumstances where most of Sydenham Hill Wood was also designated as an LNR. The LWT Letter explained that it has managed Sydenham Hill Wood since 1982 and that its boundary was just 15m from the application Site. The LWT Letter identified five key concerns and made detailed observations about them.

The Claimant's argument

53. The essence of the Claimant's arguments on the legal merits of Ground 4, as I saw it, was as follows:

    i) The LWT Letter was a significant response, from an important source, addressing important aspects of the application for planning permission. As with the SCO comments and as with the TCS objection the LWT letter was an obviously material consideration required to be taken into account. The failure to do so was a matter of materiality in the context of the decision that was reached. The LWT letter made points about the adverse impact on the adjacent ancient woodland, enhancement and net gain in biodiversity not going far enough, lack of net gain in open space through the developments, implications for Sydenham Ridge Area of Special Character and landscape proposals and their future management.

    ii) The LWT Letter has recently come to light. So has the fact that it was never considered within the decision-making process either in conjunction with the decision at the meeting on 27 August 2020 or in conjunction with the decision at the meeting on 29 June 2021. The substance of the LWT Letter was never considered by planning officers. It was not contained in any comments pack. It was unmentioned in the NOR (and the OR, before that). Members were left in ignorance of what LWT had said and the fact that it had said it.

    iii) The duty to consider the LWT Letter was 'triggered' by its supply and receipt. The LWT Letter was sent to and received by the Council, into a relevant, active email address (the "planning" in-box) used by the Defendant for the planning decision-making process. What happened was this. An email sent on 20 March 2020 at 12:17 attached the LWT Letter. It was "sent" to the Council's "planning-PA" email address. But it was "cc'd" to the "planning" email address. The

Council's published "Guide to commenting on planning applications" explained that anyone could "express views", to "help the Council" reach a balanced view about whether or not to grant planning permission to any proposal, in one of three ways. (a) One was to make a "comment online", which the Council would "acknowledge". (b) A second was to make a "comment by email", in which case the person should email their comments to the "planning" email address. (c) A third way was by making a "comment in writing", sent to a given postal address. The Guidance explained that the Council would "acknowledge" receipt of comments sent to it by email. The "cc" email, to the "planning" email address, constituted the second way. Nothing in the Guide stated that emailed comments would not be considered if "cc'd" to the "planning" email address.

iv) LWT also entered a "comment online" – using the first way – on 20 March 2020 at 12:13. The "comment online" from LWT told the Council: "we have submitted our comments in a specific letter". The "comment online" was immediately, automatically acknowledged from the "planning PA" email account (20 March 2020 at 12:13). Three days later, on 23 March 2020, LWT received an email from the "planning" email account which attached a standard letter from Mr Robinson. It thanked LWT for the "submission giving your comments" which it said would be "taken into account" and "carefully considered". Any consideration of the "comment online" would have alerted a reader to LWT Letter. If they had looked, they would have found it in the "planning" email inbox, having been "cc'd" there. LWT considered – entirely understandably – that the LWT Letter had been received and acknowledged and would be taken into account. But that is not what happened.

v) The substance of the points made in the LWT Letter is not replicated by those points which were identified by officers and for Committee Members in the NOR. There are material differences. Moreover, whether or not the substance is mirrored, what was on any view missing is the important factor that the "voice" of LWT had been expressed and was raising significant concerns. That voice would necessarily have added weight when those concerns came to be considered, even if and to the extent as there was a symmetry. The very fact that LWT's voice was being added to the chorus of concern on these five key points was a matter of relevance and materiality. It cannot possibly be said that the decision would have been the same or even that it is highly likely that it would have been the same. It is not just a case of an objection being missing from the discussion in the NOR, but the LWT letter was not even included within the responses being provided to members. In this respect the situation is materially different from applied to Old Ground three in the First Judgment. The appropriate course and the only safe course is to quash the decision and remit the matter for reconsideration so that LWT's concerns – which it has confirmed remain extant – can be considered.

54. The Claimant's arguments in support of the application for permission to amend, in essence as I saw it, were as follows

i) It is true that Ground 4 was only raised in the claimant's skeleton argument served at 16:01 on Friday, 27 May 2022. It is also true that no formal application for permission to amend the grounds was made until Wednesday, 1 June 2022. On the other hand, it is appropriate to have clearly in mind the practical realities

as they were from the perspective of the Claimant and her representatives. It was entirely unexpectedly, and unforeseen – at a meeting on 18 May 2022 in conjunction with a spring fayre and leafleting relating to the proposed development – that the Claimant became aware that, unbeknown to her and unrecorded anywhere, LWT had written raising concerns about the proposed development. The LWT Letter was emailed to the Claimant and seen by her for the first time on 18 May 2022. She sent it by email to her solicitors in circumstances where her lead solicitor was at that stage on maternity leave. It was forwarded to Counsel on 19 May 2022. He needed to consider it and was in a lengthy and substantial trial. He was able to consider it when writing the skeleton argument on 27 May 2022. He referred to its contents within that skeleton argument, clearly recognising and foreshadowing that an application for permission to amend would be made. That happened on 1 June 2022, which was when a fuller picture relating to the emailed acknowledgements sent to LWT were available. Equipped with the fuller picture, a formal application to amend the grounds was made, accompanied by witness evidence and relevant emails.

