TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 79 AND

TOWN AND COUNTRY PLANNING (INQUIRIES PROCEDURE) (ENGLAND) RULES 2000

Application by Starbones Ltd

Land at Chiswick Roundabout, Great West Road, Chiswick, London W4 5QB

Local Planning Authority references 00505/EY/P18 and 00505/EY/P19

PINS references APP/F5540/W/17/3180962 and APP/F5540/H/17/3173208

CLOSING SUBMISSIONS ON BEHALF OF THE HISTORIC BUILDINGS AND MONUMENTS COMMISSION FOR ENGLAND (HISTORIC ENGLAND)

1. Historic England is the lead body for the heritage sector and the Government's principal adviser on the historic environment. Its statutory duties include securing the preservation of ancient monuments, historic buildings and conservation areas. Historic England add properties to the statutory register of gardens and parks, and are a consultee on World Heritage Sites.

2. Historic England rarely see the need to intervene in a public inquiry. On this occasion we do given the widespread and extensive harmful impact of the scheme on historic sites, some of which are of the greatest importance.

The decision making framework

3. The decision making framework relevant here is straightforwardly in the NPPF and Planning Practice Guidance.

4. Account should be taken of the desirability of sustaining and enhancing the significance of all heritage assets.[1]

[1] NPPF, para 131.

5. World Heritage Sites, Registered Parks and Gardens, listed buildings and conservation areas are all designated heritage assets.[2]

6. Significance is the asset's value 'because of its heritage interest', including from its setting.[3] The interest will be identified by the purpose of designation (for example, 'special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance' for conservation areas[4]), any explanation of interest at the time of designation and in non-WHS cases, an evaluation of the interest in the light of the purpose of designation. The interest in a WHS derives from the Outstanding Universal Value which has been identified. The PPG provides a considerable amount of advice on World Heritage Sites. Advice on assessing significance and the role of setting in that is given in the PPG[5] and by Historic England[6]

7. 'Great weight' is to be given to conserving the significance of all designated heritage assets, with greater weight to more important assets.[7] Any harm or loss, including harm caused by an effect on setting, 'should require clear and convincing justification'.[8] In addition, any harm to a listed building or its setting gives rise to a strong presumption against the grant of planning permission.[9]

8. Development within the setting of a designated heritage asset may cause harm to its significance.[10] Harm caused by the effect of a development on the setting of a designated heritage asset may be substantial harm[11] or less than substantial harm.

9. Substantial harm is a policy test to be applied in the light of the NPPF and the PPG. The PPG says that it is 'a high test, so it may not arise in many cases'. Giving the example of works to a listed building, the PPG advises that to constitute substantial harm, 'an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic interest. It is the degree of harm to the asset's significance rather than the scale of the development that is to be

[2] NPPF, Annex 2: Glossary.
[3] NPPF, Annex 2: Glossary.
[4] Listed Buildings Act, s 69.
[5] ID: 18a-008, 009, 013, 019, 035.
[6] Historic England Advice Notes 2 (Managing Significance) and 3 (Setting) CDF12, CDF13.
[7] NPPF, para 132, first and second sentences.
[8] NPPF, para 132, fourth sentence.
[9] *East Northamptonshire Council v Secretary of State for Communities and Local Government ("Barnwell Manor")*
[10] NPPF, para 132
[11] *Barnwell Manor* and PPG 5-020-20140306 (on wind energy).

assessed.'[12] This is a reasonable approach to apply more generally. The recognition in the PPG that wind turbines and large scale solar farms may cause substantial harm by reason of their impact on setting[13] is also a steer as to the level of impacts which might cause such harm;

10. The Courts have not analysed the meaning of 'substantial harm' as it now applies given the PPG. The previous PPS5 Practice Guidance did not contain the text in the previous two paragraphs or anything like it.

11. Taking the caselaw in order of seniority, the Court of Appeal quashed an Inspector's decision that harm was not substantial in *East Northamptonshire Council v Secretary of State for Communities and Local Government* (Barnwell Manor). This concerned the previous PPS5 substantial harm test. A wind farm was proposed with the nearest turbine 1.7 km from the grade I listed Lyveden New Bield and 1.3 km from the boundary of its grade I registered garden.[14] The Inspector had found that 'the turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site' and 'Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.'[15] He had concluded 'On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other'.[16]

12. Sullivan LJ held that finding that the turbines did not dominate the site did not answer whether the significance of that site was maintained as it did not address the objectors' contention that Lyveden New Bield was designed to be the dominant feature.[17] He then rejected the 'reasonable observer' approach of the Inspector:

> "43. … no matter how non-prescriptive the approach to the policy guidance in PPS5 and the practice guide, that guidance nowhere suggests that the question

[12] 18a-017-20140306.
[13] ID: 5-019-20140306 'As the significance of a heritage asset derives not only from its physical presence, but also from its setting, careful consideration should be given to the impact of wind turbines on such assets. Depending on their scale, design and prominence a wind turbine within the setting of a heritage asset may cause substantial harm to the significance of the asset' and for solar ID: 5-013-20150327.
[14] At para 6.
[15] Decision para 50, quoted at judgment para 7.
[16] Decision para 51, quoted at judgment para 7.
[17] At para 40.

whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the "reasonable observer" test adopted by the inspector in this decision.

44 If that test was to be the principal basis for deciding whether harm to the setting of a designated heritage asset was substantial, it is difficult to envisage any circumstances, other than those cases where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a heritage asset would be substantial: the reasonable observer would always be able to understand the differing functions of the heritage asset and the turbine array, and would always know that the latter was a modern addition to the landscape. Indeed, applying the inspector's approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the "reasonable observer" would be less likely to be confused about the origins and purpose of the new and the old. If the "reasonable observer" test was the decisive factor in the inspector's reasoning, as it appears to have been, he was not properly applying the policy approach set out in PPS5 and the practice guide."

13. In *Bedford v Secretary of State for Communities and Local Government* the NPPF was considered explicitly in the light of the PPS5 Practice Guidance.[18] Three possible explanations of substantial harm appear in the judgment:

(i) The Inspector's explanation that 'author(s) [of the policy] must have regarded substantial harm as something approaching demolition or destruction';[19]

(ii) The judge's comment that what 'the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away';[20]

(iii) The judge's approach that it was 'such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced';[21]

[18] At para 20 per Jay J. The use of the practice guidance is also endorsed in *East Northamptonshire*.
[19] Judgment para 22.
[20] At para 24.
[21] At para 25.

14. In respect of (i) Jay J considered whether 'the phrase "something approaching demolition or destruction" add a further layer of seriousness as it were? The answer in my judgment is that it may do, but it does not necessarily. All would depend on how the inspector interpreted and applied the adjectival phrase "something approaching". It is somewhat flexible in its import. I am not persuaded that the inspector erred in this respect'.[22]

15. So the Inspector's expression was seen as dangerous, that it might be applied as too high a test, although it had not been in that case. Of the other elements, 'very much reduced' is closer to identifying the threshold between substantial and less than substantial harm. It is a lesser impact than vitiated or very much or all drained away and the latter expressions were not seen in *Bedford* as marking the boundary.

16. Several points arise on *Bedford*. Firstly the PPG has given some explanation of what substantial harm is. That was not available to the Inspector or the Court in *Bedford*. Substantial harm is a 'high test', but not a 'very high test'. One way of considering it is whether the adverse impact 'seriously affects a key element of' of the designated heritage asset's interest which led to its designation. That might overlap with, but is more precise than, very much reduced and is certainly a lower level of impact than the 'drained away', 'vitiated' or 'something approaching' expressions in *Bedford*. It is the meaning of the NPPF as explained by the PPG, rather than the NPPF and the PPS5 Practice Guidance which has to be applied.

17. *Bedford* is on different policy guidance and so is not directly in point on the current text. It could not be binding for that reason and is not binding in any event, since High Court judgments do not bind anyone except the individual parties to the case.

18. Substantial harm has to be construed in accordance with *East Northamptonshire* (which as a Court of Appeal case takes precedence over *Bedford*). Sullivan LJ critiqued the error in relying on the ability to distinguish between old and modern works in the Inspector's analysis. The Court of Appeal also proceeded on the basis that an Inspector could lawfully have concluded that the impact of turbines a mile or more away in that case was substantial harm.[23]

[22] At para 26.

[23] The developer's appeal would have been allowed otherwise on the basis that any error by the Inspector could not have led to a different decision. The High Court (Lang J) had expressly concluded the decision might have been different without the errors.

19. The language of *Bedford* is imprecise. Even trying to apply a concept of 'very much reduced' begs the question of how much reduced and the significance of what is at the start of the exercise and what remains. The Courts frequently warn against interpreting judicial comments as if they are statues: the danger is that excessive precision and importance is applied to words which a judge came up with in a particular set of circumstances.

20. It is better therefore to apply an imprecise expression in policy than an imprecise expression used by a judge when trying to explain the policy. Let alone an imprecise expression used by a judge in trying to explain a previous iteration of the policy. With the PPG, government guidance is on substantial harm now clearer than the language used by the Court in *Bedford* and can be applied as it stands.

21. *Bedford* has not been considered by the Courts in any citeable judgment.[24] The Courts have accepted, without query, findings of substantial harm to the significance of designated heritage assets caused by effects to their settings in *Whitby v Secretary of State for Transport*[25] (the decision of the Secretaries of State on the Ordsall Chord rail scheme in Manchester) and *Forest of Dean v Secretary of State for Communities and Local Government* (13 caravans near three grade II listed buildings).[26]

22. By paragraph 133 proposals leading to substantial harm to any designated heritage asset shall be refused unless:

    (a) the substantial harm is necessary to achieve substantial public benefits that outweigh that harm; or

    (b) four criteria in that paragraph are satisfied (these are not applicable in the present case);

23. Substantial public benefits in paragraph 133 are a narrower category than public benefits in paragraph 134. The public benefits themselves must be substantial, not that there are a substantial amount of public benefits.

24. For the harm or loss to be necessary to achieve the substantial public benefits, it must not be possible to achieve those benefits without causing that harm. The former PPS5

[24] The only judgment on Westlaw which considers it, relatively briefly, is *Rosscrowther* which is the hearing of an application a permission to apply to the Court. Such judgments should only be cited in court if the judge has certified that an important point is raised.
[25] [2016] EWCA Civ 444, [2016] J.P.L. 980, see para 38, 39, 40 (quoting IR para 725, 726), 74 (SoS decision para 9).
[26] [2013] EWHC 4052 (Admin), see para 2, 3, 31(quoting decision para 192), 68 per Lindblom J.

Practice Guidance said 'For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site'.[27] This was applied in *Whitby* where the consideration was whether the impact was necessary, looked at in terms of whether there is a reasonable alternative (see para 22, 26, 30, 35, 46 to 48). That advice is not repeated in the PPG but is a reasonable approach to take. In opening the Appellant said this provision required, by reference to *Whitby,* 'no reasonable alternative to the achievement of substantial benefit'.[28] Necessary in this situation does not relate to the need in planning terms for the benefit, but an inability to achieve the public benefits arising from the scheme without causing the harm.

25. In addition, substantial harm to a World Heritage Site, Grade I and II* listed buildings and registered gardens, should be 'wholly exceptional'.[29] Substantial harm to a grade II listed building has to be exceptional.[30]

26. 'Less than substantial harm' is to be weighed against *public* benefits of the proposal (para 134) but does not amount to a less than substantial objection to a development (*Barnwell Manor*). It has to be applied with the considerable weight required by paragraph 132.

27. As an aside, the statutory duty in section 72 of the Listed Buildings Act in respect of conservation areas only applies 'In the exercise, with respect to any buildings or other land in a conservation area, of any functions'. Since the Minister's functions are exercised with respect to land outside any conservation area, section 72 does not apply in the present case. However it has been recognised since at least PPG15[31] that development outside a conservation area may affect it, a position which continues in the NPPF.

The evidence and its testing

28. The inquiry has been blessed (or cursed) with detailed proofs on the heritage issues. The expert witnesses for the Council and the Rule 6 parties faced no serious challenge

[27] Para 91, quoted in *Whitby* Court of Appeal at para 12.
[28] Opening, para 99.
[29] NPPF, para 132, last sentence. The 'wholly exceptional' requirement had been contained in PPG15, para 3.17.
[30] NPPF para 132, penultimate sentence.
[31] PPG15, para 4.14 'The desirability of preserving or enhancing the area should also, in the Secretary of State's view, be a material consideration in the planning authority's handling of development proposals which are outside the conservation area but would affect its setting, or views into or out of the area'.

to their views on the existence of harm and the extent of harm. Several points need to be made on the expert witnesses for the Appellant.

29. Mr Finch appeared to give 'Independent Design Evidence', however he has been part of the Appellant's design team since at least summer 2017. He is included in the consultants identified as part of the Brentford East Collective in their Public Realm Strategy[32] and in their letterhead.[33] Mr Finch wrote a paper for the Collective on the draft SPD which was submitted with their representations on that document and summarised for a page in DP9's representations for the Collective.[34] Understandably Mr Finch was paid for that work. In these circumstances Mr Finch is not 'independent' and should not have been put forward as independent.

30. A more troubling aspect of Mr Finch's evidence was how he dealt with these matters. None of his Brentford East Collective involvement was mentioned even though the material was all lurking in the evidence before the inquiry. When the Public Realm Strategy was brought to his attention he initially asserted that his name ought not to be there and then that he had agreed to be part of it but could not remember who had asked him to join. Mr Finch then denied doing any other work for Galliard, Starbones or landowners in Brentford East other than the evidence to this inquiry (and a design review for Galliard in Ealing). When pointed to his review of the SPD he then claimed that his memory was at fault. No satisfactory explanation has been offered for his incorrect statements and the Minister can conclude that Mr Finch is unreliable as a witness.

31. Mr Coleman and Mr Finch are giving their professional opinions and relied on their previous experience. However not everything they support is architectural gold. Mr Coleman's evidence referred to his previous support for Strata (the tower at Elephant and Castle with three wind turbines in the roof) and VTI Victoria (an office scheme designed by PLP and now known as Nova Victoria).[35] These schemes won the Carbuncle Cup in 2010 and 2017. The Carbuncle Cup is awarded by *Building Design* magazine to the ugliest building completed in the UK in the previous 12 months. Mr Coleman conceded that the PLP scheme was 'a disaster' but excused his support for both schemes by saying that the failures were due to later changes to details. That is

[32] Egret App Vol 1, pp.20-22. See also Egret proof, p.74 'the Collective got to work with their design teams'.
[33] Goddard App 7.
[34] Goddard App 7, App 1 within that, 5th page.
[35] Coleman App Vol 1, tab 1, pages A14, A16.

unconvincing. The inquiry has the *Building Design* criticisms of PLP's scheme which ranged well beyond details like the size of fins, calling the scheme 'crass', 'over-scaled' and 'a hideous mess'.[36] Whilst details can undermine a scheme, a move from supportable to the ugliest new build, cannot be down to them. Mr Finch gave evidence in support of 20 Fenchurch Street (the 'Walkie-Talkie') which won the Carbuncle Cup on 2015. Their opinions can be horribly fallible.

32. Mr Coleman and Mr Goddard also chose to give contradictory answers in Re-examination to the clear and unequivocal answers which they had given Counsel and the Inspector in cross-examination. Those instances are explained further below, but involved Mr Coleman reversing his acceptance that if there was harm to Strand on the Green conservation area then that harm would be substantial in NPPF terms; Mr Goddard saying six times that he had no evidence on the viability of the Citadel scheme and then saying in Re-examination that the Appellant had indicated that they would proceed with it; and Mr Goddard accepting that the Appellant said in the Environmental Statement that the Citadel was not commercially viable and then in Re-Examination that the Environmental Statement merely meant that it was less viable than the Chiswick Curve. The changes of position were shameless, unexplained and with no attempt at an excuse. Given the obligations to answer truthfully, give professional opinions and to provide all relevant facts to the inquiry, the changes in evidence are not credible and show a contempt for the process before the Minister.

Harm in the present case

33. Historic England are concerned with the harm which the scheme will cause to designated heritage assets comprising and within four geographical areas: the Kew Botanic Gardens World Heritage Site; the Gunnersbury Park Registered Garden and the Gunnersbury Cemetery (both of which are in the Gunnersbury Park Conservation Area); Kew Green Conservation Area; and the Strand on the Green Conservation Area, along with listed buildings within them.

34. Several general points arise.

The significance of the assets

[36] INQ27..

35. The matters that make up the significance of the designated heritage assets are not in dispute. The evidence of the Council and rule 6 parties was not challenged in that respect and was often expressly accepted by the Appellant.

The contentions in this appeal

36. The Council and the rule 6 parties have carefully based their heritage cases on the impact of the Chiswick Curve on the identified significance of the designated heritage assets. They have not taken a position at the application or appeal stages of an 'assumption that visibility of a new building in the background of a heritage asset must be harmful'.[37] The care of their positions is illustrated by Historic England's 13 page initial response in February 2016.[38] This mischaracterisation is illustrative of the Appellant's inability to answer their critics. They have to claim the complaint is something which it is not because they cannot address what it is.

The relevance of design to heritage effects

37. Design ranges from the scale and mass of a building through various detailing, down to door knockers. The context is critical. An otherwise good design may still cause heritage harm, as the NPPF recognises at para 65. There is of course a variety of meanings attached to design. Looked at holistically, a scheme which harms designated heritage assets is not good design. Similarly if the height and mass causes harm, it is not good design. That the architect may have done something extremely well with a brief which required a certain height or quantum of development may be a tribute to their skill but does not mean that that it is a good building in its context.

38. As the Appellant's THVIA acknowledges 'even a well designed building has the potential to unacceptably dominate or be incongruent'.[39] Mr Coleman maintained that acceptance in his evidence.

39. Policy requires tall buildings to be of an exemplary quality. That does not excuse heritage harm that follows. It is also worth remembering that any consideration of height limits in policy (such as the emerging local plan review and SPD) or other work such as the capacity study are based on schemes of exemplary quality. If a

[37] Coleman proof, p.39, para 7.20.
[38] CDE4. Pages 8-9 and 11 were addressed in XX of Mr Coleman.
[39] CDA11 THVIA p.5, para 2.45.

height limit is established, the quality of a design cannot be an excuse for breaching it as quality has been taken into account in setting the limit in the first place.[40]

The abandonment of the Appellant's heritage 'benefit' evidence

40. The Appellant's position (and the expressed opinion of Mr Coleman in the documents) had been that the Chiswick Curve would benefit the interest of the designated heritage assets where it would be visible. The THVIA and THVIA Addendum repeatedly express that view[41], as does Mr Coleman's proof. That position is, and always was, ludicrous. The Chiswick Curve has no relation to the historic or architectural interest of the assets or the Outstanding Universal Value of Kew. Even if it was a beautiful piece of architecture in its own right, any benefit of seeing it could not enhance the designated heritage assets.