ii) Although that came too late for the skeleton arguments of the Council and IP, filed on Wednesday, 1 June 2022, they were each able to – and did – file supplementary skeleton arguments on 6 and 7 June 2022 addressing Ground 4. There were exchanges of correspondence and evidence.

iii) There was no factual controversy, such as might threaten an adjournment. By the time of the hearing, there was an agreed factual picture against which the point could be considered on its legal merits. That factual picture involved the following key considerations. The Council operated arrangements by which only emails directly sent (and not cc'd) to the "planning" email inbox identified in the Guide were considered in the planning decision-making process. The email acknowledgements that were sent in the present case were responsive to the "comment online" that had been made, which itself involved no point of substance. There was no acknowledgement of the emailed LWT Letter. The LWT Letter was never seen by Mr Robinson and was not considered in the process. LWT received an email 'bounceback' message to its email from the "planning-PA" email inbox, to say that emails sent to that automated "planning-PA" account would not be actioned. It was in those circumstances that the LWT Letter was not seen and considered by Mr Robinson. Those material facts being agreed, there was no further factual investigation which was required, in fairness to the Council or the IP, as they confirmed at the hearing.

iv) Ground 4 is important one and viable. In all the circumstances, dealing with it on its legal merits is in the interests of justice. Doing so involves no prejudice to the Council and IP, other than defeat were the point to prevail on its legal merits, which would mean the impugned decision us an unlawful one. Permission to amend should be granted and the Court should determine that question on its legal merits.

Lines of opposition

55. The Council and the IP respond to Ground 4 by submitting that the Court should refuse permission to amend, or alternatively should refuse permission for judicial review, or

alternatively should refuse to grant judicial review (including any remedy). The essence of their arguments, as I saw it, involved three lines of opposition. The first line of opposition concerns promptness and procedural rigour. The Claimant and her representatives failed to act with appropriate promptness in raising the new ground for judicial review. No complaint is made about any passage of time prior to 18 May 2022. But promptness and standards of procedural rigour, in a case fixed for hearing on 9 June 2022, called for far greater proactivity. The Claimant's representatives ought, very promptly after 18 May 2020, to have alerted the Council and the IP to the development and concern that had arisen. That would have accelerated investigation as to what had happened regarding the LWT Letter. It would have given full and fair warning. There is no reason why the Claimant's representatives could not have taken that course. Counsel had the letter from 19 May 2022. It was known that the Claimant's skeleton argument was due on 27 May 2022 and the Council and IP skeleton arguments on 1 June 2022. Even when Counsel came to draft the Claimant's skeleton argument it must been known, at the very latest during the day on 27 May 2022, that it was now intended that there be an application to amend the judicial review grounds to include Ground 4. But no letter was written or email sent. Instead, the Claimant's skeleton argument was simply filed and served at 16:01 on Friday, 27 May 2022. Only on reading the contents would it be seen (page 2) that an application was going to be made to amend the grounds. It was entirely unsatisfactory the application to amend to be dealt with in that unheralded way. And even then, the LWT Letter was not provided. Entirely unsurprisingly, the new ground and application to rely on it were strongly resisted in the skeleton arguments filed on Wednesday 1 June 2022 by the Council and the IP. It was only on that day that an application to amend the grounds was made and the LWT Letter provided. Even if a further investigation had been underway with LWT, those investigations could and should have been pursued with promptness after 18 May 2022, and a proper investigation necessarily involved the Council. Moreover, on 27 May 2022 Mr Harwood QC was able to say that an application to amend the grounds was going to be put forward and was able to identify in the skeleton argument what the new Ground 4 was to be. This puts beyond doubt that an application for permission to amend could and should have been made, at the very latest, on Friday 27 May 2022. The lack of promptness undermines the proper and fair preparation by the parties for the hearing. It jeopardised the hearing. There is no excuse. In the first judicial review proceedings, permission to amend to include Old Ground 7 was refused on the basis of a lack of promptness and unreasonable delay. In all the circumstances, the same fate should befall new Ground 4. Permission to amend, or alternatively permission for judicial review, should be refused on grounds of lack of promptness.