41. Mr Coleman accepted in cross-examination that the assets were not benefited by the Curve. Consequently the Appellant's case on heritage impacts has completely collapsed.

42. Whether the impact of the Curve is harmful or neutral, and the extent of harm, is considered below.

Harm and design in the present case

43. Ultimately there is an overall theme to all of the heritage impacts. The significance of the designated heritage assets involves high quality and often exceptional buildings in landscapes which are either designed (at Kew Gardens and Gunnersbury Park) or have evolved (Kew Green, Strand on the Green) to have very special qualities. They are overlain with immense historic interest and have inter-relationships as part of the Arcadian Thames. The Arcadian Thames is described by Mr Dunn as 'peaceful relaxed surroundings, at one with nature and free to be inspired with art and poetry'.[42]

44. Any view is as a whole of and the totality of what is seen. The settings of these assets benefit immensely from clear skylines and the absence of competing elements, particularly those which are modern or urban. That exclusion is not total. Some

[40] The early draft documents are Hounslow's (not Historic England's) and attract limited weight at this stage. Historic England inputted into the Capacity Study's height recommendations (see p.5 and level at p.88) but the higher levels in the draft Local Plan Review are the Council's.
[41] For example CDA11 THVIA p.30, para 8A.8 (Gunnersbury Park CA), p.37, para 8A.50 (Strand on the Green), p.45 para 8A.98 (Kew Green), Orangery (Gunnersbury Park), p.52, para 8B.15, Orangery (Kew Gardens) p.55, para 8B.43.
[42] Dunn, proof, p.39, para 6.2.7, agreed by Mr Coleman in XX by Mr Harwood.

views are presently entirely uninterrupted. Others are affected, and the harm caused to Kew Gardens by the Haverfield Towers was referred to by UNESCO when inscribing the WHS. That there is some interference in some of the views is not an excuse for causing more harm, either to those views or to other, presently unharmed, views. Even less is it an excuse for interfering with the views with a building which is considerably taller than anything which presently exists or intrudes.

45. The Appellant rests heavily on recent or future change, some of which, such as Citroen, is not even consented. The harmful nature of various recent schemes has been asserted and often undisputed. They do not provide an excuse for more harm. But even if they did, those elements are much lower than the Curve. A collection of lower buildings (Brentford FC (permission granted) 61 AOD; Albany (resolution to approve) 8 storeys; Citroen (resolution to refuse, called in by Mayor of London) 70.7m AOD; Capital Interchange Way (refused) 78.7m AOD) does not assist the promotion of a 120m AOD tower.

46. Views are often kinetic and changing. In some of those views, in particular that of Strand on the Green, the Curve will be ever present. In others it will break through at times but that maintains the intrusion. The pedestrian's experience of the Curve at times, whether long or glimpses, will affect the appreciation of the whole walk.

47. The appeal scheme intrudes into key views which are entirely or largely unspoilt: the views of the orangeries at Kew Gardens and Gunnersbury Park; the view from the Gunnersbury Park temple; the tranquillity of Gunnersbury Cemetery; the unspoilt lines of buildings at Kew Green and Strand on the Green. In all cases a large, tall, lump will be imposing itself, wholly alien to the historic, architectural and cultural interest of these areas. It will dominate particular important views. It detracts from the appreciation of these areas and of certain listed buildings, including grade I and II*, within them.

48. It is the sheer scale of the building and its relationship to those designated heritage assets which causes the harm. The problem is not the detailed design of the 32 storey tower block but that it is a 32 storey tower block. Even if the design is seen as attractive in its own right, it is harmful to the historic views and interest of the heritage assets. The building is simply in the wrong place.

49. The detailed design of the building does not diminish the harmful impact. The predominant surface of the Curve is glass and the building itself is not transparent. Its predominant appearance will be grey. Splitting the building into a cluster will not alter the volume of material which intrudes and from the south the towers would not be separated. The curvature of the building does not take away its size. Coloured fins are proposed. Some of these will be seen edge on, others from the side. But they will be details viewed at a distance. The first reaction of a viewer from the Kew side of the river overlooking Strand on the Green conservation area will be that the Curve is a large grey building, not that its fins have the colours of the buildings by the river.

50. The effect of breaking up the views and distracting from the views within or of the heritage assets is not diminished

Marker

51. The Chiswick Curve is promoted as a marker or a landmark. Emerging policy encourages a landmark building for the Golden Mile. However the designated heritage assets do not need a marker for the location of the site, the Golden Mile or even to 'celebrate' the junction of the M4 with the North and South Circular Road. It was bizarrely put forward as a marker to be viewed from the heritage sites, such as Gunnersbury Park.[43] Mr Egret accepted that there was no need for a marker from the park[44] and the point holds for the other sites.

52. A marker is designed to attract and to draw attention. From with the designated heritage assets or viewing them it is a distraction and so harmful.

53. It is also common ground that a marker building does not need to be 109 metres high.[45]

Kew Botanic Gardens

54. Kew Botanic Gardens has a landscape of international renown, created from its history as a Royal residence and its past, present and future as the greatest botanic gardens in the world and a popular place for the public to visit. With a considerable degree of success it has kept the sight of urban London at bay. It is not Central Park, New York.

[43] Egret, proof, p.169.
[44] Mr Egret XX by Mr Harwood.
[45] Mr Egret XX by Mr Harwood.

55. In addition to its exception inscription as a World Heritage Site in 2003, it is a Grade I registered garden, a conservation area, and the home of 44 listed buildings, two of which are also scheduled monuments.[46] Its significance is explained by Mr Dunn[47] and by Royal Botanic Gardens, Kew. Two of the inscribed attributes of Outstanding Universal Value are directly affected by this scheme: the 'rich and diverse historic cultural landscape providing a palimpsest of landscape design' and its 'iconic architectural legacy'.

56. The development will appear prominently within the setting of the Grade I listed Orangery. It will create an antagonistic contrast, with the Curve competing for attention amongst the carefully designed garden surroundings.[48] The Curve will distract and obscure the WHS's significance, altering the character of the gardens from an historic royal retreat towards that of an urbanised park.[49] It is the substantial height of the proposal which causes adverse visual impacts within the heart of the WHS.[50]

57. There was a considerable amount of effort by the Appellant to distract the inquiry with debates about strategic and identified key views. Kew is an inward looking WHS. Unlike the exercises in governmental power at Westminster and the Tower of London or the connections with the River Thames of Greenwich, Kew is usually not intending to share views. Whilst there are some designed views in Kew that extend beyond the botanical gardens (e.g. the Syon Vista), the views shared by Kew are intended to evoke Arcadia and to provide a break from urbanity. The qualities of Kew give rise to many valuable views. One which is of particular concern is the view of the front of the Grade I Orangery which is part of Kew's iconic architectural legacy. Views of outstanding listed buildings from the direction in which they were meant to be seen do not need putting on a map to have the highest significance. There was much questioning by the Appellant on the pre-1802 views of the Orangery. However it is apparent from the contemporary drawings that it was visible from the Great Lawn with the White House. The Appellant's witnesses ended up making a series of bad and inaccurate points on those images, erroneously believing that they

[46] Dunn proof, p.37, para 6.2.1.
[47] Dunn proof, pp.37-43, para 6.2.1-6.2.18.
[48] Dunn proof, pp.45-46, para 6.2.24-6.2.26.
[49] Dunn proof, p.46, para 6.2.29.
[50] Dunn proof, p.47, para 6.2.31.

showed the Orangery turned 90º and confusing a famous 'Swan' boat with an oversized drawing of a live swan.[51]

58. The appeal scheme will cause serious, but less than substantial, harm to the WHS, Grade I listed Orangery and Grade I registered park.[52]

Gunnersbury Park Conservation Area

59. Historic England are concerned with two parts of the Gunnersbury Park Conservation Area: the Park itself and Gunnersbury Cemetery. The Park is a garden designed to connect with an Arcadian landscape and not a city environment. Its significance is set out by Mr Dunn.[53] It is a designed landscape, with buildings, lakes and follies.[54] The Park is now turned over to a successful public garden and has been the subject of recent very considerable public investment (around £33.5 million) for heritage and recreational purposes.[55]

60. There are two particularly significant impacts. The first is on the views from the mansions, terrace and lawn including over the orangery. The Curve will be the first tall building visible from the lawn.[56] It will intrude dramatically into that view. The importance of the view has been enhanced by the recent works, clearing some of the trees and reconstructing half of the horseshoe lake, which allows a greater appreciation of the orangery.

61. The views from the round pond, in particular around the temple are hugely important and will be significantly harmed by the Curve.

Gunnersbury Cemetery

62. The significance of the cemetery is again set out by Mr Dunn.[57] Whilst the cemetery is presently affected by tall buildings, the Curve will have an overwhelming visual presence, not least in the planned view southwards towards the chapel. The cemetery has particular communal value to the Polish community as the site of the Katyn Memorial. It will though retain its character as a purpose built cemetery and causes less than substantial harm.[58]

Kew Green

[51] Image at INQ24.
[52] Dunn proof, p.50, para 6.2.39.
[53] Dunn proof, pp.51-58, para 6.3.1-6.3.8. Agreed by Mr Coleman in XX by Mr Harwood.
[54] THVIA Addendum, p. 25.
[55] Dunn proof, p.55, para 6.3.11.
[56] THVIA Addendum, p.25, para 5.4.
[57] Dunn proof, pp.58-59, para 6.3.19-6.3.21.
[58] See Dunn proof, p.68, para 6.3.49.

63. Kew Green was designated as a conservation area in 1969, is part of the WHS buffer zone, contains 38 listed sites, four at grade II*.[59] Is a quintessential village green[60] and a rare survivor in London.[61] Mr Egret agreed with Mr Taylor's description of 'a very beautiful green which has all the qualities that can be expected of an English village green'. It is enhanced by being lined with listed buildings which reflect the status of the area and its Royal connections.[62]

64. The Chiswick Curve would disrupt the historic low scale of the skyline formed by the buildings fronting the Green. The currently harmonious combination of foreground open space and a background of traditionally scaled buildings and trees would be encroached upon by the conspicuous height and form of modern development. [63] The materials and detailing would not be readily appreciable but the solidity of the building will be visually arresting.[64] They will dominate the historic low scale of the skyline from the western and eastern part of the Green.[65]

65. The setting of the conservation area is integral to its significance and would be fundamentally undermined by visually imposing the modern city onto a village green setting that remained largely unaffected. This causes substantial harm to the conservation area.[66]

66. Kew Gardens and Kew Green are part of the Arcadian Thames, but nowhere is more so than Strand on the Green with its buildings facing over the river, many of which have done for over two centuries.

Strand on the Green

67. Strand on the Green was designated as a conservation area in 1968, as the first in the London Borough of Hounslow. It contains 23 listed heritage assets, many of these covering several addresses, including the Grade II* listed Zoffany House.[67] According to the Thames Strategy, it is one of only three reaches of the River Thames within London that feature a continual thread of fine-grained traditional buildings with their faces towards the river.[68] It is best experienced travelling along the south bank of the

[59] Dunn proof, p.69, para 6.4.1.
[60] 'A fine example of a village green' THVIA p.45, col 2.
[61] See Dunn proof, p.75, para 6.4.18.
[62] See Dunn proof, p.71, para 6.4.7.
[63] Dunn proof, p.75, para 6.4.18.
[64] Dunn proof, p.76, para 6.4.19.
[65] See also Dunn proof, p.77, para 6.4.23.
[66] Dunn proof, p.79, para 6.4.28.
[67] Dunn proof, p.80, para 6.5.1.
[68] See Dunn proof, p.86, para 6.5.18.

Thames and this is the best way of understanding its historical development.[69] In discussing the contribution of setting to the significance of Strand on the Green conservation area the THVIA said:[70]

> 'visually the river remains a key element in the significance of the conservation area as a whole, *particularly* in views from the south side of the Thames looking north'

68. Mr Egret prepared his 'invisible line'[71] showing a line of buildings along the Golden Mile which curved steeply up at the Chiswick Curve as viewed from the Kew side. In examination in chief he said that this would 'guide the eye upwards'. As he accepted in cross examination, that would guide the view away from the Strand on the Green conservation area.[72]

69. The Chiswick Curve will have an extreme degree of prominence, dominance and conspicuousness, appearing more than twice the size of the Strand on the Green buildings.[73] The size, form and materials of the development would draw attention away from the conservation area.[74] As Mr Dunn says, 'The relaxed, village-like form of the settlement has been encroached upon by a domineering, urbanising structure quite alien to the riverine surroundings'.[75] It will be completely out of scale even with the consent impacts.[76] It will cause substantial harm to the conservation area and less than substantial harm to the listed buildings.[77]

70. Mr Coleman did not accept that there was harm to the Strand on the Green conservation area but said in cross-examination that if there was such harm then it would be substantial harm. That agreement was unequivocal, unhurried, informed and checked by the Inspector. It followed from the work Mr Coleman had done to assess impacts on the designated heritage assets with the assistance of *his* sensitivity/change/impact matrix, see the consideration of the Strand on the Green Conservation Area where the THVIA says that 'high' sensitivity of the conservation area and its setting and high magnitude of change give 'rise to a major effect'.[78]

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[69] Dunn proof, p.92, para 6.5.36 and p.93, para 6.5.37.
[70] THVIA CDA11 p.37.
[71] Slide 123 of the presentation.
[72] Mr Egret XX by Mr Harwood.
[73] Dunn proof, p.89, para 6.5.26.
[74] See Mr Dunn at p.90, para 6.5.27.
[75] Dunn proof, p.90, para 6.5.29.
[76] Dunn proof, p.91, para 6.5.30.
[77] Dunn proof, p.94, para 6.5.39.
[78] CDA11, THVIA p.37, para 8A.49.

These are the highest categories of sensitivity, magnitude of change and significance of effect in the THVIA matrix.[79]

Conclusion on impact

71. For the Kew Green and Strand on the Green Conservation Areas, Historic England consider the harm to be substantial. The harm to the World Heritage Site, the Gunnersbury Park registered gardens and the conservation areas which include them is less than substantial, as is the harm to the setting of listed buildings.

Alternatives and necessity

72. On the basis that the scheme causes heritage harm the Secretary of State will need to consider whether the harm is necessary. Necessity, in the sense of absence of an alternative means to achieve the requisite public benefits in a less harmful way, is explicitly required by paragraph 133 of the NPPF. It is implicitly required in paragraphs 132 and 134 since there cannot be a clear and convincing justification if the harm could be avoided.[80]

73. In practice the burden is on the Appellant. In the context of determining a planning application, a policy requires a party (eg. an applicant) to demonstrate a state of affairs, then although it is correct to say that he is not under a *legal* burden of proof, the effect in forensic terms is nevertheless similar. "The decision-maker will still be looking for the party identified by the policy to adduce evidence of the kind prescribed by the policy to the standard set by the policy". In such a case, it is permissible for an Inspector to reject that party's case as lacking sufficient cogency to satisfy the policy.[81]

74. The Appellant's consideration of alternatives has been inadequate. They have not considered any possible schemes which are lower than the planning application scheme.[82] They simply started with a 140 metre (42 storey) scheme in November 2014.[83] This was then redesigned at a lower height by Studio Egret West and the height further reduced because of the Palm House. At some point there had been a

[79] CDA11, THVIA p.4, para 2.42.
[80] See *R (East Meon Forge and Cricket Ground Protection Association) v East Hampshire District Council* [2014] EWHC 3543 (Admin).
[81] *Parkhurst Road Limited v Secretary of State for Communities and Local Government* [2018] EWHC 991 (Admin) at para 48 per Holgate J, agreeing with *Vicarage Gate Limited v First Secretary of State* [2007] EHC 768 (Admin) at para 48, 54 per HH Judge Gilbart QC.
[82] Environmental Statement chapter 3; ES Addendum chapter 3; Mr Coleman XX by Mr Harwood.
[83] See GLA Stage 1 report CDG01, para 21.

reduction because of the impact on conservation areas, but the appellant is unclear as to when or how. Other views were not addressed at all, including of other listed buildings at Kew Gardens.

75. It is accepted by Mr Egret that a lower building could be designed. He said that designing a 60 metre building was not in his brief. There has been no dismissal throughout the inquiry of the proposal by the Kew Society (represented by Mr Taylor who has immense property development experience) that the Appellant's site be developed with the adjacent B&Q site. The Brentford East Collective ought to be able to work together.

76. There is no policy requirement for a 109 metre building at this location, indeed the emerging policies discuss height limits of no more than 65 metres, even with the CC site being a landmark or marker building. Having considered that there should be a landmark building, the emerging policy is that it should be well over 40 metres lower.

77. No explanation was given in the Environmental Statement for failing to look at a new building lower than the application scheme.

78. No real explanation has emerged since.

79. An even greater lack of clarity hangs over the development or design brief from the client (who seems in practice to be Galliard). Under the heading 'design brief' the Environmental Statement says that Studio Egret West and the Project Team were provided with a development brief by the client. Mr Egret appears to remember it. He said that designing a 60 metre tall building was not in the brief. He agreed to the brief being provided to the inquiry.

80. Mr Coleman denied that there was a brief, Mr Finch claimed that the scheme met 'the functional needs of the brief' but had not seen it and Mr Goddard was not involved until much later. The absence of any instructions from the client as to what they wanted is implausible. The reasonable conclusion from Mr Egret's answer and all of the evidence is that the client were looking for a very tall building and did not want consideration of anything lower than the application scheme.

81. There is a severe shortage of evidence on the viability of any smaller scheme. The only schemes assessed by the Appellant are the Citadel and the Octopus which are

said not to be commercially viable and so were excluded from being reasonable alternatives for EIA purposes.[84]

82. Mr Goddard asserted in this proof that 'A reduction in the scale of the development would be likely to result in an unviable proposition and further statis and dereliction on the Site'.[85] He had failed to assess any reduction. The Appellant's viability report prepared for the appeal failed to deal with the point either. They only attempted to produce evidence on this in a short letter from James R Brown in Mr Goddard's rebuttal. This did not contain an appraisal either, merely the assertion that higher flats are more attractive and fewer flats mean less income so a considerably reduced scheme would be less viable. That is an inadequate basis for what has become in the last few days a primary plank of the Appellant's case: that viability means that they cannot design and build a new lower scheme.

83. Consequently there is no design, policy or viability reason which leads to a conclusion that no building lower than 109 metres could be constructed on the site.

The Citadel – planning history but no fallback

84. The Citadel planning permission was granted in 2002. Whilst the permission has been implemented there is no prospect that it will be built out. The Environmental Statement says on the Citadel and the Octopus that 'For commercial viability reasons the Applicant did not consider these schemes to be suitable nor reasonable alternatives for the Site.[86] The point is made again in the ES Addendum dated October 2016.[87] Mr Goddard, who was unaware of this part of the Appellant's case, accepted in cross examination that this was a statement that the Citadel was not viable. He subsequently tried to assert in Re-examination that this just meant that it was less commercially viable than the Chiswick Curve, but that is inconsistent with the language of the ES (which talks of reasonable not better alternatives) and the context (which is what alternatives are looked at rather than any thought by the Appellant to be better). It was also in the context of his ignorance of the text. He wrongly contradicted his evidence in cross-examination. He also said in Re-examination that when instructed in 2017 he asked the client whether they would proceed and they indicated that this would be the likely action. This statement is inconsistent with his

[84] Environmental Statement, para 3.11.
[85] Proof, para 13.4.
[86] CDA10, para 3.11.
[87] CDA14, para 3.11.

assertion on six occasions when asked by Mr Ground that he did not have evidence on the current viability of the Citadel.

85. A fall-back position involves a real prospect of that fall-back being relied upon if the present application is refused. It would be immaterial and irrational to take into account the prospect of something happening if it will not happen. Provided that it might happen, the weight to be attached to that prospect is for the decision maker, taking into account what the chances are of it occurring and the consequences if it happens.[88]

86. As the developer and landowner says that it is not a viable and so not an alternative for EIA purposes, there is no real prospect of it happening. It is therefore not capable of being material as a fall-back: it is not possible to take into account the prospect of something happening when it will not happen.

87. The Appellant did not raise the Citadel as a fall-back in its planning application, its statement of case or its proofs of evidence. Unlike the Appellant's rather tedious and inaccurate attempts to accuse other parties of changing their cases, this is a substantial new point raised at a very late stage with no evidential basis. The appellant's late assertion, in Mr Goddard's rebuttal, that there is a prospect of the development happening because there is a live planning permission is legally flawed, devoid of merit and, from its timing, a desperate argument.

88. The 2002 permission is part of the planning history, however a bad decision is not a precedent to be followed. It should be noted that:[89]

(a) The approval was granted in the face of a strong objection from English Heritage;[90]

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[88] See *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2018] JPL 176 at para 27 per Lindblom LJ. Contrary to the questions put to Mr Goddard in chief *Mansell* does not provide a checklist of factors. At para 27 Lindblom LJ refers to a non-exclusive list of potential circumstances but does not suggest that the existence of any will be particularly significant. It depends on the circumstances:

"there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."

[89] See the committee report at Goddard App 2.

[90] Mr Dunn, proof, p.8 para 4.3. English Heritage are now of course Historic England. They have never been Heritage England.

(b) It was not appreciated at the time that it would be visible from parts of Kew Gardens, in particular in views from the Great Lawn of the Orangery;

(c) Consequently harmful impacts on the Grade I registered Kew Gardens and the Grade I listed Orangery at Kew were not assessed;

(d) Since the planning permission was granted, Kew has been inscribed as a World Heritage Site;

(e) The Appellant's evidence is that the Citadel causes harm to the Kew Gardens heritage designations[91] and the Strand on the Green Conservation Area.[92]

The planning balance

89. Historic England leave the planning balance to the Secretary of State, but it is useful to consider some aspects of the evidence.

90. Substantial harm to designated heritage assets has been a major issue on this application at least since Historic England responded to the consultation in February 2016 and is part of the reasons for refusal. It was incumbent on the Appellant to say how the planning balance should be exercised if the Minister found that there was substantial harm. The Appellant's statement of case and written evidence failed to deal with the point at all.[93] In Evidence in Chief Mr Goddard talked about para 133 and 134 of the NPPF and benefits but failed to reach a conclusion in the event of substantial harm. In cross-examination he said in such a case that the balance would fall in favour of the scheme. That was hopelessly late and hopelessly incoherent. There was no attempt to distinguish substantial public benefits from public benefits nor any attempt to address necessity. Mr Goddard based his approach to 'substantial' public benefits on matching some unspecified but very low level of 'substantial harm'; he referred to the example of a change to a door knocker. Since all of the expert witnesses who consider that there is substantial harm are applying it as a high test in accordance with the NPPF as explained in the PPG,[94] Mr Goddard fails to address what are substantial public benefits and the application of the balance if that level of harm is found.

[91] See Mr Coleman XX by Mr Maurici.
[92] THVIA addendum CDA15 p.19, para 4.4.
[93] See Mr Goddard XX by Mr Harwood and Mr Maurici.
[94] For example, Mr Dunn proof para 5.2.20; Mr Grover para 3.43, 3.64.

91. If the Kew Gardens case is accepted that there is substantial harm to any of the World Heritage Site, the Kew Gardens grade I registered garden or grade I or II* listed buildings, then there must also be wholly exceptional circumstances for approving the scheme. Whilst Mr Maurici took Mr Goddard to that point, the witness did not suggest that the circumstances were wholly exceptional.

92. We leave whether there is a clear and convincing case that public benefits outweigh the harm which has been caused to the other parties. However the Secretary of State needs to be confident that his policy requirements in the NPPF have been satisfied and that there is clear and convincing justification that in so far as heritage assets are irreplaceable, that that the substantial harm which arises from this development to the Strand on the Green and Kew Green Conservation Areas is necessary and that there are substantial public benefits arising from this scheme which outweigh that substantial harm.

The Advertising Appeal

Historic England make no representations on the merits of the advertising appeal, although note that it will fall if the planning application is dismissed as there will be literally nowhere to put the advertising panels.

Richard Harwood QC

39 Essex Chambers

5th July 2018

Neutral Citation Number: [2018] EWHC 991 (Admin)

Case No: CO/3528/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/4/2018

Before :

MR JUSTICE HOLGATE

- -

Between :

Parkhurst Road Limited	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**Defendant/s**
and	
The Council of the London Borough of Islington	

- -
- -

Mr Russell Harris QC (instructed by **Town Legal LLP**) for the **Claimant**
Mr Tim Buley and Mr Toby Fisher (instructed by **GLD**) for the **1st Defendant**
Mr Daniel Kolinsky QC (instructed by **London Borough of Islington**) for the **2nd Defendant**

Hearing dates: 6th and 7th of March, 2018

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Approved Judgment

Mr Justice Holgate :

Introduction

1. The Claimant, Parkhurst Road Limited ("PRL"), seeks to challenge the decision letter dated 19 June 2017 of the First Defendant's Inspector in which its appeal against the refusal of planning permission by the Second Defendant, the London Borough of Islington ("LBI"), for the redevelopment of the former Territorial Army Centre, Parkhurst Road, Islington, London, N7 0LP was dismissed.

2. On 28 September 2017, Gilbart J ordered the application for permission to apply for statutory review to be dealt with at a rolled-up hearing. He decided that ground 4 of the proposed challenge was unarguable. It had been contended under this ground that the Inspector failed to comply with his duty to give reasons (in accordance with North Wiltshire D.C v Secretary of State (1993) 65 P&CR 137) for reaching different conclusions from those in an earlier Inspector's decision dated 22 September 2015 (see paragraphs 13 and 14 below). Mr Russell Harris QC, stated on behalf of PRL that his client no longer pursued the point.

3. The site comprises about 0.58ha of land and has been vacant for several years. It was included in "Islington's Local Plan: Site Allocations" DPD (adopted in 2013) as site NH5 with "potential for intensification for residential accommodation to help meet housing need in the Borough". The former owner of the site, the Ministry of Defence, invited competitive bids to purchase the freehold. PRL was the successful bidder and in May 2013 purchased the site for £13.25m.

The 2015 public inquiry

4. In December 2013 PRL made an application to LBI for full permission to develop 150 residential units in a series of buildings ranging from 4 to 7 storeys in height to replace the existing 1 to 3 storey buildings. The scheme was then reduced to 112 units rising to a maximum height of 6 storeys. The Council refused permission in October 2014 and PRL appealed to the First Defendant. An inquiry lasting some 6 days was held in July 2015. The Inspector decided that the main issues were the effect of the proposed scheme firstly on the character and appearance of the area and secondly on the amenity of neighbouring properties, and thirdly whether the proportion of affordable housing proposed was sufficient.

5. The Inspector concluded that elements of the scheme rising to 6 storeys would result in serious harm to the character and appearance of the area and that the effects on certain neighbouring properties as regards privacy and outlook would be seriously harmful to living conditions. In view of those "serious shortcomings", the Inspector decided to dismiss the appeal.

6. The proposal before the 2015 inquiry was that 16 of the units should be affordable housing (14% of the total number of units). LBI contended that the proportion proposed was inadequate, relying on local policies that required each scheme to provide the "maximum reasonable amount of affordable housing" in the context of an overall affordable housing target of 50% of all new housing across the Borough.

7. It appears from paragraphs 62 and 63 of the 2015 decision letter that a number of inputs to the viability appraisals carried out by the two parties were agreed at that stage, notably the sales values achievable on the residential units and development costs, including £2.67m for the costs of complying with *other* planning obligations and the payment of the Community Infrastructure Levy ("CIL"). However, the parties disagreed upon an important input, namely the Benchmark Land Value ("BLV"), that is the price at which a reasonable landowner would be sufficiently incentivised so as to be willing to sell the site for alternative development, having regard to the requirements of relevant planning policies and obligations.

8. PRL used a figure updated from the purchase price it had paid for the site as an input into its viability analysis, representing "a fixed acquisition cost." On this assumption, the resultant profit levels for the developer were below normal target values, and so PRL contended that residential development restricted to the scale proposed in the application would not be deliverable if a greater proportion of affordable housing were to be required.

9. LBI disagreed with that approach. Using the same values as those adopted by PRL save for the site acquisition cost, the Council carried out a series of residual valuations inputting alternative affordable housing proportions of 50%, 40% and 32% which produced residual land valuations for the site of £4.98m, £7.32m and £9.35m respectively. They contended that the price which PRL had paid for the site was excessive since it did not properly reflect the policy requirement to maximise the affordable housing component on each scheme, in the context of the 50% "target".

10. It was confirmed during the hearing before me that PRL has never made available in the planning process the viability appraisal in 2013 upon which it based its successful bid of £13.25m. Given the substantial reliance placed by PRL upon that bid, that document was plainly of direct relevance to the weight that could be placed upon the actual purchase price for the appeal site. It would have revealed the assumptions made about the costs of planning obligations (including affordable housing) and CIL. It is also possible, if not likely, that that bid was influenced by the prospect of achieving a significantly larger scheme than the reduced scheme for 112 units proposed in 2015.

11. The Inspector who conducted the 2015 inquiry acknowledged that if viability appraisals are conducted using market prices which are inflated by bidders ignoring or diminishing requirements in development plan policies to provide affordable housing, that may undermine compliance with those policies. He said this at DL 72:

> "In this context I can understand the wider concern of the Council about the possible effect of inputting purchase prices which are based on a downgrading of the policy expectation for affordable housing on the eventual outcome of a scheme viability appraisal. If such prices are used to justify a lower level of provision, developers could then in effect be recovering the excess paid for a site through a reduced level of affordable housing provision. Such a circularity has been recognised in research for the RICS, and the Council in its SPD and the GLA (in its Development Appraisal Toolkit Guidance Notes of 2014) are alive to this potential outcome of using purchase price as an input in viability assessment. The Council postulates an

> undesirable scenario of diminishing returns of affordable housing and eradication of the potential to achieve its delivery. It argues that the current appeal is an opportunity to return to a proper approach."

This "circularity," or self-fulfilling prophecy, became a central issue at the inquiry in 2017 which led to the decision now being challenged. The issue may also arise where an actual purchase price is inflated because of overly optimistic expectations about the amount of development for which planning permission might be granted in due course.

12. The Inspector also recognised that a residual land valuation may be unduly influenced by one party's view about the development which the site can accommodate and thus be too orientated towards a "scheme value," rather than the underlying land value of the site reflecting its attractions to all potential bidders in the market (DL 73).

13. The Inspector did not accept LBI's case on affordable housing provision because it was not supported by any market based evidence (DL64). There remained the market evidence advanced by PRL. They relied upon the price they had paid to the MoD for the site and the closeness of competing bids to that price (DL65), a subsequent unsolicited *offer* from one of the unsuccessful bidders (DL 66), an independent valuation strongly influenced by evidence from the sale of the site (DL67), and an analysis of 21 land sales in Islington since 2010 (DL68). The Inspector recognised that the "comparables" varied in terms of location, nature, size, constraints, scheme content and affordable housing provision and also that the assumptions made by purchasers were unknown (DL68 to 71).

14. The Inspector accepted that each of the methods used by PRL had limitations, but nonetheless, in his judgment, they gave a consistent indication that the price paid by PRL "was not of a level significantly above a market norm" and there was no evidence to the contrary (DL69). Indeed, he considered that the comparable market evidence, which was said to indicate a value for the appeal site of between £12.98m and £16.44m, "supports a higher valuation for the site than that used by the appellant" (DL74). Accordingly, he concluded that PRL's land value figure of £13.26m "can be regarded as adequately reflecting policy requirements on affordable housing" (i.e. should be treated as the BLV) and PRL's proposal would achieve the "maximum reasonable amount of housing" for the site (DL75).

15. Although PRL's appeal was dismissed on other grounds, LBI were very concerned about the approach taken by the Inspector to viability assessment in order to determine whether "the maximum reasonable amount of affordable housing" was being provided. They contemplated making an application for judicial review. Pre-action protocol correspondence was exchanged. However, proceedings were not commenced and the issues were left to be revisited at the 2017 inquiry.

16. The Council's concern about the 2015 decision is perfectly understandable. For example, the Inspector's reasoning did not suggest that he had considered the crucial questions he had identified in DL72, "the circularity issue," in relation to any of the pieces of evidence relied upon by PRL. In addition, it could be said that the consistency which he believed was shown by this evidence, when considered as a whole, also begged the very same question. It does not follow that, merely because an

analysis is based upon a substantial amount of market evidence, the conclusions drawn will be untainted by the circularity problem. That will depend upon whether the transactions in the data base adequately reflected, for example, the requirements of relevant planning policies and, if not, the adequacy of the steps taken, if any, to adjust that information to overcome that problem.

The 2017 public inquiry

17. PRL made a further application for full planning permission on 22 January 2016. The scheme was further reduced in scale to 96 units so as to address the design criticisms made in the 2015 decision letter. When LBI refused planning permission on 13 May 2016 they did not object to the scale or design of the proposal. Instead only two reasons for refusal were given. The first stated that PRL had "failed to demonstrate that the proposed development will provide the maximum reasonable amount of affordable housing taking account of the borough wide strategic target of 50% and the financial viability of the proposal". The second refusal related to the lack of adequate section 106 obligations to mitigate the effects of the development. Those objections reappeared as the two main issues defined by the Inspector in paragraph 4 of his decision letter. This challenge is solely concerned with the way in which the Inspector dealt with the first issue.

18. When the parties exchanged their evidence in advance of the inquiry, PRL contended that the scheme could no longer provide any affordable housing, whereas LBI argued that 50% of the proposed units should be affordable. By the time the inquiry closed this gap has narrowed somewhat. Using a revised BLV of £11.9m for the acquisition of the site (a reduction of 10% from the figure previously used of £13.26m), PRL proposed that 10% of the units be provided as affordable housing. Using a BLV of £6.75m, LBI contended that the appropriate proportion should be 34% (DL8).

19. As Mr Harris observed, it was no longer contended by LBI that this was a case in which the 50% target should be input as a policy requirement into the viability appraisal in order to determine the appropriate value of the site as a residual. It appears that during the course of the inquiry the figures used to estimate development costs had been increased. This resulted in LBI's residual land valuation (assuming a 50% affordable housing provision) to decrease from £7.15m to £2.4m. The Inspector recorded the Council's acceptance that it was unlikely that a site value of £2.4m would have been sufficient to incentivise a "willing landowner" to sell the land. Instead, LBI maintained that the appropriate figure for the BLV was £6.75m (DL19). The Inspector agreed with that opinion (DL50).

20. PRL submits that the Inspector's acceptance of £6.75m as the BLV was vitiated by legal error in his assessment of LBI's evidence and that this tainted his rejection of PRL's viability appraisal. The Defendants submit firstly that the Inspector's decision that the BLV for the site was £6.75m cannot be impugned. Secondly, they submit that even if the Court should take a different view, none of the points made by PRL affects the basis upon which the Inspector concluded that PRL's viability appraisal failed to demonstrate that the proposal for 10% affordable housing represented the "maximum reasonable amount" that the site should provide. Accordingly, any error was wholly immaterial when the decision letter is read fairly and as a whole and in the light of the way in which the parties' cases were presented to the Inspector.

21. It is helpful at this stage to point out the widely differing approaches which were taken by the parties at the 2017 inquiry.

22. LBI submitted that the site was exactly the type of site that should be making a substantial contribution towards affordable housing. It was common ground that the existing use was redundant and so the existing use value ("EUV") was "negligible" (DL16 and 18). There was no alternative form of development which could generate a higher value for an alternative use ("AUV") than the development proposed by PRL (DL16 to 18). The site did not suffer from abnormal constraints or costs (DL18). As Mr Daniel Kolinsky QC put it on behalf of LBI, there was considerable "headroom" in the valuation of such a site enabling it to provide a substantial amount of affordable housing in accordance with policy requirements. LBI contended that the achievement of that objective was being frustrated by PRL's use of a greatly inflated BLV for the site which failed properly to reflect those requirements. The circularity problem had not been addressed by PRL's case (see eg. paragraphs 3 to 13 of LBI's opening submissions and paragraph 3 of their closing submissions).