56. The second line of opposition concerns the absence of a 'trigger' for the duty to 'have regard' to the LWT Letter. It is as follows. The Council's Guide made clear that any substantive "comment" about a planning application communicated by the "online" route would be acknowledged and reviewed. In this case, the "online comment" did not make any substantive point. It was the subject of an automated email receipt. It was also the subject of an automated standard form letter. Since it contained no point of substance it can have 'triggered' no duty. It referred to a "letter". But it was and remained a matter for LWT whether it submitted a letter. That had to be done in one of the ways set out in the Guide. The LWT Letter was sent only by email, and only to the "planning-PA" email address. That is not the email address given in the Guide. It was an inactive email address. Far from providing an acknowledgement or receipt, it did the opposite. It generated an automated 'bounce-back' email. LWT received that 'bounce-

back'. There was never any acknowledgment or receipt of the LWT Letter, sent to the wrong email address and only "cc'd" to the right one. The Claimant's amended pleaded case clearly contends that the Council acknowledged the LWT Letter, provided by email. That is not what happened. What actually happened was that there were two acknowledgements of the online comment, and no acknowledgement of the emailed letter. It is unfortunate if LWT misappreciated the acknowledgements. It is true that the letter to the "planning-PA" email address was "cc'd" to the "planning" email inbox. That is regrettable. The Guide clearly envisages, and was reasonably operated so as to receive, comments "sent" to that address. There was no unlawfulness or unfairness in the Council's internal email (outlook) arrangements gathering only direct email traffic, and diverting "cc" email traffic. It was not difficult for LWT to adhere to the Guide. LWT could have made sure, having been alerted by the 'bounce-back' email. It was not for the Council to 'chase up' whether there was a letter received as a "cc" email, by trawling through that "cc" email traffic. In these circumstances, LWT Letter was not a response whose existence was discovered at the time, by the Council or its officers; nor whose existence was anticipated by them; nor could reasonably have been discovered or anticipated. In those circumstances, no "have regard" duty could be 'triggered': see R (Kides) v South Cambridgeshire District Council [2002] EWCA Civ 1370 (2003) 1 P & CR 19 at §124. To these points can be added the fact that there was no follow-up by LWT including when there was no mention of the LWT Letter in the published OR for the August 2020 meeting, nor again the published NOR for the June 2021 meeting

57. The third line of opposition is that there is in any event no 'material' public law breach. The failure to "have regard" to material considerations, in the form of the substantive comments made in the LWT Letter, was not a 'vitiating' flaw in the making of the decision at the meeting on 29 June 2021. The substantive contents of the LWT Letter can be examined alongside the contents of the NOR. (I interpose that I will return to that exercise below.) The Court is also assisted by a witness statement from Mr Robinson. There is no point of substance in the "observations" LWT was making, which was not actively considered and properly addressed in the decision-making as to whether to grant planning permission and, if so, on what appropriate planning conditions. There was no 'material' failure to 'have regard' to any relevant or material consideration. That is the case, notwithstanding that officers and Members did not appreciate that LWT was adding its 'voice' in relation to the 5 'headline issues' discussed in the LWT Letter; which unlike the TCS letter was not in the public comments' packs provided to Committee Members (Old Ground 3). The HL:NSD test in section 31(2A) of the Senior Courts Act 1981 (First Judgment §§155-157), which the Court is duty bound to consider including in relation to permission for judicial review, is clearly satisfied. If the LWT Letter and its contents had been identified and addressed in the NOR, it is not "possible that the Members would have concluded that the IP ought to re-consider the height and scale of the proposed development, and submit a more acceptable proposal" (cf. First Judgment §157) nor that the outcome, for the Claimant or for anyone else, would have been substantially or significantly different in any other way. The Court should refuse permission to amend on the basis of the lack of viability of Ground 4 (cf. First Judgment §15), or alternatively refuse permission for judicial review or refuse the substantive claim for judicial review on grounds of lack of 'materiality', or pursuant to the statutory HL: NSD test.

Materiality

58. I propose to address these three lines of opposition to Ground 4 in reverse order. I start with 'materiality'. I need to set the scene. In the LWT Letter, the position adopted by LWT was that there was "not yet enough information provided to determine the application as it stands". Five "Headline Issues" were raised:

> ***(1) The impacts that the development is likely to have on the adjacent woodland (a Priority Habitat), and the species that inhabit it, through increased light levels from residential properties appears to be underplayed. (2) Enhancements and net gain in biodiversity do not go far enough nor reflect the ecological character of the environs. (3) The development results in a net loss in green space. (4) The application does not fully take into account the impact that a 6–7 storey building will have on the Sydenham Ridge Area of Special Character, in particular as detailed in Lewisham Local Development Framework Core Strategy Policy 18. (5) Landscaping proposals to be maintained through a Maintenance & Management Plan ["M&M Plan"] do not reflect the local ecological character and a Landscape & Ecological Management Plan ["LEM Plan"] is not submitted despite being referenced.***

The rest of the LWT Letter expanded upon these five headline points. The Claimant's pleaded case on Ground 4 includes this:

> ***The concerns expanded upon included the lighting, user pressure on the woodland, the loss of the small pond on site and the failure to provide [an LEM] Plan. Neither [the OR or the NOR] made reference to any representation by [LWT]. Whilst some objections as a result of public consultation were summarised in respect of biodiversity, those did not include many topics raised by LWT, such as harm to the local nature reserve, net loss of green space, loss of the pond and the absence of [an LEM] Plan [and] the [NOR] was not there summarising the LWT representations. The nature conservation section … identified the significance of the local nature reserve but failed to refer to the reserve's manager's concerns. The [NOR] did not address some points which had been raised by LWT at all, such as visitor pressure on the LNR, the loss of the pond and the need for an [LEM] Plan at this stage. It was highly material that [LWT] considered that there was insufficient information to approve the application given (a) their general status and expertise and (b) that they managed the local nature reserve which was 15 metres from the site. That should have been a matter of considerable concern to officer and committee members. LWT raised important issues, many of which were not addressed in the report at all.***

59. I will seek now to encapsulate what the LWT Letter was saying in relation to each headline issue, together with the expansion. In doing so, I have in mind that LWT has confirmed to the Claimant's representatives, in a recent email, that it still has the same concerns which it was expressing in the LWT Letter. Here, then, is an encapsulation of those concerns, as expressed in the LWT Letter:

i) LWT's first headline issue was the apparent underplaying of woodland and species impacts through increased light levels. When expanded, there was also a point about user pressure. As LWT recognised, an "ecological assessment report" ("EAR") (November 2019) had described "no residual effect" on the Dulwich and Sydenham Hill Woods; had stated that a lighting strategy would "likely" be required as a planning condition, to ensure "no light spill from the site onto the adjacent Sydenham Hill Woods site"; had stated that the "small increase in visitors' was "unlikely to have an adverse effect", which "additionally" was the subject of mitigation by enhanced existing areas of green space. The LWT Letter expressed the view that light spill impacts should be evidenced and assessed prior to a decision, not addressed as a condition; that the proposed mitigation might help to alleviate potential user pressure; but that the experience of the woodland would be very different from that described in the EAR.

ii) LWT's second headline issue was that biodiversity enhancements and net gain were insufficient and non-reflective of local ecological character. The expansion referred to the loss of the small pond and failure to provide a pre-decision LEM Plan. The LWT Letter also explained that the Site was located near a registered bat roost in Sydenham Hill Wood, which had not been referenced in the EAR; that "landscaping proposals" did not go far enough to reflect the ecological character of the adjacent historic woodland; that LWT recommended retention and enhancement of the small pond (which did not meet habitat-designation criteria) whose loss would not be fully mitigated by the envisaged rain garden.

iii) LWT's third headline issue was net loss of green space. In the expansion, LWT acknowledged that the IP's Heritage Statement identified the overall minor loss in green space. LWT's view was that the "footprint" should be "reduced" or mitigated by "additional green infrastructure" such as "green walls or a green roof".

iv) LWT's fourth headline issue concerned failure fully to take account of the visual impact on the Sydenham Ridge Area of Special Character, by reference to Core Strategy Policy 18. The expansion included these points: that if the wooded skyline of Sydenham Ridge was to be preserved the height of the building would require further reduction so as no longer to form a visual marker competing with it; that Policy 18 identified areas where the effect of tall buildings would require "careful assessment"; that Sydenham Ridge was an identified topographical and wooden skyline feature that the Council would wish to preserve, where tall or bulky buildings would affect the skyline and have an adverse effect on landscape and a local residential amenity; that the IP's Heritage Statement acknowledged that 5-7 storeys would be relatively prominent and visible extending higher than other precedents in the local area, forming a new visual marker will involve a degree of harm to the character and appearance of the CA.

v) LWT's fifth headline issue was that the landscaping proposals through an M&M Plan did not reflect the local ecological character and (as with the second headline issue) there was no pre-decision LEM Plan. The expansion welcomed the M&M Plan "commitment" to foster a richer ecological mix of species, enhance residents' sense of contact with nature and deliver enhancement of biodiversity, ecological potential habitat value, conservation and visual amenity. LWT welcomed the proposed installation of new rain gardens (referred to within the second headline issue). LWT expressed concerns about planting plans, recommended changes in planted species to reflect local woodland flora, and offered to help with this and with LEM plan targets and monitoring.