23. PRL's case was that an approach based on EUV with some uplift was inappropriate where the EUV of the site was negligible. Accordingly, an alternative approach was needed to establish BLV using market value or "market signals". Circularity could be avoided by disregarding any transactions which "are significantly above the market norm". PRL relied upon evidence as to:

    (i) The bid process in 2013 and the purchase price paid;

    (ii) A "Red Book" valuation of market value for the site;

    (iii) An unsolicited, unconditional offer for the site;

    (iv) Analysis of comparable transactions.

    This was substantially the same approach as PRL had relied upon in the 2015 inquiry (paragraphs 41 to 64 of PRL's opening submission).

24. Ultimately, the Inspector took the view that PRL's approach had failed to give adequate effect to policy requirements for affordable housing. For example, in DL 48 and 49, he said:

> "48. Whilst I attach limited weight to the Red Book exercise, which is required to be in accordance with professional standards, it is a market valuation which does not, in my view, adequately demonstrate proper consideration of, or give adequate effect to, the guidance in PPG or the requirements of the development plan. I do not accept the appellant's position that the level of affordable housing provision is not relevant to determining land value, as any notional willing land owner is required to have regard to the requirements of planning policy and obligations in their expectations of land value. It is unknown what the expectations of the MoD were in this case, but it would obviously not refuse bids above that expectation.

> 49. The appellant's case relies to a large extent on the fact that the development plan does not require 50% affordable housing provision on individual sites. However, reliance on policy compliance at any level of provision underplays the strong policy imperative to ensure the 'maximum reasonable' provision with the strategic target in mind. The clear and unambiguous policy position, clarified by the guidance contained in the Council's Development Viability SPD is that 50% affordable housing provision is the starting point and that any provision below that level, whilst capable of being policy compliant, will require robust justification."

Legal principles

25. The relevant legal principles governing the basis upon which the court may review an Inspector's decision were summarised by Lindblom J (as he then was) in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at paragraph 19.

26. Paragraph 19(1) states (*inter alia*) that "Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues." That observation is particularly apposite in the present case. The 2017 inquiry lasted some 9 days, copious evidence was produced to the Inspector (some experts produced three rounds of proofs) and lengthy submissions were made. The court was told that the two decision letters on the Parkhurst Road site have generated a good deal of interest amongst planning professionals, as if either decision could be taken as laying down guidance of more general application on the approach to be followed where development viability and affordable housing contributions are in issue.

27. It is important to emphasise that that is not normally the function of a decision letter. The Inspector's task is to resolve the issues which have been raised *on the evidence produced in that appeal*. The Inspector is not giving guidance on what course should generally be followed, even in cases raising the same type of issue. First, the application of policy often involves a good deal of judgment and second, the circumstances of an appeal (and the evidence produced) may differ quite considerably from one case to another (see eg. St Albans DC v Secretary of State for Communities and Local Government [2015] EWHC 655 (Admin)). There is a risk of attaching too much importance to the decisions of individual Inspectors, particularly where their conclusions were heavily dependent upon the circumstances of the cases before them and the nature of the evidence and submissions they received, with all their attendant strengths and weaknesses specific to that appeal. Reliance upon such decisions may take up a disproportionate amount of time and may distract parties from preparing suitable and sufficient information to deal with the circumstances and issues which arise in their own case.

28. Certain of Mr Harris's grounds of challenge involved dissecting the Inspector's decision letter and *some* of the evidence before him. It was therefore necessary, unfortunately, for all parties to delve into large parts of the evidence before the inquiry in order that the subject might be understood as a whole and provide context for some concisely expressed reasoning in the decision letter. It is only in exceptional

circumstances that that should be allowed to happen in the High Court, bearing in mind the limited role performed by this Court in applications for statutory review. Furthermore, readers of either of the two Parkhurst Road decisions should appreciate that it may be difficult for them to have a proper understanding of the conclusions reached by the Inspectors without access to the evidence and submissions before them.

Planning policies and related documents

National Planning Policy Framework

29. The NPPF contains policies intended "to boost significantly the supply of housing." Thus, local planning authorities are required to ensure that their local plan meets "the full objectively assessed needs for market and affordable housing...." in so far as that is consistent with other policies in the framework (paragraph 47). Paragraph 50 states that where an authority has identified that affordable housing is needed, it should set policies for meeting that need on site, unless off-site provision or a financial contribution of broadly equivalent value can be "robustly justified".

30. Paragraph 173 of the NPPF requires that "careful attention" be given to viability and costs in both "plan-making and decision-taking". The "scale of obligations and policy burdens" should not threaten the ability to carry out development viably:

> "To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable."

31. There are three points to be noted about paragraph 173. First, it is recognised that affordable housing imposes an economic cost on the carrying out of development. But as a matter of principle that is no different from the costs of other planning requirements, such as highway or other infrastructure necessary for the development to take place. A transparent, properly prepared viability appraisal which demonstrates that the overall cost of planning obligations is too great for development to be viable can enable the planning authority to exercise a judgment about the relative importance of each of the obligations *in that particular case*. It also assists the decision-maker to balance the desirability of securing those obligations against planning disbenefits which are said to constrain the amount or type of value-generating development which can be carried out on the site.

32. Second, it is recognised that a "competitive return" must be allowed not only for the developer but also the owner of the land upon which the development is to be sited.

33. Third, a viability appraisal is required to assess an appropriate return for a land owner who is said to be "willing". The concept of a "willing seller" commonly features in legal principles applied to a wide range of open market valuations. The "willing seller" is a hypothetical character with no special characteristics or attributes, but who is assumed to be willing to sell at the best price he can *reasonably* obtain in the open

market (Trocette Property Co Ltd v Greater London Council (1974) 28 P & CR 408, 416). Likewise, in the classic statement in Inland Revenue Commissioners v Gray [1994] STC 360 Hoffmann LJ (as he then was) explained that the hypothetical seller is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business. The hypothetical purchaser is also assumed to behave reasonably and to make proper enquiries about the property. He reflects reality in that he embodies whatever actually was the demand for the property at the relevant time. The concept of the open market involves the assumption that the whole world was free to bid for the property, and then forming a view about what in real life would have been the best price reasonably obtainable. The term "willing" indicates that it must be assumed that the vendor and purchaser behaved as would reasonably be expected of prudent parties.

National Planning Practice Guidance

34. Part of the NPPG deals with viability assessment. Following on from paragraph 173 of the NPPF, paragraph 001 of the Guidance states that where the effect of planning obligations on development viability needs to be assessed, decision-making should be underpinned by an understanding of viability to ensure "realistic decisions are made to support development and promote economic growth." Where the viability of a development is in question, planning authorities "should look to be flexible in applying policy requirements wherever possible". I take that statement to refer to situations in which the overall burden of the obligations is such as to render a development non-viable. Even so, the NPPG recognises that it may not be proper for the authority to compromise on policy requirements.

35. In the context of decision-taking, paragraph 016 states that a site is viable if the value generated by its development exceeds the costs of developing it (including planning obligation costs) and "also provides sufficient incentive for the land to come forward and the development to be undertaken".

36. Paragraph 019 of the NPPG states:

> "**How should the viability of planning obligations be considered in decision-taking?**
>
> In making decisions, the local planning authority will need to understand the impact of planning obligations on the proposal. Where an applicant is *able to demonstrate to the satisfaction of the local planning authority* that the planning obligation would cause the *development to be unviable*, the local planning authority *should be flexible in seeking planning obligations*.
>
> This is *particularly relevant for affordable housing contributions* which are often the largest single item sought on housing developments. These contributions should not be sought without regard to individual scheme viability. The financial viability of the individual scheme should be carefully considered in line with the principles in this guidance." (emphasis added)

The NPPG is similar in effect to provisions in local policies which place the responsibility on the developer to demonstrate non-viability (see paragraph 41 et seq below). No doubt this reflects the point that in cases where viability is in issue, the developer is effectively asking to be allowed to depart from normal policy requirements and, in any event, is normally well placed to provide information on viability which can then be tested.

37. Paragraph 023 of the NPPG was regarded by both PRL and LBI as being of central importance. It states:

> "**Land value**
>
> *Central to the consideration of viability is the assessment of land or site value*. Land or site value will be an important input into the assessment. The most appropriate way to assess land or site value *will vary from case to case* but there are common principles which should be reflected.
>
> *In all cases*, land or site value should:
>
> - *reflect policy requirements* and *planning obligations* and, where applicable, any Community Infrastructure Levy charge;
> - *provide a competitive return to willing developers and land owners* (including equity resulting from those wanting to build their own homes); and
> - *be informed by comparable, market-based evidence wherever possible*. Where transacted bids are significantly above the market norm, they should not be used as part of this exercise." (emphasis added)

38. Paragraph 024 of the NPPG states:

> "**Competitive return to developers and land owners**
>
> The National Planning Policy Framework states that viability should consider "competitive returns to a willing landowner and willing developer to enable the development to be deliverable." This return will vary significantly between projects to reflect the size and risk profile of the development and the risks to the project. A rigid approach to assumed profit levels should be avoided and comparable schemes or data sources reflected wherever possible.
>
> A competitive return for *the land owner* is the price at which a *reasonable land owner* would *be willing to sell* their land *for the development*. The price will need to provide an incentive

> for the land owner to sell in comparison with the other options available. Those options may include *the current use value of the land or its value for a realistic alternative use that complies with planning policy*." (emphasis added)

39. Paragraphs 023 and 024 of the NPPG contain the essential ingredients which define the Benchmark Land Value to be used in a viability appraisal. I agree with LBI's submission that paragraph 023 of the NPPG requires that site value to respect *all three* of the stated requirements. Thus, what is to be regarded as comparable market evidence, or a "market norm", should "reflect policy requirements" in order to avoid the "circularity" problem identified in DL72 of the 2015 decision letter. That may require the comparable evidence to be adjusted so as to be on the correct basis. If there are substantial difficulties in making these adjustments to a particular piece of market evidence, the decision-maker may give it correspondingly reduced weight, or even little or no weight. That would be a matter of judgment for the decision-maker after examining the specific evidence put forward on a case by case basis.

40. Furthermore, in some cases a competitive return in terms of the site value payable to the landowner may need to give him an incentive to sell which exceeds a relatively high existing use value or the value of a "realistic alternative use [to that proposed] that complies with planning policy" (see paragraph 024). That was not an issue affecting PRL's appeal site as such (DL 16-17). But market evidence of "comparable" transactions which had been influenced by high EUV's or AUV's might need to be adjusted by the valuer (see eg. DL18 and DL22).

The London Plan (March 2016)

41. Policy 3.3 of the Spatial Development Strategy for Greater London places strategic importance on increasing the supply of housing in order to meet needs. Policy 3.11 requires London boroughs to set overall targets in their local plans for the amount of affordable housing needed in their area to reflect the strategic priority given to this land use and to maximising affordable housing, as well as taking into account the viability of future developments.

42. Policy 3.12A requires that when determining proposals on individual sites "the maximum reasonable amount of affordable housing" should be sought having regard to eight matters which include "(b) The affordable housing targets adopted" in the local plan, "(c) The need to encourage rather than restrain residential development" and "(f) The specific circumstances of individual sites". Paragraph 3.71 of the "reasoned justification" for the policy states that the planning authority should take into account economic viability and continues:

> "Developers should provide development appraisals to demonstrate that each scheme provides the maximum reasonable amount of affordable housing output."

Islington Core Strategy and Development Viability SPD

43. Policy CS12 G requires that 50% of additional housing to be built in Islington over the plan period should be affordable. It is common ground that this is a borough-wide, rather than a site-specific, requirement. For individual sites the policy seeks "the maximum reasonable amount of affordable housing" from private residential and

mixed-use schemes involving 10 or more units. "It is expected that many sites will deliver at least 50% of units as affordable, subject to a financial viability assessment, the availability of public subsidy and individual circumstances on the site."

44. These policy requirements are elaborated in LBI's Development Viability Supplementary Planning Document ("SPD") (January 2016). For a proposal of the present kind, page 11 of the SPD requires an applicant to submit a viability appraisal providing certain information with the application. LBI will then consider whether the approach adopted by the applicant and inputs used are appropriate and whether the levels of planning obligations proposed are the maximum that can viably be supported (paragraph 3.18).

45. Referring to policy CS12 of the Core Strategy, the SPD requires the viability testing supplied by the applicant to start with the policy target of 50% affordable housing and, depending on the circumstances of the site, test *higher or lower* levels of affordable housing incrementally until "the maximum reasonable level" is determined. "Lower levels should only be considered where warranted by genuine viability constraints under the terms of the guidance in this SPD" (paragraphs 6.71 to 6.73). Where the issue is said to be land value, lower levels of affordable housing should only be considered where "an acceptable benchmark land value" (informed by comparable market evidence which is compliant with planning policy) could not be achieved. Paragraph 6.74 of the SPD continues:

> "It is therefore not the case that any level of affordable housing provision between 0 and 100% can be assumed to potentially be acceptable from the outset, without reference to viability testing the application site under the terms of this guidance including an acceptable benchmark. The use of such an assumption as a basis for determining land value, which is then applied as a fixed input within a viability assessment, is not evidence of a genuine viability constraint but, as noted above, is the result of a circular approach which has the potential to pre-determine and distort the outcome of the viability assessment process."

46. Subject to recognising the need for a degree of flexibility in the application of policy requirements (see NPPG paragraphs 001 and 019), the policy approach in the Core Strategy and SPD accords with the approach in the NPPG as summarised above.

The Developer's responsibility

47. I agree with Mr Buley (who appeared for the Secretary of State) and Mr Kolinsky QC that the effect of the policies in the London Plan and Islington Core Strategy (together with the NPPG) is that where an applicant seeking planning permission for residential development in Islington proposes that the "maximum reasonable amount of affordable housing" is lower than the borough-wide 50% target on viability grounds, it is his responsibility to demonstrate that that is so.

48. The relevant policy framework here is not materially distinguishable from that considered by HHJ Gilbart QC (as he then was) in Vicarage Gate Limited v First Secretary of State [2007] EWHC 768 (Admin) at paragraphs 44 to 54. He held that

where, in the context of determining a planning application, a policy requires a party (eg. an applicant) to demonstrate a state of affairs, then although it is correct to say that he is not under a *legal* burden of proof, the effect in forensic terms is nevertheless similar. "The decision-maker will still be looking for the party identified by the policy to adduce evidence of the kind prescribed by the policy to the standard set by the policy" (paragraph 48). In such a case, it is permissible for an Inspector to reject that party's case as lacking sufficient cogency to satisfy the policy (paragraph 54). Thus, a policy requirement can give rise to an *evidential* burden. In Harris v First Secretary of State [2007] EWHC 1847 (Admin), Lloyd-Jones J (as he then was) took the same approach (paragraphs 43 to 44).

49. Mr Harris QC placed emphasis upon the reference in paragraph (c) of Policy 3.12A of the London Plan to "the need to encourage rather than restrain residential development". But this is only one of eight matters in paragraphs (a) to (h) to which decision-makers should have regard and Policy 3.12A does not give paragraph (c) any additional, let alone overriding, weight as against the seven other criteria. Accordingly, paragraph (c) provides no basis for distinguishing in this case the approach set out in Vicarage Gate and Harris.

RICS Professional Guidance: Financial Viability in Planning

50. Although this is not a planning policy document, it is helpful to refer to it next because it has been relied upon in certain planning policy documents and in the 2017 decision letter. It explains some of the valuation concepts to which they refer. The document was published in August 2012. Page 1 explains its status so far as members of the Royal Institution of Chartered Surveyors are concerned. It is not a "practice statement" laying down mandatory requirements to which members must adhere. Instead, it is a "guidance note" which "provides users with recommendations for accepted good practice as followed by competent and conscientious practitioners." The note points out that it is for each surveyor to decide on the appropriate procedure to follow in any particular case. But where members do not follow the practice recommended in the document, "they should do so only for a good reason."

51. The RICS note states that the residual valuation method is an accepted method for the valuation of development schemes and land. It is used, for example, where direct comparison with other transactions is not possible because of "the individuality of development projects" (paragraph 2.2.1). It can be used to establish a residual site value for *the landowner*, by assuming an appropriate level of return for *the developer* (paragraph 2.2.2). The majority of financial viability assessments use the residual approach, but it is important both to benchmark and to have regard to comparable market evidence in so far as that is available (paragraph 2.2.3).

52. Paragraph 2.3.1 defines "site value" as a benchmark in the following terms:

> "Site Value should equate to the market value subject to the following assumption: that the value has regard to development plan policies and all other material planning considerations and disregards that which is contrary to the development plan."

"Market value" is defined as:

> "The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgably, prudently and without compulsion."

This is essentially the same explanation as that given by Hoffmann LJ in IRC v Gray. The RICS's definition of site value is consistent with paragraph 023 of the NPPG (see paragraphs 38 to 40 above).

53. Paragraphs 3.6.1.1 to 3.6.1.2 state that the price actually paid for the site may or may not be relevant to assessing financial viability according to how closely the price paid conforms to the definition of "site value" (including compliance with planning policy). As the Guidance Note says:

> "A viability appraisal is taken at a point in time, taking account of costs and values at that date. A site may be purchased some time before a viability assessment takes place and circumstances might change. This is part of the developer's risk. Land values can go up or down between the date of purchase and a viability assessment taking place; in a rising market developers benefit, in a falling market they may lose out.
>
> A developer may make unreasonable/over-optimistic assumptions regarding the type and density of development or the extent of planning obligations, which means that it has overpaid for the site."

54. At DL25 the Inspector referred to paragraph 4.2.1 of the Guidance note which identifies the importance of viability assessment being "supported by *adequate* comparable evidence" (emphasis added).

55. Paragraph 3.4.7 of the Guidance Note also identifies difficulties in using comparable evidence:

> "Sale prices of comparable development sites may provide an indication of the land value that a landowner might expect, but it is important to note that, depending on the planning status of the land, the market price will include risk-adjusted expectations of the nature of the permission and associated planning obligations. If these market prices are used in the negotiation of planning obligations then account should be taken of any expectation of planning obligations that are embedded in the market price, or valuation in the absence of a price. In many cases, relevant and up-to-date comparable evidence may not be available, or the diversity of development sites requires an approach not based on direct comparison."

Box 13 summarises the position by stating that even limited comparable evidence is important for establishing site value, provided that it is "appropriate".