60. It is I think helpful to give two illustrative reference points at this stage. First, by way of an illustrative encapsulation of aspects of the IP's position, there is this taken from the IP's second and updated Ecological Technical Note (17 June 2021):

> ***The proposed re-development of the Site is aligned with relevant policies on biodiversity in the London Plan and the emerging draft Lewisham Local Plan. Ecological measures have been embedded into the proposed re-development of the Site to manage impacts on ecological features and to protect nearby Sydenham Hill Wood and Fern Bank Local Nature Reserve (LNR), and Dulwich and Sydenham Hill Woods SINC. This includes retaining existing trees and other habitat where possible and providing new areas of green space of biodiversity value. New habitat provision includes wildflower and tree planting, provision of a semi-natural***

> ***habitat buffer between the Site and the SINC, and installation of bat and bird roosting/ nesting opportunities. There will also be a sensitive lighting design to avoid/ minimise light spill on features of ecological value, and pollution protection measures implemented via a Construction Environmental Management Plan (CEMP). The 2019/20 assessment concludes that the proposals are expected to achieve an overall net gain in biodiversity.***

Secondly, by way of an illustrative encapsulation of aspects of the Claimant's position, there is this, taken from what she said to Members at two points during the meeting:

> ***The bigger footprint is to be gained by felling much-loved trees. Trees that form an irreplaceable wildlife corridor, which your own Tree Officer says will take years to replace. They form the outlook for all of us in Otto Close. The pandemic has shown community green space to be invaluable. The research is conclusive. Green space is essential for mental health and we have a mental health crisis on our hands. I'm a teacher. Our green space is to be infilled and sanitised… We urge you to review the scale and height of this development…***
>
> ***The area's not urban. It's suburban and it can't support that many people. Without a doubt it can't support that many people. The woods opposite, Sydenham Hill Woods, during the pandemic have been so filled with people desperate to be walking in some sort of countryside when they couldn't go anywhere else. We're in danger of destroying that wildlife because the building is closer than I am to you from the woods. And the light that's going to be spreading out. We have to, when we want to make social housing, put it into context and we have to look at the context of the environment that it's in.***

61. I turn to the contents of the NOR. In the NOR, Dulwich and Sydenham Hill Woods were recognised as the closest and most significant of the sites of importance for nature conservation (NOR §759). Members were told that officers had assessed – in light of the confirmation from the ERM, including that proposed mitigation measures were appropriate – that the application was acceptable with regard to ecology and biodiversity. The NOR set out the response of the ERM (NOR §§106-116). It told Members that the ERM had confirmed (NOR §771) that the proposed development was acceptable with regard to impact on ecology and biodiversity, subject to appropriate planning conditions being imposed. The range of ecological initiatives and mitigation measures proposed for the scheme were set out (NOR §768). The NOR referred to the pond habitat-suitability index assessment (NOR §760) and the study recording species (including bat roosts) within 2 km of the Site (NOR §§761-763). The NOR described the initiatives and measures addressing tree removal, tree planting, the creation of deadwood piles, the creation of a rain garden, new areas of wildflower planting, the creation of a boundary hedge, tree bird boxes, building bird boxes, mounted bat boxes, and a swift call systems (NOR §768). Against the backcloth, I turn to these specific topics:

i) Light levels and woodland/species impacts. As Mr Robinson points out, many consultation responses had raised concerns about the impact with regard to light. A lighting design strategy ("LDS") was required as a planning condition which, Members were told, would secure a sensitive lighting design to avoid or minimise light spill on features of ecological value (NOR §774). The relevant planning condition deals with an LDS "for light-sensitive biodiversity". It requires, prior to any occupation on the Site, the LDS to have been submitted to the Council and approved by it. It is required that the LDS: identify areas and features that are particularly sensitive for biodiversity and likely to cause disturbance in or around breeding sites or resting places or along important routes; show how and where external lighting will be installed so that it can clearly be demonstrated the areas to be lit will not disturb or prevent species

from using territory, having access to breeding sites and resting places. All external lighting is to be installed in accordance with the strategy. The impacts relating to light levels and their impact on woodland and species were directly addressed. The view was arrived at that an LDS was needed to be approved and implemented, but that this could be done under a planning condition mechanism. This was the topic in the Ecology Technical Note ("there will also be a sensitive lighting design to avoid/ minimise light spill on features of ecological value"). Mr Robinson's witness statement confirms that the Council will consult LWT in relation to implementation and discharge of that planning condition and LWT will be able to comment on the detailed lighting proposals at that point.

ii) Visitors and mitigation. As LWT recognised, the EAR had described a small increase in visitors, unlikely to have an adverse effect given the dedicated footpaths for members of the public, and that the embedded mitigation could help to alleviate these potential pressures. Officers described the ecological initiatives and mitigation measures (NOR §768), embedded into the proposed redevelopment to manage impacts on ecological features and protect the nearby Dulwich and Sydenham Hill Woods (NOR §773), whose appropriateness had been confirmed by the ERM.

iii) Pond/rain garden. Loss of the small pond is emphasised in the Claimant's pleaded case as an objection unmentioned in the NOR. But members were told that a pond habitat-suitability index assessment had been conducted (NOR §760) and that loss of this (ornamental) pond was mitigated by the rain garden (NOR §768). The ERM assessed the proposed measures as suitable, acceptable and appropriate (NOR §§769, 771 and 776). Officers consider the proposed package of ecological measures as being acceptable.

iv) Trees/LEM-Plan/landscaping/planting. The issues relating to the retention and planting of trees, and in relation to new areas of wildflower planting were prominent in the assessment of ecology and biodiversity consideration (NOR §768) and, again, were assessed as suitable by the Council's ERM (NOR §769). Officers explained for Members that the measures to manage impact on ecological features and protect the nearby Dulwich and Sydenham Hill Woods (NOR §773) included "retaining existing trees and other habitat where possible and "providing new areas of green space of biodiversity value" with new habitat provision including wildflower and tree front planting (NOR §§773-774). A section of the NOR addressed green spaces and trees (NOR §§777-806) and the landscaping scheme condition was imposed to include details for claiming plants to grow vertically up the new buildings (NOR §804). Members were told that the design had evolved to reduce the number of tree removals and ensure maximum number of trees retained (NOR §805). The discussion relating to the comments from the tree officer (NOR §797) addressed an "enhanced green corridor" with "new planting" to help establish a "continuous planted ecological corridor" linking the great North Wood on Sydenham Hill as well as additional woodland edge ground flora and wildlife refuges within the planting bed. Officers assessed and informed members that the proposed planting areas to the Sydenham Hill frontage had increased in size and additional large species trees had been added "to create a stronger tree group" which would "mature into woodland character specimens" (NOR §799). The proposed planning conditions

– alongside a "soft landscaping" condition – specifically included the adoption of an LEM-Plan (condition 24). What was assessed as appropriate – and sufficient – was that this plan be submitted to and approved by the Council prior to any occupation of the development. The LEM-Plan is to include a description and evaluation of the features to be managed; ecological trends and constraints on the Site that might influence management; preparation of a work schedule; and ongoing monitoring and remedial measures. The rationale of the condition was to comply with policies relating to biodiversity, open space and environmental assets. Regarding LWT's wish and offer to assist further in relation to the LEM-Plan, Mr Robinson's witness statement explains how this is achievable: the Council will consult with LWT on the details in relation to the LEM-Plan.

v) Green space/ footprint/ green walls/ green roofs. Net loss of green space is emphasised in the Claimant's pleaded case as an objection unmentioned in the NOR. The NOR described the "new areas of green space of biodiversity value" (NOR §774). It was acknowledged that a small amount of existing green space would be lost as a result of the proposed development. As Mr Robinson points out, this was the subject not only of description in the NOR but also in an officer's presentation slide. "Footprint" was raised by the Claimant, and discussed by Members, at the meeting. A section of the NOR (NOR §§379-385) addressed children's playspace and open space within walking distance of the Site. Officers assessed the proposed development is being in accordance with the relevant playspace policy and acceptable with regard to playspace provision (NOR §385). The NOR addressed green spaces and trees (NOR §§777-806).

vi) Wooded skyline. This is a feature of the impact of the development which had featured heavily in Old Ground 5. The contents of the NOR reflect the impact of the proposals on Sydenham Ridge Area of Special Character as a key aspect fully considered. As Mr Robinson's witness statement explains, it was also a matter raised many times by the public at pre-application and application stage. It featured heavily in the gisted objections (NOR §55). Officers explained to Members that "the impact on Sydenham Ridge" was a matter "of particular concern" (NOR §430). The IP's TVIA examined this acknowledged impact (NOR §§431-433). Officers explained why the application was nevertheless considered to be appropriate, why there was no unreasonable harm which would warrant refusal (NOR §432), proposals overall being considered to sit relatively comfortably within the existing built context and make a positive contribution to the character and appearance of the surrounding area (NOR §433).

62. In the light of all of this, I can return to 'materiality' and the failure to have regard to the LWT Letter. The primary decision-making function in this case does not belong to the judicial review court, or to planning officers, but to Committee Members. Having said that, the judicial review court does have the duty to consider the 'materiality' of a claimed public law breach of duty. At common law, there is an inevitability test, asking whether the Court is satisfied that the outcome would inevitably have been the same, had there been discharge rather than the default of the public law duty. There is a statutory overlay, in the form of the HL:NSD test. Circumspection is called for, as was seen in the First Judgment at §157. Looking at the position objectively, and in light of the points which I have identified, I have been quite unable to identify any point of