56. In a similar vein the Inspector noted in DL 23 that:

> "Para 4.4 of the RICS Valuation Information Paper 12 states "Generally, high density or complex developments, urban sites and existing buildings with development potential, do not easily lend themselves to valuation by comparison. The differences from site to site (for example in terms of development potential or construction cost) may be sufficient to make the analysis of transactions problematical. The higher the number of variables and adjustments for assumptions, the less useful the comparison."

57. Paragraph 3.4.1 of the Guidance Note describes the estimation of site value using EUV. The approach involves the addition of a premium, often between 10 and 40% to EUV (see the Glossary in Appendix F) to arrive at a value at which it is supposed that a reasonable land owner would sell. This method is referred to as "EUV Plus". The Guidance Note discourages reliance upon EUV Plus as the sole basis for arriving at site value, because the uplift is an arbitrary number and the method does not reflect the workings of the market. Furthermore, the EUV Plus method is not based upon the value of the land if the redevelopment involves a different land use (eg. an office building redeveloped for a residential scheme).

58. On the other hand, the Guidance Note recognises (paragraph 3.4.1) that once the land value of a site has been established (an "outcome"), that figure can be disaggregated or re-expressed as an EUV plus a premium, which may be of assistance in judging, or cross-checking, the reasonableness of the site value which has been found by other means.

Housing Supplementary Planning Guidance

59. This policy document was adopted by the Mayor of London in March 2016. Notwithstanding the views expressed in the RICS's 2012 Guidance Note on the EUV Plus method, paragraph 4.1.4 of the SPG states:

> "On balance, the Mayor has found that the 'Existing Use Value plus' approach is generally most appropriate for planning purposes, not least because of the way it can be used to address the need to ensure that development is sustainable in terms of the NPPF and Local Plan requirements, he therefore supports this approach. The 'plus' elements will vary on a case by case basis based on the circumstances of the site and owner and policy requirements. "

60. Paragraph 4.1.5 of the SPG states:

> "4.1.5 A 'Market Value' approach is only acceptable where, in line with the NPPG the value reflects all policy requirements and planning obligations and any CIL charges. Recent research carried out by RICS found that the 'Market Value' approach is not being applied correctly and "if market value is based on comparable evidence without proper adjustment to reflect

> policy compliant planning obligations, this introduces a circularity, which encourages developers to overpay for sites and try to recover some or all of this overpayment via reductions in planning obligations" (RICS 2015 p 26). Thus, a market value approach should only be accepted where it can be demonstrated to properly reflect policy requirements and take account of site specific circumstances. In many cases this will require an adjustment of market comparables to take account of policy compliant planning obligations."

61. In November 2016 the Mayor issued a draft SPG "Homes for Londoners" for consultation. This document reinforces his preference for the EUV Plus method and suggests that other methods would only be considered in exceptional circumstances and if robustly justified (see paragraphs 3.36 and 3.42 to 3.47).

Islington LBC – Development Viability SPD

62. This Supplementary Planning Document was adopted in January 2016. Paragraph 6.48 explains that the "EUV plus" approach is commonly used to assess whether a residual land value from a development scheme provides a competitive return for the landowner. LBI takes the view that the EUV Plus approach should form the primary basis for determining BLV in most cases (paragraph 6.52).

63. The Council also accepts that comparable, market-based evidence can be used to inform the BLV (paragraphs 6.58 to 6.59). But in paragraph 6.60 the SPG points out that there are a number of potential difficulties in the transparent analysis of market transactions for land:

- "The full facts of past transactions are rarely available and bids for land may have overestimated actual value.
- There is potential for transactions to not fully reflect current planning policy requirements such as those relating to affordable housing and density, as required by PPG *in all cases.*
- Sites may have a differing 'inherent' value depending on the presence or absence and nature of income generating existing uses.
- Land transactions are typically based on assumptions of growth in values (whereas viability assessments are normally based on current values).
- Transactions may relate to sites of different sizes, densities, mix of uses and costs to facilitate development.
- Reliance on transactions that are not comparable, that do not reflect the Development Plan policies as they relate to the application site, or that are based on

> assumptions of growth may lead to inflated site values. This would restrict the ability to secure development that is sustainable and consistent with the Development Plan."

Consequently, paragraph 6.61 states that it is vital that transactions are "genuinely comparable and that they reflect planning policy."

A summary of the issues between the parties in these proceedings

64. Mr Harris QC reordered the Claimant's grounds of challenge. Beginning with ground 2 he submitted that the Inspector's decision to accept LBI's BLV of £6.75m was based upon his acceptance of a method advanced by its expert Mr Andrew Jones ("the Jones method"), a comparative method of valuation which claimed to analyse market data in a manner which addressed the circularity issue and avoided the need to make large numbers of adjustments to reflect differences between sites (see eg. paragraphs 4.55 to 4.57 of Mr Jones's proof). Mr Harris submitted that it was shown at the inquiry that this method was logically flawed and did not achieve what it claimed to do. The Inspector did not address those important points in his decision, and he applied the Jones method in a manner which was inconsistent with his understanding of it. Lastly, under ground 2 it was submitted that the Inspector failed to recognise in his decision letter substantial changes in LBI's valuation case by the time the end of the inquiry was reached.

65. Under ground 3 the Claimant advances criticisms of the way in which the Inspector treated certain comparable transactions when arriving at his decision to accept LBI's BLV figure of £6.75m.

66. Under ground 1 it is said that the Inspector erred in concluding that LBI's case was based on the EUV Plus approach, and that this was supported by recent policy statements. It is plain that LBI did not use an EUV Plus method in order to arrive at a BLV of £6.75m.

67. The Defendants resist each of these contentions. But they also submit that, in any event, the Claimant's criticisms do not vitiate the essential conclusions in the decision letter upon which the Inspector decided that PRL's proposal failed to provide "the maximum reasonable amount of affordable housing." Between DL 42 and 49 the Inspector explained why he thought PRL's valuation exercise was flawed and accordingly it had failed to show that no more than 10% affordable housing could reasonably be provided on the site. Thus, the proposal conflicted with important planning policies (DL 70 and DL 96). The Claimant has not made any legal challenge to the findings in DL 42 to 49, which remain unaffected by the criticisms advanced against other parts of the decision letter. Although the Inspector accepted the LBI's BLV of £6.75m, he did not go so far as to accept their case that 34% affordable housing should be provided. It was sufficient for the Inspector to dismiss the appeal that he did not accept that 10% was adequate, given the policy framework and the principle set out in the Vicarage Gate decision.

68. In order to address these rival contentions, it is necessary examine how LBI put its case at the 2017 inquiry.

LBI's case at the 2017 Inquiry

69. The inquiry sat in January 2017 and then adjourned to two different weeks in March before finally concluding on 27 April 2017. During that time additional evidence was adduced by both of the principal parties and the valuation evidence was altered. Both sides made closing submissions in writing. PRL sought to address LBI's case as it stood by the end of the inquiry. Accordingly, in this hearing both parties looked to LBI's closing submissions to identify the contentions it was advancing at that stage, by way of both evidence and submission.

70. Between paragraphs 91 and 204 of their closing submissions LBI examined the evidence before the inquiry and how it related to the relevant policy requirements topic by topic. The LBI's submissions then drew the threads together (paragraphs 205 to 206), made submissions as to why PRL's approach did not address the "circularity problem" (paragraphs 207 to 213), dealt with sense-checking (paragraphs 214 to 219), explained why the 2015 decision letter had failed to address the circularity problem (paragraphs 220 to 225) and concluded by submitting (paragraphs 225 to 230) that: -

    i) PRL's use of market evidence to appraise site value did not make necessary adjustments for differences between comparables and the assumptions required to be made for the appeal site applying paragraph 023 of the PPG and RICS guidance;

    ii) PRL's revised site value of £11.9m should be rejected;

    iii) PRL's proposal of 10% affordable housing was inadequate because its estimate of BLV was unsound.

    In their conclusions (paragraph 302 to 306), LBI submitted that PRL had not shown that the proposal provided the maximum reasonable amount of affordable housing and so the appeal should be dismissed.

71. LBI referred to the common ground that the EUV of the appeal site was nominal and submitted that, for the delivery of affordable housing, the site benefited from not having to overcome the "constraint" of a high EUV. LBI's case was that this negligible EUV was a relevant factor in determining BLV. Because a reasonable landowner would have no other use for the land, he would be incentivised to release it for residential development so as to be able to gain a return. It was therefore pointless to debate the difference between a BLV of £6.75m or £11.9m in terms of a percentage or absolute uplift in value for the landowner from EUV. Even the lower number represented "a very large premium indeed over the existing use value" (paragraphs 91 to 99).

72. LBI noted that PRL had not sought to rely upon any AUV in order to derive the BLV. The appeal site was not constrained by a high AUV for some different use from the residential scheme proposed which the latter would have to overcome. Furthermore, the residential capacity of the appeal site had become "ascertainable and reasonably firmly settled". The proposed scheme for 96 units represented the optimum use of the land (paragraphs 100 to 109).

73. LBI dealt with residual land valuations at paragraphs 110 to 124 of its closing submissions. In summary, LBI submitted: -

i) Although sensitive to small changes in inputs, a residual valuation has the potential to provide a "helpful signpost" for what the BLV should be, particularly in the valuation of complex sites for which comparable evidence is hard to come by;

ii) The range of residual land values is a relevant part of the evidence base for testing the BLV's adopted by each side at the inquiry;

iii) During the inquiry, Mr Jones, LBI's valuer, had substantially revised his residual valuation downwards to £2.4m, with the consequence that it no longer "actively support[ed] his BLV of £6.75m, but that did not mean that residual land values had ceased to be a material part of the overall evidence base;

iv) When CBRE's residual valuation relied upon by PRL was adjusted to provide 50% affordable housing instead of an assumed 16%, the residual land value was £7.32m, very much closer to Mr Jones's BLV of £6.75m;

v) But care must be taken to avoid misusing residual appraisals. Because PRL's expert valuer, Mr Fourt, had inappropriately continued to use a BLV of £13.26m as a *fixed* input in those appraisals, as the development capacity of the site had been progressively reduced, so the affordable housing proportion had been artificially diminished. Instead, the proper approach was to reassess site value by taking proper account of both development capacity and policy requirements as inputs.

74. LBI's primary submissions on market evidence were contained in paragraphs 125 to 193 of their closing. In summary, LBI submitted: -

i) It is necessary to look for comparable evidence as close as possible to that which is being valued, to ascertain the circumstances of those transactions, and make appropriate and transparent adjustments to reflect (a) differences from the appeal site and (b) the assumptions required by paragraph 023 of the PPG and the RICS Guidance Note. Whether evidence can properly be regarded as comparable can be affected by difficulties in making such adjustments, including the extent to which a market bid has disregarded or diminished the effect of planning policy requirements (paragraphs 125 to 130);

ii) No weight could be placed upon the price paid for the site in 2013 in different market conditions and with inflated expectations as to the development capacity of the site. The development appraisal which would have been prepared by

PRL to inform its bid for the site had not been produced to the inquiry (paragraphs 133 to 143);

iii) There was insufficient information on the factors which had informed competing bids for the site in 2013 (eg. site capacity or level of affordable housing) and so no sensible conclusions could be drawn from this material (paragraphs 144 to 151);

iv) No weight could be placed on the unsolicited offer in May 2015 by an unsuccessful bidder in the 2013 sale because of the absence of any information on the assumptions which had informed that offer (paragraph 152);

v) CBRE's residual valuation approach undermined PRL's case and supported LBI's position for reasons summarised in paragraph 73(iv) above (paragraphs 153 to 155);

vi) Mr Fourt's attempt to identify "market norms" for deriving land value from 27 transactions was of no use. A good many of the sites were not remotely comparable. Some did not involve the application of relevant planning policies. The range of factors affecting the sites prevented the making of meaningful comparisons with the appeal site (paragraphs 156 to 162). Mr Kolinsky showed the court paragraphs 6.4 to 6.8 of Mr Fourt's proof which stated that his analysis of the 27 transactions in Islington between 2010 and 2016 had been "deliberately high level". It made no adjustments for planning permission, location, planning obligations or site specific development costs. The exercise simply involved averaging all this high level data and stating that the level of affordable housing provided had been 16% on average. A second exercise which adjusted for land price inflation but which otherwise averaged the data set produced similar answers;

vii) Mr Fourt's five "key comparables" did not, as a set, provide a reliable foundation for drawing conclusions on the value of the appeal site, given the differences between them although the Coppetts Wood Hospital site was "more promising" (paragraphs 163 to 170). Mr Kolinsky showed the court those parts of Mr Fourt's evidence which dealt with this material so as to confirm that he made no adjustments to deal with, for example, differences between the sites. However, LBI submitted to the Inspector that analysis of three of the sites more closely comparable to the appeal site produced figures for land value much nearer to LBI's assessment than PRL's, even before making any other necessary adjustments (eg. for high EUVs) which might well have reduced the analysed land value further (paragraphs 171 to 175);

viii) LBI relied upon 351 Caledonian Road because of its comparability to the appeal site in terms of location and size and

submitted that it indicated a land value for the appeal site of £6.432m (paragraphs 176 to 192);

ix) A pattern of evidence supported Mr Jones's opinion that the BLV was £6.75m, namely the winning bid for the site even if adjusted solely for development capacity (£8.32m), 351 Caledonian Road (£6.432m) and a per unit analysis of Mr Fourt's 3 best comparables (using figures accepted by Mr Fourt), subject to the need for further adjustments (paragraph 193).

75. It is important to note that in paragraph 194 of its closing submissions, LBI submitted that the analysis could and should stop there. In other words, it was submitted that the evidence before the Inspector, particularly that relied upon by PRL was inadequate to show that the proposed scheme included "the maximum reasonable amount of affordable housing". However, paragraphs 195 to 200 of LBI's closing submissions dealt with an additional issue which had arisen at the inquiry, namely what *unit* should be used in order to express data on other transactions in terms which could be *compared* with the appeal site. I will return to this subject when dealing with ground 2 of the challenge.

76. In paragraphs 201 to 204 of its closing, LBI submitted that distortions introduced by the use of indexation to adjust for differences in the dates of transactions should be addressed by confining the exercise to "sufficiently recent" comparables.

77. In "drawing the threads together" LBI submitted that a proper approach to site value should take account of the negligible EUV, the very substantial premium over EUV available as an opportunity to incentivise a reasonable landowner to sell whilst at the same time meeting reasonable planning requirements, the absence of any AUV or realistic opportunity to realise an alternative to the development proposed and the fact that the development capacity of the appeal site had become fairly well-established. BLV should also be informed by market value, having regard to the extent to which it is possible to achieve sufficient comparability and the need for proper and transparent adjustments to render any comparisons valid and to accord with paragraph 023 of the PPG and RICS guidance. Without relying upon differences of approach to "per unit analysis," LBI explained why Mr Jones's approach to BLV gave effect to these considerations and Mr Fourt's did not (paragraph 205 to 206). LBI explained why it considered that PRL's evidence, including its generalised evidence asserting "market norms" failed to address the "circularity" problem (paragraphs 207 to 213).

78. At paragraph 214 to 219 of its closing LBI set out its submissions on why PRL's BLV of £11.9m failed tests for sense-checking. For example, LBI referred to "relatively unconstrained" sites which had yielded affordable housing between 38% and 50% of total units and submitted that site-specific circumstances explained why lower contributions had been made on other sites (see paragraph 215). LBI also suggested that an approach which used uncontroversial inputs, but allowed for affordable housing requirements to be taken into account as a further input, would produce much lower residual land values for the appeal site than £11.9m (paragraphs 217 to 218).

79. At paragraphs 220 to 227 of its closing, LBI explained why DL 73 to 75 of the 2015 decision letter should be treated as having failed to address the "circularity" problem identified in DL 72.

80. LBI asked the Inspector to reject PRL's approach to BLV and its value of £11.9m and as a consequence, the proposal to provide only 10% of the units as affordable housing.

A summary of the 2017 decision letter

81. DL 4 to DL 50, DL 70 and DL 93 to 96 are set out in an Addendum to this judgment.

82. In DL 9 to 12 the Inspector correctly summarised national planning policy and guidance.

83. In DL 13 to 15 the Inspector summarised valuation approaches used by LBI.

84. In DL 16 to 17, the Inspector summarised the agreed position that the appeal site had a negligible EUV, a residential redevelopment scheme was a highly likely alternative use of the land (subject to complying with planning policy requirements including the need to provide the maximum reasonable amount of affordable housing). The proposed scheme provided a good indication of the site's potential and there was no basis for assuming an alternative with a greater AUV. In DL 18 the Inspector stated that these were matters which a reasonable landowner would have to take into account, including the 50% affordable housing contribution as a "starting point". The negligible EUV, and the absence of AUV (apart from the appeal proposal) and of abnormal costs, had to be built into the viability appraisal. Consequently, to be comparable with the appeal site, the land value of other sites had to reflect those circumstances, including the provision of "the maximum reasonable amount of affordable housing".

85. LBI had accepted that a residual land value of £2.4m based on 50% affordable housing was insufficient to incentivise a reasonable landowner to sell, given the availability of an alternative reasonable option, namely to hold on to the land until a later date (DL 19).

86. Between DL 20 and 24 the Inspector explained why it had been "extremely difficult" to find "truly comparable" sites in "this busy urban area". Nonetheless, the need for comparability was of "critical importance". The number of adjustments suggested by the parties to allow comparison had been "vast". "Comparing transacted bids on sites that are not similar in terms of the existing EUV, available AUV or that are *similarly unencumbered by constraints* is, in my view, of little value" (emphasis added). Without having all the relevant information on sites and assumptions made by individual parties to transactions, it is "impossible" to know whether circumstances are comparable. In DL 23 the Inspector referred to paragraph 4.4 of RICS's Valuation Information Paper No 12 which states that generally high density or complex development sites and urban sites "do not easily lend themselves to valuation by comparison," the differences from site to site may make analysis problematic and the greater the number of variables and adjustments for assumptions the less useful is the material for comparison. The Inspector made it plain that he could not accept PRL's suggestion that simply disregarding transaction bids significantly above the market norm avoided an estimate of BLV being tainted by inflated land values (DL 20)

unless "true comparisons" could be made (DL 24). In other words, PRL's contention, or assertion, begged the critical question which could not be avoided.