substance which was not carefully and conscientiously addressed, and convincingly answered, in the NOR. Where I would agree with the Claimant is that what was missing for Members, the Claimant and objectors was the fact that LWT – with its status and specialist role – was registering these concerns in relation to points which were under consideration. One way of putting it is that the chorus was missing an important voice. Knowledge of the fact of LWT's voice would have been reflected in the writing of the NOR. It could have empowered objectors. It could have been referenced by the Claimant when she spoke at the meeting. This is a real, practical consequence. But, in my judgment, it could not have made a difference to the outcome: the grant of planning permission, with the identified planning conditions. My degree of confidence in that conclusion – looking at the position objectively and addressing questions which I am duty-bound to address – crosses the common law threshold of inevitability. In those circumstances Ground 4 would also necessarily fail by reference to the statutory overlay of the HL:NSD test, which conventional wisdom treats as being a lower threshold. I have regard, but with caution and so only by way of a cross-check – given that he is the planning officer and not the decision-maker, and given the risk of subconscious distortion – to the fact that Mr Robinson's witness statement tells me, accompanied by a statement of truth, that he does not for his part consider the LWT Letter to contain any point of substance which was overlooked or could have made a difference to officers' assessment. In those circumstances Ground 4 cannot succeed on its legal merits. Since this is a "rolled-up" hearing and since the Court has a statutory duty to apply the HL:NSD test at the permission stage where invoked, the logically sound outcome is that I would refuse permission for judicial review on this ground even if I were allowing the application for permission to amend. This conclusion is fatal to Ground 4, but I will address the other issues on their independent legal merits, as I saw them.

Trigger

63. I deal next with the second line of opposition (§56 above): the 'trigger' for the "due regard" duty. I think there was a series of unfortunate events in and after March 2020. (1) LWT's substantive response in the LWT Letter (16 March 2020) was not straightforwardly sent, by email, to the correct ("planning") email address, clearly identified in the Guide. Even when a 'bounceback' email was received from the "planning-PA" email address, it was not sent again to that correct address. LWT relied instead on having used the email "cc" function. (2) Although the Council's Guide gave the "planning" email address, and although the "planning-PA" in-box was programmed to send the bounceback email which was sent to LWT and received by LWT, the Guide and bounceback email did not state – as they could have done – that emails cc'd to "planning" would not be read. (3) LWT – understandably but, it transpires, incorrectly – treated the two acknowledgements (16 and 20 March 2020) as acknowledging the letter which made substantive points (the LWT Letter) rather than the online submission which did not. (4) When online submissions were being gathered and substantive responses considered, LWT's non-substantive online submission did not precipitate an enquiry within the Council, through searches of email in-boxes, or with LWT, to track down whether a letter had indeed been provided. (5) Notwithstanding the significance to LWT of the proposed development, and the transparency in the publication of the OR and NOR where it was unmentioned (and other responses were summarised), LWT did not follow the matter up. (6) Notwithstanding the ascertainable role which LWT has in relation to Sydenham Hill Wood, the importance of the development, and the

transparency in the publication of the OR and NOR where LWT was unmentioned (and other responses were summarised), the Claimant and RSG did not follow up with LWT to ask (as eventually happened in May 2022) what position LWT took. With hindsight – which cannot govern any legal analysis – all of this could be done differently.

64. The question for me to consider is whether, in all the circumstances, there was the receipt by the Council of a set of representations, in a manner which triggered a duty to have regard to them. Mr Harwood QC's argument has failed to persuade me that there was such a triggering receipt. The "planning-PA" email address was a non-functional inbox. Those who sent emails to it received a bounceback, as did LWT. On the evidence before the Court, the "planning" in-box receives 400 "direct" emails on a daily basis and, as a result of that volume of traffic, arrangements had been made not to monitor "cc" and "bcc" emails, it being not considered "feasible" to do so "given the volume of email traffic". In my judgment, Mr Robinson as the planning officer was not, in all the circumstances, in a position where he ought reasonably to have become aware of the LWT letter: cf. Kides at §§124-125. It would have been straightforward to comply with the Council's published Guide by sending an email direct to the email address there given, not by sending an email to the wrong email address and hoping that a "cc" would be sufficient: cf. R (Rainbird) v Tower Hamlets LBC [2018] EWHC 657 (Admin) at §39.

65. There is another point. Mr Harwood QC did not disagree that – in light of the very belated introduction of Ground 4 – it is appropriate that the Claimant be held to the way it is put in the amended pleading. The amended, pleaded case contends as follows: that LWT "submitted representations to the Council" in the form of the 6-page LWT Letter; that the Council responded to the LWT Letter on 23 March 2020 with the "standard form acknowledgement" which told LWT that its "submission would be considered"; and the Council failed to have regard to the LWT Letter "which it was bound to consider and had promised to do so". That analysis fails on the evidence. The standard form acknowledgement was sent in response to the online-comment. There was no "promise" to consider the LWT Letter.