87. There then followed an important conclusion by the Inspector: -

> "In this case, the appellant has not provided as evidence the assumptions made in its viability appraisal supporting its winning bid for the site and this information is also unavailable for the other bidders, or any other 'comparable' site identified. Therefore, I treat the market evidence provided with some caution. That is not to diminish the importance of market evidence as a key consideration in determining land value, but it must be truly comparable and meet the other aspects of PPG guidance at paragraph 023 on viability."

That conclusion underlay the remainder of the Inspector's reasoning on the BLV issue. It should be noted that Mr Harris QC did not seek to challenge it. Indeed, it could not be challenged.

88. In DL 25 to 30 the Inspector then went on to consider differences between the parties as to the unit of analysis which may be used for comparing actual transactions. This included a method advanced by Mr Jones and is the subject of ground 2. The issue is whether the Inspector's handling of that subject is tainted by legal error and if so whether that vitiates the Inspector's conclusions rejecting PRL's estimate of BLV and his decision that PRL failed to show that its proposal would provide the maximum reasonable amount of affordable housing.

89. In DL 31 to 33 the Inspector explained why Mr Fourt's analysis of 27 transactions within Islington was insufficiently reliable for estimating a BLV on the appeal site. His reasoning involved freestanding criticisms which did not depend in any way upon the issues referred to in DL 25 to 30. The Inspector also made it clear that he was addressing his criticisms to the *comparability* of the sites and land values relied upon by Mr Fourt, irrespective of the *method of comparison* used (including those *additional* methods of comparison referred to in DL 31).

90. In DL 34 to 36 the Inspector addressed Mr Fourt's 5 key comparables. He found that they suffered from the same issues as the 27 comparables, but concluded that certain information lent support to LBI's BLV and hence undermined the figure advanced by PRL.

91. In DL 37 the Inspector found that LBI's method of comparing market data was preferable to the others put forward. Mr Harris QC links that paragraph to those the subject of challenge in ground 2.

92. In DL 38 to 39 the Inspector returned to paragraph 023 of the PPG and re-emphasised the need for proper comparability so as to satisfy the requirement in the first limb that land value must reflect (inter alia) planning policy requirements. That provided the context for the next part of the decision letter which addressed PRL's valuation approaches for the appeal site itself which had previously been accepted in the 2015 decision letter.

93. Between DL 40 and DL 48 the Inspector rejected the PRL's reliance upon evidence using the purchase price paid in May 2013, rival bids in the 2013 sale, the unsolicited offer in May 2015, and CBRE's red book valuation. It can therefore be seen that in DL 31 to DL 36 and DL 40 to 48 the Inspector rejected the evidence relied upon by PRL to support the adequacy of its proposed provision of affordable housing (see the summary in paragraph 23 above). This then led to the overall conclusions in DL 49 to 50 on how PRL's approach to BLV failed to comply with policy requirements (quoted in paragraph 24 above).

Ground 1

94. It is convenient to deal with the Claimant's grounds in the order set out in the claim. PRL submits that the Inspector erred in law because in DL 14 and DL 15 he incorrectly stated that LBI was promoting an EUV Plus method of valuation when that was not the case, he relied upon recent policy as endorsing the use of that approach and he relied upon his erroneous misunderstanding of the Council's position as one reason for not accepting PRL's contention that a market value approach was "the only reasonable means by which to establish the land value". The Claimant adds that the Inspector's error was all the more significant because in reality LBI had advanced a purely market-based approach and so DL 14 was flawed by an internal inconsistency.

95. Mr Kolinksy referred to paragraph 4.16 and 4.19 of Mr Jones's proof of evidence. At that stage his residual valuation of the site was £7.15m. He relied upon the percentage and absolute size of the uplift that represented over an "optimistic" EUV of £700,000 as providing "a more than adequate incentive" to the landowner to release the site for development. Similarly Mr Wacher, LBI's Development Viability Manager, stated that although the BLV in this case could not be *derived* by adding a percentage of up to 30% to EUV, nonetheless comparison of the value generated by the development for the landowner with the EUV still remained "highly relevant". An estimated BLV of £6.75m was said to represent a return of about 9 times the EUV, which was competitive and sufficient to incentivise a reasonable landowner to sell the site (paragraph 6.30 of rebuttal proof). This approach was relied upon by LBI in its closing submissions (see paragraph 71 above). The uplift was said to represent the sufficient "plus" or premium for the landowner.

96. The approach taken by LBI was entirely consistent with paragraph 3.4.1 of the RICS Guidance Note (see paragraph 58 above). The figure which Mr Jones had arrived at by £6.75m was re-expressed as an EUV plus a premium, in order to judge the reasonableness of the BLV figure which had been arrived at.

97. At DL 19 the Inspector said: -

> "Having engaged with market evidence, something that it failed to do in the previous appeal, the Council consider that a value of £6.75m is the appropriate BLV, including a significant uplift above the EUV, and representing the Plus element of the EUV Plus approach."

This confirms that the Inspector correctly understood the way in which LBI had used the EUV Plus method in accordance with paragraph 3.4.1 of the RICS Guidance Note.

DL 40 does not suggest any inconsistency in the Inspector's reasoning. He considered that the EUV Plus method, in the manner applied here, was an appropriate method in this case and preferable "to a *purely* market value approach, allowing for value to have regard to the market as a *consideration*, *rather than the determining factor"* (emphasis added). In that paragraph the Inspector was referring to his criticisms of PRL's purely market based approach, which he had already rejected in DL 31 to 36.

98. For these reasons I reject ground 1 of the challenge.

Ground 2

The Inspector's comments on using units of accommodation to compare land prices

99. In order to make a comparison between land prices on one site and another, valuers generally express the data they are analysing by reference to a common unit of comparison. So Mr Fourt analysed information in terms of, for example, price per acre, price per sq ft and price per habitable room (DL 31). Ground 2 relates to DL 26 to 30 where the Inspector considered three other comparative techniques using value *per unit of accommodation* which the parties had suggested.

100. In relation to a suggestion from LBI that land value be divided by the total number of units (both market and affordable housing) the Inspector said (DL 26): -

> "this attributes value to the affordable housing units (where provided) and it is agreed between the parties that the commercial value of these is limited. It can, therefore, have the effect of artificially reducing land or site values when comparing sites that provided affordable housing against those that did not."

101. He then dealt with an approach suggested by PRL (DL 27): -

> "The appellant seeks to discount the affordable housing units and divide the land value by the number of market units but this has the result of inflating the unit prices on schemes that have provided larger proportions of affordable housing, incorrectly giving an impression of higher land value. As the full circumstances that led to the various levels of affordable housing on other sites is unknown, neither of these methodologies is of particular value"

102. Mr Kolinsky QC explained that DL 27 related to a paradox pointed out at the inquiry by LBI (for example in paragraph 200 of their closing submissions). If a high price paid for a site was influenced by a low provision of affordable housing and that price is divided by a correspondingly high number of market units, that figure will be expressed as a relatively low land value per unit. But if a lower price paid for a site was influenced by a high provision of affordable housing, and is then divided by a relatively low number of market units, that figure will be expressed as a relatively high land value per unit. These relationships "turn things on their head".

103. PRL does not seek to challenge the Inspector's comments in DL 26 and DL 27 on those two approaches.

104. The challenge relates to an approach put forward by Mr Jones (DL 28): -

> "A more reliable comparison is the Council's methodology, which assumes a 50% affordable housing contribution for all transactions analysed (as the starting point in policy) and to divide the land purchase price by the remaining 50% market dwellings. Whilst actual affordable housing provision on various sites differs, this can be assumed to account for downward revisions from 50% affordable housing provision in light of site specific circumstances evidenced in those individual planning applications. *Therefore*, this method allows a comparison across sites without being affected by differing levels of affordable housing provision and avoids importing assumptions and circumstances from other sites that do not apply to the appeal site." (emphasis added).

105. At paragraphs 4.56 to 4.57 of his proof Mr Jones contended that by using a divisor based on a number of market units which assumed that 50% affordable housing had been provided on each site, whether or not that was the case, he was adjusting land value so as to (i) reflect LBI's policy, (ii) avoid the issue of "circularity" and (iii) comply with paragraph 023 of the PPG.

106. Plainly, a challenge to an Inspector's judgment on valuation matters which is no more than a disagreement with his or her assessment of the merits, cannot be advanced under the guise of a complaint of Wednesbury unreasonableness (Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2017] PTSR 1126 paragraphs 6 to 7). But an irrationality challenge may succeed where it is shown, for example, that the decision proceeds from flawed logic or "an error of reasoning which robs the decision of logic" (R v Parliamentary Commissioner for Administration ex parte Balchin [1996] EWHC Admin 152 at paragraph 27; R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213, 244 at paragraph 65). That was how Mr Harris QC presented his main challenge under ground 2.

107. PRL's case before the Inspector on this subject was set out in their closing submissions at paragraphs 299 to 324. In summary, PRL demonstrated that Mr Jones's method did not produce a land value which reflected the policy target of 50% affordable housing at all. Whatever level of affordable housing was assumed in Mr Jones's method (whether 50% or some other percentage), it would always generate the same BLV. In his approach the level of affordable housing, rather than being a factor which in part defined the BLV, was treated in effect as being irrelevant to it. Arithmetically this was so because the 50% assumption used to determine the unit of comparison, the divisor applied to the land price, was also used to determine BLV for the appeal site when the per unit figure was applied to 50% of the 96 units to be constructed on that site. The choice of the 50% affordable housing parameter turned out to be self-cancelling and of no consequence to the exercise. The same would apply to any alternative affordable housing percentage used in Mr Jones's method.

108. This should not have come as any surprise to the parties at the inquiry because the exercises carried out in Tables 4 and 5 of Mr Jones's proof, the latter expressing land price per *total* number of units and the former per *market* unit (assuming 50% affordable housing), both produced a land value for the appeal site of £5.29m as an average across the transactions analysed. Not only is this apparent from a simple inspection of the two tables, it was explicitly stated in paragraph 4.77 of Mr Jones's proof. Not surprisingly therefore, neither Defendant sought to refute Mr Harris's submission on this particular point.

109. However, it is necessary for the court to articulate the flawed logic in Mr Jones's method, and not simply rely upon Mr Harris's arithmetical exercise. There are at least two points. First, if an actual land price was inflated by an over-optimistic expectation about the overall development capacity of the site, that price may nonetheless have assumed a correct proportion of affordable housing, planning obligations and other development costs. An erroneous judgment about the site's capacity is not corrected by applying a 50% affordable housing assumption to the number of units on the site. Halving the per unit divisor has nothing to do with removing that flaw in the land price. That should be addressed by adjusting the land price to a proper basis.

110. This first point is but one example of a second, more fundamental flaw in Mr Jones's method. It assumes that any differences between comparables and the appeal site can be properly allowed for simply by applying the 50% affordable housing assumption to the divisor and that no adjustment needs to be made to the land price itself before it is expressed in a comparative form, whether that be per unit of accommodation or per unit of area. The appeal site suffered from no unusual physical or economic constraints. The price paid for another site might have been high relative to the appeal site because of a high EUV and/or AUV. Alternatively, the price may have been influenced by abnormal development and planning costs, which in turn may explain why a lower contribution of affordable housing had been properly justified. Mr Jones's method illogically assumes that there is no need to adjust the land price because the approach taken to the divisor addresses all such differences between sites. Plainly it cannot. Whatever *number of units* the land price is divided by, the effect of these differences on land price remains in the numerator and therefore in the per unit figure derived from that price.

111. For these reasons, I am unable to accept Mr Buley's submission that the second sentence of DL 28 explains the third sentence of that paragraph or anything in DL 29. The logic in DL 28 was flawed in so far as the Inspector was led by LBI to accept that Mr Jones's approach overcame the problem of comparison between land prices being affected by differences in the levels of affordable housing provided or by assumptions and circumstances affecting other sites which were inapplicable to the appeal site (last sentence of DL 28).

112. The next and essential question is whether the legal error in DL 28 vitiated the basis upon which the Inspector rejected PRL's case that a 10% affordable housing provision represented the maximum reasonable level. It is a well-established principle that, if it can be seen from reasoning in the decision letter untainted by the legal error identified that the Inspector would necessarily have reached the same decision, namely to dismiss the appeal, if his decision has not contained that error, then the Court will exercise its discretion against the quashing of the decision. In such circumstances the error is treated as being of no materiality or significance to the legal

validity of the decision (Simplex GE (Holdings) Limited v Secretary of State for the Environment [2017] PTSR 1041; R (Smith) v NE Derbyshire PCT [2006] 1 WLR 3315; R (Smech Properties) v Runnymede BC [2016] JPL 677 at paras 25 to 39; Secretary of State for Communities and Local Government v South Gloucestershire Council [2017] JPL 798 at paras. 24 to 29). Because a decision on a planning appeal must be expressed through a formal document setting out the Inspector's reasons in accordance with a statutory obligation, the court may more readily be able to see whether the error *might* have made a difference to the outcome arrived at by the Inspector, or whether the court can be satisfied from untainted reasoning that his decision would inevitably have been the same. The *Simplex* exercise does not involve the court second-guessing what might happen on any future redetermination if the decision were to be quashed. That would beg the question which the court is to decide (Goodman Logistics (UK) Ltd v Secretary of State for Communities and Local Government [2017] JPL 1115 at paras. 95-98).

113. As I have already explained, PRL's case that it had discharged the policy requirement to provide the reasonable maximum level of affordable housing was in any event rejected by the Inspector for the reasons given in DL 31 to 36 and DL 38 to 48. In this context it is also important to note that the Inspector's wholesale and robust rejection of the Claimant's valuation case was supplemented by his rejection at DL 49 of its incorrect approach to the application of development plan policy. None of the Inspector's reasoning in these paragraphs was affected by his earlier comments in DL 28 on the approach of Mr Jones to *per unit comparison,* or by his comments in DL 26 to 27 on the use of other forms of *per unit comparison*. The Inspector's rejection of PRL's viability case was based upon entirely different and very much more fundamental criticisms. No legal challenge has been made to any part of DL31 to 36 and DL 38 to 48.

114. I appreciate that in DL 37 the Inspector stated that he preferred Mr Jones's method of comparing market data to others, but I cannot accept the submission that this tainted his rejection of PRL's viability case. Plainly, the rejection at DL 40 to 48 of PRL's valuation exercises relating to *the appeal site itself* had nothing to do with that method. The Inspector's earlier rejection at DL 31 to 36 of PRL's comparative analysis of market evidence did not rely upon Mr Jones's method (or the criticism in DL 27 of Mr Fourt's approach). The criticisms made of PRL's viability case were free-standing points largely drawn from LBI's case in its closing submissions preceding paragraph 195. They were not therefore related to the technique described in DL 28 (or indeed in DL 26 to 27). For example, the Inspector criticised PRL's evidence because the variables between sites were unknown and/or adjustments had not been made. There has been no challenge to that reasoning. The fact that the Inspector did not appreciate that the particular method identified in DL 28 also suffered from these problems does not vitiate his positive reasons for rejecting the Claimant's valuation case, especially in the context where it was for the Claimant to justify its proposal that 10% affordable housing represented the maximum reasonable amount that could be provided (see paragraphs 47 to 49 above).

115. Mr Harris QC sought to demonstrate that the Inspector's criticisms of PRL's evidence were tainted by his acceptance of LBI's BLV figure of £6.75m. He contended that that figure was derived, indeed solely derived from Mr Jones's method descried in DL 28. I reject that submission for a number of reasons.

116. Ironically, the first reason involves PRL's own arithmetical demonstration of the flawed logic of Mr Jones's alternative basis of comparison (see paragraph 107 above). Whether the divisor used by Mr Jones assumed 50% affordable housing (i.e. his table 4) or the total number of units provided (his table 5), or assumed any other percentage of affordable housing, the land value he derived for the appeal site would still be £5.29m (see paragraph 108 above and paragraph 4.77 of Mr Jones's proof). Mr Harris QC was therefore wrong to insist that the BLV shown in Mr Jones's table 1 was based solely on the exercise in his table 4 using the method described in DL 28. For completeness, I should mention that during the hearing there was a dispute as to whether Mr Jones had conceded this point. The court cannot resolve such a dispute in proceedings of this nature. But, in any event, there is no need to do so because, as I have explained, the point is academic. It is therefore right to say that Mr Jones's table 1 relied in part upon the figure of £5.29m derived from his table 5.

117. Plainly, Mr Jones's BLV figure of £6.75m was significantly greater than £5.29m. According to DL 29, that was explained by a weighting exercise which Mr Jones had carried out, although the Inspector did not find it necessary to rely upon that further analysis.

118. Second, it is plain from table 1 and from LBI's closing submissions that the Council also relied upon residual valuation to support the figure of £6.75m. In table 1 Mr Jones had also relied upon his residual valuation of £7.15m as part of a basket of material. That assumed 50% affordable housing provision. By the end of the inquiry that valuation had fallen to £2.4m and did not "actively support" Mr Jones's judgment that the BLV was £6.75m (see also DL 19). But paragraph 116 of LBI's closing submissions nevertheless relied upon a residual valuation approach to support the figure of £6.75m (paragraph 73(iv) above). In my judgment there was no legal requirement for the Inspector to refer explicitly to that particular point in his decision letter. That document was addressed to the parties on the basis that they would be familiar with the cases which had been advanced and the way in which they had evolved by the end of the inquiry.

119. Third, the Inspector found that the evidence on the Coppetts Wood Hospital transaction supported LBI's BLV of £6.75m. That was a matter of judgment for the Inspector and is not open to legal challenge.

120. Fourth, the Inspector was aware of limitations in Mr Jones's comparative technique (see DL 30). But, in any event, in DL 49 to 50 he decided that the majority of the evidence before him was "not adequately comparable" to provide a robust justification by PRL for the level of affordable housing it had proposed. On the other hand, other evidence which he considered to be of value showed that LBI's BLV of £6.75m was "not out of kilter with the market" (see DL 34 and 35). Plainly this was so very much lower than PRL's figures of £13.26m revised downwards to £11.9m, which were closely related to the price paid in May 2013, that in DL 50 the Inspector said that "an inflated land value [should not] be subsidised by a reduction in affordable housing".

121. Accordingly, I am satisfied from reasoning in the decision letter that is untainted by the legal error I have identified, that the Inspector's decision to reject the adequacy of the proportion of affordable housing proposed would inevitably have been the same if

he had not made that error. It follows that the decision should not be quashed because of that error.