Promptness and procedural rigour

66. Finally, I will set out what I thought about the first line of opposition (§55 above). I have referred to the appropriateness of holding Mr Harwood QC to his re-pleaded case, in light of the enquiries he says were necessitated for precision in pleading. But I would not have refused permission to amend to advance Ground 4 on grounds of lack of promptness, unreasonable delay or lack of procedural rigour. I do think mistakes were made by the Claimant's team. Knowing that the hearing was imminent on 9 June 2022, and having received the LWT letter on 18 May 2022 (Claimant and solicitors) and 19 May 2022 (Counsel), the point about whether it was received and considered could and should have been raised in correspondence. That way, it could be investigated by the Claimant's team and by the Council in parallel. That would have been likely to have illuminated, more speedily, the position relating to emails and acknowledgements which could have impacted on the shape of the pleading. When the Claimant's skeleton argument was written and submitted on 27 May 2022, the Council and IP legal teams should have been alerted, directly and specifically, to the fact that a new judicial review ground was going to be raised and that they were going to face an application to amend the grounds for judicial review, to advance it. That was known on 27 May 2022. There could have been the filing of a formal application on that day. At the very least, there

could have been an email communication from solicitors to solicitors, or from Counsel to Counsel, to alert them to the fact that a new ground was now being advanced. I think that was another mistake. It is really not satisfactory to leave parties to read a skeleton argument and to find, within it, a reference to a proposal to revise the pleading, and add a ground. Particularly when a hearing is so close at hand and the new points so obviously cause for investigation. These were mistakes. The complaints about them are justified. And that is not 'hindsight'.

67. But I would not have refused permission to amend because of these mistakes. We all make mistakes. In the event, both the Council and the IP were able speedily to deal with the matter. And, unlike Old Ground 7 (First Judgment §§19-20), dealing with this new ground on its legal merits did not mean an adjournment. Supplementary skeletons were filed on 6 June 2022 (Council) and 7 June 2022 (IP). Mr Robinson's witness statement was filed (6 June 2022), responding to what had happened in March 2020 under the arrangements for receiving and acknowledging responses, and responding to and making observations about the contents of the LWT Letter. I examined at the hearing with all Counsel whether ventilation of the new Ground 4 would in fairness call for an adjournment. In the event, all Counsel were agreed that it did not. I reverted to this point when announcing that I would be reserving my judgment, giving the Council and the IP the opportunity, if they wished, to provide any further evidential response in writing. That was declined as being unnecessary. I was and remain satisfied that no adjournment was called for. To their credit, everyone was able to take the new Ground 4 in their stride, and we were able to address it head-on. In all the circumstances, having regard to the interests of justice, I would have granted permission to amend. It is not the first time that points have arisen about communications relating to this development (cf. Old Grounds 1-3). There was, ultimately, no prejudice and no question of adjournment. The Claimant had only very recently been alerted. Planning officers had been in ignorance. Questions arose about the Councils' own arrangements. I would have wanted to deal with the newly pleaded ground on its legal merits. That is what I have done.

Part 5. Conclusion

68. For the reasons which I have given, this claim for judicial review fails. The circulation of this judgment as a confidential draft was intended to enable me to deal here with consequential matters including resolving any contested matter. The terms of the Order as to disposal were agreed, reflecting the outcome for the various Grounds described in the judgment, and an Order that the Claimant pay the Council's costs summarily assessed at £5,000. That left permission to appeal (PTA). Mr Harwood QC applies for PTA on Grounds 1 and 4. His ground of appeal on Ground 1 is: "The judge erred in law and fact in in considering that the error in respect of optimum viable use in the NOR, with the subsequent references to viability, was not one which was sufficiently significant to amount to taking into account an erroneous and immaterial matter. That statement at the heart of the conclusion and repeated at the meeting was sufficiently critical." I cannot accept that there is a real prospect of success on appeal on that ground of appeal. My analysis of Ground 1 does not turn on whether NOR §873 mattered but what it meant (on which I do also not see a real prospect of success). The grounds of appeal on Ground 4 are that I erred on the legal merits because: (i) the LWT Letter was received at the Council's published email address, albeit cc'd, the Council never having communicated that cc emails would be ignored ("a matter of some wider interest"); and (ii) the LWT Letter could have made a difference to outcome (because a major and

respected participant managing a proximate site was raising weighty new or newly-contentious issues which the Committee needed to consider) and my contrary conclusion impermissibly enters forbidden territory evaluating unknowable matters. I can see no real prospect of success on point (ii), which is dispositive. Like the Council, the IP communicated that it resists PTA but asked (at 09:44 on 8.7.22) for an extension (from 10:00 on 8.7.22 to 10:00 on 11.7.22) to respond to the (2-page) application for PTA (08:54 on 8.7.22). The draft judgment had been circulated at 10:00 on 5.7.22 and the application should have been shared earlier in the week. But 10:00 on 11.7.22 was excessive and unrealistic: that was the very date and time known to have been scheduled for handing down a judgment known to be intended to deal with consequential matters; these were brief submissions on very familiar matters. I considered all the communications (mid-afternoon on 8.7.22) and decided to deal with typos, the order and PTA; not to defer hand-down; nor to hold over PTA; with no prejudice to the IP.