122. I should add that in DL 73 to 82, 92 and 96 the Inspector dismissed the appeal for a further reason, namely the inadequacy of the review mechanism contained in PRL's unilateral undertaking under section 106 dated 27 April 2017. This formed part of his consideration of the second main issue defined in DL 4. No legal challenge has been made to that part of the decision letter. Furthermore, PRL has not suggested that the legal error arising from DL 28 influenced in any way the Inspector's reasons for deciding that the review mechanism in the undertaking was unacceptable and conflicted with relevant planning policies. The Inspector explicitly stated in DL 78 that:

> "These matters alone render the submitted [unilateral undertaking] incapable of securing an appropriate review mechanism, were the appeal to succeed."

This freestanding basis for the dismissal of the appeal constitutes a separate reason as to why the decision should not be quashed because of the legal error identified above.

Whether there was an internal inconsistency in the decision letter

123. Next, Mr Harris QC criticised the Inspector for applying Mr Jones's method as described in DL 28 in an inconsistent manner. In DL 29 the Inspector stated that this method could only be applied to sites purchased without planning permission, but in DL 30 he referred to evidence on 12 sites, 5 of which had the benefit of planning permission. Although this was a point made by Mr Fourt, PRL complains that the Inspector did not address it.

124. In view of my rejection of the main points raised by PRL under ground 2, this complaint raises no additional point of any significance. The Inspector's rejection of PRL's affordable housing proposal was based upon its own intrinsic lack of merit. It did not depend upon the application of the method described in DL 28, nor therefore could it have been affected by any defective application of that method.

125. Although it is unnecessary to go further, I also accept the argument in paragraph 57 of LBI's skeleton. As the Inspector recognised, sites with planning permission would have a relatively higher value than sites without permission (all other things being equal). The appeal site did not have planning permission. Accordingly, the removal of sites with planning permission, and therefore relatively more valuable than those without, would have the effect of reducing the average value of the remaining sites. That works against the Claimant's argument that the BLV should have been greater. It would increase the "headroom," thus enabling a greater level of affordable housing to be provided.

Adequacy of reasons

126. Finally under ground 2, PRL criticises the Inspector for failing to address part of LBI's case (and PRL's response) as it had evolved by the close of the inquiry. Mr Harris referred to the three aspects summarised in paragraph 193 of LBI's closing submissions (see paragraph 74(ix) above). The complaint is that the Inspector made

no mention of (a) the adjustment of the 2013 purchase price of the appeal site for its reduced development capacity and (b) the evidence on 351 Caledonian Road as a comparable. It is suggested that he had not appreciated how far LBI's case had altered by the end of the inquiry. Essentially, this was a reasons challenge.

127. It is well-established that an Inspector does not have to rehearse every point or argument raised by a party (see Bloor at paragraph 19). The Inspector is not writing an examination paper. To require him to refer to every material consideration would impose an unjustifiable burden. Consequently, an argument that an Inspector has not understood the materiality of a point to the decision, must necessarily be limited to the main issues and "then only...when all other known facts and circumstances appear to point overwhelmingly to a different decision". In order to establish a reasons challenge a claimant must show that the decision letter gives rise to "a substantial doubt" as to whether the decision-maker made an error of law. Even then, a claimant must show that he has been substantially prejudiced by the legally inadequate reasoning, for example, by a developer being unable to assess the prospects of obtaining an alternative planning permission (South Bucks DC v Porter (No 2) [2004] 1 WLR 1953, 1961-4).

128. In my judgment, there was no legal requirement for the Inspector to refer expressly to the outcome of the exercise in which the purchase price paid in May 2013 was adjusted for a reduction in the development capacity of the site. In DL 42 to DL 45 the Inspector explained why he gave only "limited weight" to PRL's reliance on that purchase price. In DL 17, 24, 42 and 43, the Inspector was plainly aware of the reduction in the capacity of the site and of the lack of evidence about the development assumptions underlying the various bids in the sale. The Inspector rejected PRL's case. There was no legal requirement for him to refer to a piece of evidence which only served to further undermine that case.

129. It is common ground that the Inspector did not refer to evidence on the transaction at 351 Caledonian Road. As I have already explained, that evidence was relied upon by LBI in order to support its assessment of the BLV (see paragraph 74(viii) above). Mr Harris QC sought to criticise LBI's analysis by reference to paragraph 192 of the Council's closing submissions because it involved the total number of unit method of comparison criticised in DL 26. In fact, PRL's Closing Submissions criticised LBI's reliance upon this material because of the use of Mr Jones's method of comparison referred to in DL 28. As we have seen there is no arithmetical difference between the two. Either way, this was simply a criticism of the figure of £6.432m derived by LBI from the evidence on 351 Caledonian Road. Mr Harris QC did not identify any further issue on this comparable, nor did he suggest that the PRL had sought to rely upon it in order to provide positive support for its case.

130. Given that the Inspector rejected PRL's affordable housing case for reasons which did not depend upon resolving any issue about the analysis of the comparable at 351 Caledonian Road, he was not legally obliged to deal with the issue identified by Mr Harris QC. Furthermore, the Inspector rejected PRL's case for reasons which did not depend upon his acceptance of LBI's BLV of £6.75m or the precise basis upon which that figure had been estimated.

131. In any event, PRL cannot show that it has been substantially prejudiced by the absence of any explicit reasoning on the two points which have been raised. The

Claimant knows in legally sufficient detail why its affordable housing case was rejected. It knows that if it is to pursue a further proposal with only 10% affordable housing (or some other proportion less than 50%) it must put forward a "robust justification" for that case, which would include a viability assessment overcoming the defects in its evidence identified by the Inspector in the 2017 decision letter.

132. For all these reasons I reject the various challenges advanced under ground 2.

Ground 3

133. The Claimant seeks to challenge the manner in which the Inspector sought to deal with two comparables, Coppetts Wood Hospital and 52 Tollington Way.

Coppetts Wood Hospital

134. PRL criticises the Inspector's handling in DL 34 of evidence on this site because (a) it relied upon the purchase price despite the criticism of such evidence in DL 45 and (b) indexation was used despite the criticism of that technique in DL 30.

135. Although this submission was dressed up as a complaint about internal inconsistency within the decision letter, it amounted to no more than an attack on the Inspector's judgment on the merits of the evidence before him. In DL 30 and DL 45 the Inspector did not suggest that purchase price evidence or indexation should not be used at all. His observations simply went to matters of weight. In fact, the focus of the caution expressed in DL 45 related to the use of purchase price information which is influenced by unreasonable or overly optimistic assumptions. In the case of this comparable, the site provided 54% affordable housing (DL 34). Furthermore, as Mr Kolinsky QC pointed out, the indexed figure was contained in the evidence of PRL's expert, Mr Fourt, and the transaction was "relatively recent" (DL 34). PRL accepted that the site was in the same locality as the appeal site, the transaction was recent and should be used (paragraph 347 of PRL's closing submissions).

52 Tollington Way

136. PRL submitted that its case at the inquiry was that the residential development on the site only proceeded because of public subsidy, without which it was "commercially unviable". Affordable housing in excess of 50% had only been achieved because neither the landowner nor the developer needed to make a commercial return. It was contended that if adjustments were made to address these points, the site would only have yielded 6% affordable housing.

137. The Inspector dealt with this comparable in DL 36 where he simply said: -

> "The Tollington Way scheme is in Islington but provided in excess of 50% affordable housing *so this does not alter my conclusions on the appeal site*"

PRL complains that the italicised words involved a non-sequitur and inadequate reasoning.

138. Mr Kolinsky QC responded that the Tollington Way site had been omitted from Mr Fourt's analysis because it had only provided 15 units and so was below his threshold

of 20 units. In paragraphs 2.39 to 2.43 of his rebuttal proof Mr Jones explained why he did not consider 52, Tollington Way to be a good comparable. LBI did not rely upon this transaction in order to undermine PRL's case. Tollington Way was referred to in the Claimant's Closing Submissions but not in order to make the points now advanced by way of legal submission.

139. Given the way in which Tollington Way was dealt with in PRL's Closing Submissions, I see no reason why the Inspector was legally obliged to give reasons dealing with Mr Fourt's analysis on this particular point. As for the Inspector's brief reference in DL 36 to the transaction, it is plain that he did not place any material reliance upon it. By this stage in the decision letter he had already rejected PRL's analysis of 27 comparables in Islington and 5 other key comparables (which did not include this site) for reasons which are unaffected by the last sentence of DL 36.

140. For these reasons I reject ground 3.

Conclusions

Outcome of the claim

141. I accept that grounds 1 and 2 could not be rejected without full argument and so I accept that they did cross the threshold for arguability. However, ground 3 was hopelessly unarguable. Consequently, I grant permission to apply for statutory review limited to grounds 1 and 2. However, for the reasons set out above the application for statutory review is dismissed.

Postscript

142. One of the key objectives in our planning system is efficiency in decision-making, in order to avoid delay in bringing about necessary or beneficial development. In this context the present case strikingly illustrates the importance of seeking to overcome uncertainty on how viability assessment should properly be carried out. Similar schemes on the same site have been approached by two different Inspectors in very different ways. That is not in itself unlawful, but from a practical perspective it does make it more difficult for practitioners and participants in the planning process to predict the likely outcome and to plan accordingly. It also leads to a proliferation of litigation. The second inquiry in the present case lasted nine days and, even then, a further two day hearing in the High Court followed. It appears that similar issues are being argued on sites all over London and, no doubt, in other parts of the country as well. Appeal decisions which are said to support rival positions are seized upon as part of an increasingly adversarial process. Decisions of the High Court are also subjected to intense scrutiny and added to the forensic palette, whilst overlooking the point that the court's role is limited to review on public law principles, and not to determine whether a decision was right or wrong on its merits.

143. The present case illustrates the tension that has arisen in the application of paragraph 023 of the PPG. But the plain intention of that paragraph is to promote harmonisation between the three specified requirements when they are applied in decision-making. Thus, when estimating a BLV for a site, the application of the second and third requirements should "reflect", and not "buck," relevant planning policies (including those for the delivery of affordable housing). On the other hand, the proper

application of those policies should be "informed by," and not "buck," an analysis of market evidence which reflects those policies (or where appropriate is adjusted to do so). As the PPG recognises, "realism" is needed when these matters are taken into account in decision-making. So, to take one example, a judgment may need to be made on relaxing one or more planning requirements or objectives where that would render a development on the site in question non-viable according to a viability case which uses (inter alia) land values which have adequately taken planning policies into account.

144. According to the basic principles set out in the NPPF and the NPPG, it is understandable why a decision-maker may, as a matter of judgment, attach little or no weight to a developer's analysis which claims to show a "market norm" for BLV by doing little more than averaging land values obtained from a large number of transactions within a district. If those values are inflated by, for example, a misjudgment about a site's development capacity and/or by a failure to factor in appropriate planning requirements, such an exercise does not establish a relevant "norm" for the purposes of paragraph 023 of the PPG. Such data should be adjusted (subject to any issues about reliability and cross-checking). A failure to obtain adequate information about comparables relied upon (including the planning context and circumstances influencing bids and the transacted price) would not be acceptable where development appraisal or viability is dealt with in the Lands Chamber or in an arbitration, and it is difficult to see why the position should be different where the same type of issue arises in the present type of case.

145. On the other hand, it is understandable why developers and landowners may argue against local policy statements that BLV should simply conform to an "EUV plus a percentage" basis of valuation, especially where the document has not been subjected to independent statutory examination prior to adoption. Some adherents appear to be promoting a formulaic application of "EUV plus." But as the RICS advised its members in its 2012 Guidance Note, an uplift of between 10 and 40% on existing use value is an arbitrary number and the method does not reflect the workings of the market (see paragraph 57 above). It has not been suggested that this valuation approach takes into account the value of the new land use for which the site is to be sold, whereas it might be said that a reasonable landowner would treat that as a primary consideration in valuing his property. In this context a document issued by a professional institution setting out "accepted good practice" for chartered surveyors ought to command great respect in the planning process unless there is a sound reason to the contrary. If, for example, a site value were to be negotiated so as to respect planning policy requirements properly but that price substantially exceeded an uplift of say 40% (or any other policy-specified percentage) on the existing use value of the site, the question would be posed why should that evidence not be treated as relevant to BLV? Otherwise, might it not be suggested that there is a risk of policy attempting to "buck" the market (see paragraph 143 above)? There is a difference between a policy which may have the effect of influencing market value, as compared with one which disregards levels of market value arrived at quite properly in arm's length transactions and consistent with the correct application of planning policies and sound valuation principles.

146. Mr Buley briefly referred to consultation proposals for the NPPG published in March 2018. They suggest using "standardised inputs" in viability assessments. To arrive at

an appropriate minimum premium to be added to EUV it is suggested that an assessment should look at comparable sites that have recently been granted planning permission *in accordance with relevant policies*. The prices paid for such land, suitably adjusted, can then be compared to EUVs for those sites to ascertain an appropriate premium or uplift additional to EUV for the landowner of the site being considered.

147. It might be thought that an opportune moment has arrived for the RICS to consider revisiting the 2012 Guidance Note, perhaps in conjunction with MHCLG and the RTPI, in order to address any misunderstandings about market valuation concepts and techniques, the "circularity" issue and any other problems encountered in practice over the last 6 years, so as to help avoid protracted disputes of the kind we have seen in the present case and achieve more efficient decision-making. The High Court is not the appropriate forum for resolving issues of the kind which the Inspectors dealing with the Parkhurst Road site had to consider. It is very much to be hoped that the court is not asked in future to look at detailed valuation material as happened in these proceedings.

Addendum: Extracts from the 2017 decision letter.

4. The main issues are whether the development would provide the maximum reasonable level of affordable housing in accordance with the development plan; and whether suitable planning obligations would be secured to mitigate the effects of the development.

Reasons

Affordable housing

5. It is common ground between the parties that there is a significant need for both market and affordable housing across London, including in the Borough of Islington. Policy 3.12 of the London Plan (2016) (LP) requires that the maximum reasonable amount of affordable housing should be sought from individual schemes having regard to a range of criteria, including development viability and the need to encourage rather than restrain residential development.

6. Policy CS 12 (G) of the Islington Core Strategy (2011) (CS) requires that 50% of additional housing to be built in the borough over the plan period should be affordable. There is no dispute between the parties that this is a borough wide strategic target and that this level of provision need not necessarily be delivered on every site to comply with the policy. For example, some schemes may provide more than 50% affordable housing or be exclusively affordable housing schemes. The policy does make clear, however, an expectation that many sites will deliver at least 50% of units as affordable.

7. This is a pertinent consideration given that the Council is not currently meeting its affordable housing requirements and its undisputed evidence that the need for affordable housing identified in the 2011 Strategic Housing Market Assessment (SHMA) represents more than half of the Council's overall housing target. The Council also suggests, having regard to its progress in updating the SHMA that this situation is likely to have worsened since that time. Clearly, if the pressing need for affordable housing in the area is to be met, delivery through individual schemes will need to be maximised.

8. During the course of the appeal, the appellant offered to provide 10% affordable housing (by unit), notwithstanding that this level of provision is said to make the scheme unviable in commercial terms. The Council argues that 34% provision (by unit) is the maximum reasonable level of provision on this particular site. Both parties have provided viability assessments to support their positions and both parties have changed their respective positions during the course of the appeal, the appellant shifting from an initial position of 0% provision and the Council from an initial expectation of 50% provision.

9. Paragraph 173 of the National Planning Policy Framework (the Framework) makes viability an important consideration, noting that development should not be subject to such a scale of obligations and policy burdens that their ability to be developed viably is threatened. To ensure viability, the costs of any requirements likely to be applied to development, such as requirements for affordable housing, standards, infrastructure contributions or other requirements should, when taking account of the normal cost of development and mitigation, provide competitive returns to a willing land owner and willing developer to enable the development to be deliverable.

10. Planning Practice Guidance (PPG) advises that where the viability of a development is in question, local planning authorities should look to be flexible in applying policy requirements wherever possible.

Land Value

11. One of the key considerations in viability assessment is the Benchmark Land Value (BLV). PPG sets out three principles that should be reflected in determining a site value. In all cases, land or site value should:

(i) Reflect policy requirements and planning obligations and, where applicable, any Community Infrastructure Levy charge;

(ii) Provide a competitive return to willing developers and land owners (including equity resulting from those wanting to build their own homes); and

(iii) Be informed by comparable, market-based evidence wherever possible. Where transacted bids are significantly above the market norm, they should not be used as part of this exercise.

12. PPG gives further advice on the concept of a competitive return to developers and land owners. In this case, the appellant seeks a profit on the private units of 18% (though a lower level has been accepted in its 10% affordable housing offer scenario) and this is not said to be unreasonable by the Council. As such, I take this to be a competitive return for the developer. With regards to the competitive return for the land owner, this is said to be the price at which a reasonable land owner would be willing to sell their land for the development proposed. The price would need to provide an incentive for the land owner to sell in comparison with the other options available. Those options may include the existing use value of the land, or its value for a realistic alternative use that complies with planning policy.

13. The Council advocates a residual valuation approach, which compares the net development value with an Existing Use Value (EUV). This allows a comparison of the potential development value against the existing situation to establish whether the development would generate a competitive return to a willing developer and land owner. This is the same approach suggested by the Council in the previous appeal, where it was agreed between the parties that the EUV was not a reasonable basis by itself for establishing the BLV. This is because the EUV was low, reflecting the restricted nature of the site as an army centre and the strong potential for residential development established by the residential site allocation.

14. Since that time, the army centre use has ceased and the EUV is now described by the parties as negligible. Arguably, this makes the comparison even less relevant and the appellant suggests that a market valuation approach is the only reasonable means by which to establish the land value. I could see some logic in the appellant's position if the Council's methodology did not go beyond this comparison. However, what the Council is promoting is an 'EUV Plus' methodology, the Plus element representing a premium above the EUV to be paid to the land owner to incentivise release of the land for development in comparison with the other options available.

15. This approach is now firmly endorsed by the Mayor of London's Housing Supplementary Planning Guidance (March 2016) (Mayor's Housing SPG) and the Council's

Development Viability Supplementary Planning Document (January 2016) (Development Viability SPD), both of which have been adopted since the previous appeal. These documents identify a concern that using a market value approach risks importing individual features and circumstances from other sites that may have a greater number of constraints, abnormal costs, higher EUV or valuable Alternative Use Value (AUV), amongst other variables. These issues are also noted in research for the RICS, in recently published research undertaken for a consortium of London authorities and by the Greater London Authority (GLA) in its Development Appraisal Toolkit Guidance Notes (2015) and the Draft Affordable Housing and Viability Supplementary Planning Guidance (2016).

16. It is accepted by both parties that there are no significant abnormal costs in this case and that the EUV is negligible. Clearly, the site allocation makes a residential use a highly likely alternative on the site, but any such scheme must comply with planning policy requirements, including the need to provide the maximum reasonable level of affordable housing.

17. The current proposal follows a range of previous schemes on the site, each having been reduced in scale and amount to address the concerns of the Council and the previous Inspector. It may be possible that further alternative schemes could come forward (including different residential schemes), noting that different developers will have different ideas and aspirations for a site. However, no alternative has been put forward in this case and there is no evidence before me to suggest that any more intensive residential scheme could be accommodated whilst complying with planning policy. Therefore, I consider the current appeal development to represent a good indication of the site's likely potential and there is no AUV that would justify inflation above a site valuation based on the current scheme at the present time.

18. These are matters that the PPG requires land owners to consider and it is clear that the PPG anticipates a willing land owner that is acting reasonably. Whilst there is no policy requirement for a 50% affordable housing provision on individual sites, this should always be the starting point, where the resulting land value is a price that incentivises release of the land for development. This is set out at paragraph 6.72 of the Development Viability SPD. In this case, the site has a negligible EUV, no AUV (other than the appeal proposal) and there are no abnormal costs or other factors identified that need to be built into any viability appraisal. As such, in order for the land value of other sites to be comparable they should reflect these circumstances, and it must also be possible to conclude that policy requirements have been met in such other cases, including the maximum reasonable level of affordable housing.

19. The Council's residual appraisal originally identified a land value of around £7.15M based on the provision of 50% affordable housing. However, following recognised changes to development costs during the course of the appeal, the residual land value fell to around £2.4M using this approach. The Council does not maintain, however, that this is the appropriate BLV and recognises that this would not be likely to incentivise the release of the land given the optionality available to the land owner, in this case, such options may include holding on to the land until a later date. No details of any other likely options have been put forward. Having engaged with market evidence, something that it failed to do in the previous appeal, the Council consider that a value of £6.75M is the appropriate BLV, including a significant uplift above the EUV, and representing the Plus element of the EUV Plus approach.

20. Both parties have sought to engage with market evidence to inform their respective cases. However, it is clear from the evidence submitted and from what I heard at the inquiry that finding truly comparable sites is extremely difficult, despite the large number of transactions in this busy urban area. The need to be comparable market-based evidence is, however, of critical importance. I heard from the appellant that the PPG assumes appropriate operation of the market and that the PPG's guidance to disregard transacted bids that are significantly above the market norm provided the intervention necessary to avoid an over inflation of land values at the expense of policy objectives.

21. However, there was a striking lack of truly comparable sites available in evidence and the number of adjustments suggested by the parties to allow such a comparison was vast. The RICS Information Paper, Comparable evidence in property valuation (IP26/2012) notes such difficulties. Adjustments between different sites require professional judgements, the potential difference between which was highlighted by the parties' opposing positions.

22. The PPG requires that site or land value be informed by market-based evidence wherever possible and this wording clearly anticipates circumstances where such a comparison will not be possible. Comparing transacted bids on sites that are not similar in terms of the existing EUV, available AUV or that are similarly unencumbered by constraints is, in my view, of little value. Furthermore, without knowing all of this information, or the assumptions and aspirations of the individual land owners and developers, it is impossible to know whether circumstances are comparable so that the price paid in one case should influence that paid for another site with entirely different circumstances.

23. Para.4.4 of the RICS Valuation Information Paper 12, states "Generally, high density or complex developments, urban sites and existing buildings with development potential, do not easily lend themselves to valuation by comparison. The differences from site to site (for example in terms of development potential or construction cost) may be sufficient to make the analysis of transactions problematical. The higher the number of variables and adjustments for assumptions the less useful the comparison".

24. A reliance on the fact that transactions significantly above the market norm should be discounted requires true comparisons to be made and the price paid for another site will have been determined by a number of factors. In this case, the appellant has not provided as evidence the assumptions made in its viability appraisal supporting its winning bid for the site and this information is also unavailable for the other bidders, or any other 'comparable' site identified. Therefore, I treat the market evidence provided with some caution. That is not to diminish the importance of market evidence as a key consideration in determining land value, but it must be truly comparable and meet the other aspects of PPG guidance at paragraph 023 on viability.

25. The RICS Professional Guidance, Financial Viability in Planning (GN94/2012) (RICS Guidance) is clear of the importance that viability assessments are supported by adequate comparable evidence. A range of methods have been put forward to allow some form of comparison between sites in this case.

26. A value per unit comparison, allowing a broad comparison of the unit values between various sites is one method. However, the sites put forward include various levels of affordable housing provision. The Council suggests that a simple division of the land value by the total number of units (market and affordable) allows comparison, but this attributes value to the affordable housing units (where provided) and it is agreed between the parties

that the commercial value of these is limited. It can, therefore, have the effect of artificially reducing land or site values when comparing sites that provided affordable housing against those that did not.

27. The appellant seeks to discount the affordable housing units and divide the land value by the number of market units but this has the result of inflating the unit prices on schemes that have provided larger proportions of affordable housing, incorrectly giving an impression of higher land value. As the full circumstances that led to the various levels of affordable housing on other sites is unknown, neither of these methodologies is of particular value.

28. A more reliable comparison is the Council's methodology, which assumes a 50% affordable housing contribution for all transactions analysed (as the starting point in policy) and to divide the land purchase price by the remaining 50% market dwellings. Whilst actual affordable housing provision on various sites differs, this can be assumed to account for downward revisions from 50% affordable housing provision in light of site specific circumstances evidenced in those individual planning applications. Therefore, this method allows a comparison across sites without being affected by differing levels of affordable housing provision and avoids importing assumptions and circumstances from other sites that do not apply to the appeal site.

29. During cross examination, Mr Jones made reference to a weighting exercise but this had not been explained in written submissions. In any case, I consider that the figures resulting from the above methodology provide a useful output for comparison without the application of any subsequent weighting that might distort the results. Mr Jones' method of comparison can only be applied to sites that were purchased without planning permission, as is the case for the appeal site, noting that the certainty provided by a planning permission would influence land value.

30. Table 4 of Mr Jones' Proof of Evidence compares the appeal site to 12 others in the area, and clearly demonstrates that the land value attributed by the appellant is far in excess of the average across those sites and the highest value achieved elsewhere. In contrast, the Council's land value figure, whilst higher than the average, is more comparable. There are of course limitations in this method of comparison, not least due to the selection of schemes chosen for comparison and the date of the transactions, particularly as the Council has sought to avoid distortion by using the actual sales values without indexation. However, keeping this in mind, the method does provide a broadly consistent basis on which to compare various sites without large numbers of adjustments that would be likely to result in uncertainty around the results.

31. The appellant uses a variety of methods to compare transaction evidence in addition to those discussed above, including price per acre, price per square foot, price per habitable room and land value as a percentage of Gross Development Value. Some 27 transactions are analysed, which are said to be all transactions in Islington involving developments of more than 20 units that have occurred since 2010.

32. Having compared the sites using the various methods explained, the appellant draws a conclusion that the site value of £13.26M is not at odds with the market, or at least the sites analysed. However, all the means of comparison tested compare a transacted land value without the adjustment necessary to make the sites comparable to one another. This analysis is highly affected by the varying levels of affordable housing in each case, 16% on average across the larger sample of sites considered, and the other variables I have discussed above.

It is also highly pertinent that a large number of the sites selected provided no affordable housing at all, many of which were exempt from such a requirement as they involved changes of use from office to residential under permitted development rights. Many of the variables remain unknown and unaccounted for and so the exercise cannot provide a true picture for comparison to the appeal site.

33. The reliability of the data is further reduced given the number of adjustments made to allow effective comparison, involving adjustment by a range of indices. Whilst this approach can be effective in updating dated values to current day values, applying such adjustments adds a further layer of uncertainty.

34. A total of six transactions from the local area considered, by the appellant, to be particularly comparable are analysed in more detail, though one site (Altitude) was withdrawn during the Inquiry. The analysis of the five remaining sites suffers from the same issues as I set out above. However, the Coppetts Wood Hospital site does provide a level of affordable housing similar to the starting point in policy of 50%, in fact 54%. The site was purchased relatively recently (within the last two years) without planning permission and for a similar number of units (80) in a purely residential scheme. The site was purchased for £7.5M but applying the appellant's chosen indexation, this now equates to around £6.73M, extremely close to the Council's BLV for the appeal site of £6.75M.

35. The appellant specifically identifies this site as being a key comparable and of the five key comparable transactions relied upon, this is the only one which provides a level of affordable housing close to the strategic 50% target. To my mind, this provides support for the Council's position that land value is affected by the amount of affordable housing provision and that, having regard to planning policy and guidance, the land value in that case is reflective. The other key sites tend to have higher values against the methods of comparison put forward by the appellant, but provide much less affordable housing provision. This suggests that the BLV put forward by the Council is not significantly out of kilter with the market, when compared to a comparable site that has similar circumstances, albeit that the Council has increased the BLV from the residual valuation to take account of market evidence.

36. The appellant refers to the Lawn Road, Camden example where the Council's witness, Mr Jones, advised the Council that the EUV was not an appropriate BLV given the low existing use value of the site and its potential for residential development, accepting a market value approach. I have already established that there is more than one way to carry out a viability assessment and that reference to EUV is not always appropriate. However, this particular decision pre-dated the Mayor's Housing SPG and was taken by a different Council where the, now adopted, Development Viability SPD would not have applied in any case. The Tollington Way scheme is in Islington but provided in excess of 50% affordable housing and so this does not alter my conclusions on the appeal site.

37. In my view, the Council's approach is the only method before me that seeks to remove the significant distortion arising from the varied levels of affordable housing provision. Whilst not a perfect means by which to compare market data, this method is to be preferred to the others put forward, recognising the importance of some means of market testing.

38. There is no standard answer to questions of viability, nor is there a single approach for assessing viability. In addition to the guidance contained within the Framework and PPG, there is a range of sector led guidance on viability methodologies, notably the RICS

Guidance. This document clearly establishes that site or land value should equate to the market value subject to the assumption that the value has regard to development plan policies and all other material planning considerations and disregards that which is contrary to the development plan. This is consistent with PPG.

39. It seems to me that a purely market based approach to site valuation where there are no demonstrably comparable schemes available for benchmarking seeks to prioritise the third limb of paragraph 023 of the PPG dealing with viability. Such an approach simply allows for a comparison against other transacted bids which may or may not have had comparable attributes such as EUV, AUV or abnormal costs for example. Such an approach diminishes the importance of the first limb of the PPG guidance, which requires land value to be informed by policy. This position aligns with Paragraph 4.1.5 of the Mayor's Housing SPG which states that a market value approach should only be accepted where it can be demonstrated to properly reflect policy requirements and take account of site specific circumstances.

40. The site was purchased by the appellant for £13.25M in May 2013 and the previous appeal established that an updated figure of £13.26M was an appropriate land value at that time. However, as I have noted already, this was in light of the appellant's market evidence in a situation where no opposing evidence had been provided by the Council. The previous Inspector's conclusion also pre-dated the clear guidance now contained in the Mayor's Housing SPG and the Development Viability SPD that the EUV Plus method is usually most appropriate. Whilst neither document precludes other methodologies, in light of my considerations above I consider that the EUV Plus methodology is appropriate in this case and is to be preferred to a purely market value approach, allowing for value to have regard to the market as a consideration, rather than the determining factor.

41. I note that this differs from the approach taken by the Inspector in a relatively local appeal decision in 2014. However, in that case it is clear that there were a number of alternative potential uses for the site, some of which were valuable options that would allow true optionality to the land owner. That is not the situation that I have established in this case on the evidence before me. Furthermore, the Inspector was clearly satisfied in that case that the BLV put forward by the appellant was in line with the market and development plan policy. As such, I do not consider this example to be directly comparable to the current appeal, not least given the recently adopted guidance on this topic contained in the Mayor's Housing SPG and the Council's Development Viability SPD that was not applicable previously.

42. Nevertheless, the purchase price is an important consideration and I attach moderate weight to the fact that the site transacted for this value and that the previous Inspector found this to be in line with the market, based on the evidence before him. It is not, however, determinative for the reasons I set out above and because the transaction now occurred some time ago. The PPG anticipates a notional land owner when considering viability in the present day.

43. The purchase price was the highest bid in a competitive bidding process during the sale of the site by the Ministry of Defence (MoD). A letter from the selling agent identifies that there were a number of bids within 13% of the winning bid and that the under bidder was just 2% below. The actual number of bids within this range is not specified, nor are the bidders detailed along with their assumptions about the amount, scale and type of development envisaged, expected profit or level of affordable housing provision, amongst

other factors. Therefore, whilst I attach limited weight to the fact that a range of bids were placed at this level in 2013, the evidence cannot be relied upon as there remain too many unknowns.

44. The appellant suggests that some weight should be attached to the purchase price because the seller was a public body and bound to achieve best consideration for the site. This is a fact and I do not dispute the position of the appellant or the previous Inspector in concluding that the MoD can be regarded as a rational seller. However, its duties to maximise its return on the site do not, in my mind, support the appellant's position that the purchase price was appropriate; simply that it was the highest bid. There is no duty on the seller to verify that any purchaser has taken account of planning policy and guidance in their aspirations for the site and the amount that they are willing to pay. This is part of the developer's risk.

45. The Council also highlights variance between transacted sales prices and BLV's used for planning purposes. I attach only limited weight to this evidence because the Council has not identified the actual sites used as examples and has not provided evidence capable of proper interrogation by the appellant for confidentiality reasons. However, the one example that is provided relates to a site subject to a recent Section 106BC appeal. This highlights a significant discrepancy between the two figures, with a purchase price of £9.63M compared to a BLV at planning stage of £4.3M. The RICS Guidance cautions against a reliance on purchase price in arriving at a site value for assessment of financial viability, including having regard to the assumptions made by a developer, which might be unreasonable or overly optimistic. For the reasons set out above, I attach only limited weight to the purchase price in this case.

46. I have had regard to the unsolicited offer made by a major house builder of £15.75M in May 2015, but this transaction did not occur and provides only an indication of the value attached by one developer, again, based on an unknown set of assumptions for the development of the site.

47. The appellant provides a Valuation Report (November 2016) undertaken by CBRE on a 'Red Book' basis. This identifies a market value of £15.6M which the report states is primarily derived using comparable recent market transactions on arm's length terms. It assumes affordable housing provision at 16% but does not explain why this figure has been used, other than being similar to the level of provision proposed in a previous planning application. Given the development plan requirement to provide the maximum reasonable amount of affordable housing, the use of 16% provision without any detailed justification is inappropriate given the effect on land value that a higher level of provision would necessarily invoke.

48. Whilst I attach limited weight to the Red Book exercise, which is required to be in accordance with professional standards, it is a market valuation which does not, in my view, adequately demonstrate proper consideration of, or give adequate effect to, the guidance in PPG or the requirements of the development plan. I do not accept the appellant's position that the level of affordable housing provision is not relevant to determining land value, as any notional willing land owner is required to have regard to the requirements of planning policy and obligations in their expectations of land value. It is unknown what the expectations of the MoD were in this case, but it would obviously not refuse bids above that expectation.

49. The appellant's case relies to a large extent on the fact that the development plan does not require 50% affordable housing provision on individual sites. However, reliance on policy compliance at any level of provision underplays the strong policy imperative to ensure the 'maximum reasonable' provision with the strategic target in mind. The clear and unambiguous policy position, clarified by the guidance contained in the Council's Development Viability SPD is that 50% affordable housing provision is the starting point and that any provision below that level, whilst capable of being policy compliant, will require robust justification.

50. The majority of the evidence I have seen is not adequately comparable to fulfil this requirement. That which I have considered to be of value, demonstrates that the Council's BLV is not out of kilter with the market. In addition, this reflects planning policy requirements and would provide both a competitive return to the land owner and developer. Therefore, I consider that £6.75M is the appropriate BLV in this case. I have had regard to the need to encourage rather than restrain development, and the need for flexibility in the application of planning policy, but this should not be at the expense of delivering much needed affordable housing. Nor should an inflated land value be subsidised by a reduction in affordable housing. The approach that I have adopted applies the appropriate policy balance and I see no reason why it should restrain development.

Affordable Housing Conclusion

70. Having determined that the Council's BLV and sales values are appropriate, it is clear that the appeal proposal would not provide the maximum reasonable level of affordable housing in accordance with Policies 3.12 of the LP and CS 12 of the CS. This is even when considering the appellant's proposed provision of 10% by unit which it considered to be unviable.

Other Matters

93. The appellant has identified a range of benefits that would arise from the development, one of which being the delivery of housing. In the context of the Framework's objective to boost significantly the supply of housing, I attach this matter significant weight, notwithstanding the Council's undisputed position that it can demonstrate a deliverable five year housing land supply. I have also had particular regard to the need to encourage rather than restrain development and to apply planning policy flexibly where viability is in question.

94. However, it is also important to ensure that new development is sustainable, delivering the maximum reasonable level of affordable housing in all cases so as to meet the needs of all. I note the appellant's position that no affordable housing will come forward if the development is refused planning permission but this argument could be applied to any residential case and is not justification for allowing development that does not properly meet policy requirements and objectives.

95. There would be some improvements to the character and appearance of the area and some financial benefits to the Council through increased Council Tax receipts and the New Homes Bonus. However, the benefits identified, even cumulatively, do not outweigh my conclusions with regards to the main issues in this case.

Conclusion

96. The proposed residential development would accord with a number of development plan policies and objectives, particularly those that promote the delivery of housing. However, the appeal proposal would not provide the maximum reasonable level of affordable housing and the submitted planning obligation does not provide a suitable means for a viability review. This would be in conflict with Policies 3.12 and 8.12 of the LP, Policy CS 12 of the CS, Policy DM9.2 of the DMP. Having had regard to the development plan as a whole, the appeal proposal is in clear conflict.