APP/N5660/W/20/3248960

WOODLANDS NURSING HOME
1 DUGARD WAY
LONDON SE11 4TH

CLOSING SUBMISSIONS ON BEHALF OF
LONDON BOROUGH OF LAMBETH

INTRODUCTION

1. These closing submissions will address the six remaining[1] reasons for refusal ("**RfR**") in turn before summarising the Council's position on (i) the Scheme's overall compliance with the development plan, (ii) material considerations and (iii) the ultimate disposal of this appeal.

REASONS FOR REFUSAL

Housing unit mix (RfR3)

2. The housing unit mix of the Scheme is deficient in that it would provide:

   2.1. Too many 1-bedroom and too few family-sized (3-bedroom+) affordable units under adopted policy;

   2.2. Too few 1-bedroom low cost rent units under emerging policy;

   2.3. An unbalanced mix of market units - with no family-sized units – under adopted policy; and

   2.4. An unbalanced mix of market and intermediate units – with no family-sized units – under emerging policy.

[1] RfR3 through to RfR8. In the light of amendments made to the s. 106 unilateral undertaking since this inquiry opened, the Council no longer pursues RfR2 or RfR12.

3. These submissions will first deal with the context for consideration of this issue before analysing the position in respect of (i) affordable units and (ii) market units in turn.

Context

4. It is common ground[2] that as regards both market and affordable housing, both the number of units provided and the mix of units are important. It follows that a failure to provide a policy-compliant housing unit mix cannot be excused simply by pointing to the fact that the Council's housing requirement figure is lower than its objectively assessed need ("**OAN**"). At para. 3.14 of his proof of evidence Mr Ireland relies on Policy H1(B)(2) of the Intend to Publish London Plan ("**ItPLP**"), which provides that boroughs should (*inter alia*) "optimise the potential for housing delivery on all suitable and available brownfield sites through their Development Plans and planning decisions". However given that under Policy H1(B) boroughs are required to optimise the potential for housing delivery in this way expressly "to ensure that ten-year housing targets are achieved", in a development management situation such as this both (i) the Council's track record in meeting the London Plan's housing targets and (ii) the current health of the Council's housing land supply ("**HLS**") should be considered. This point was agreed by Mr Ireland agreed in cross-examination. The Council has exceeded the London Plan's housing targets by c. 19% over the last decade[3] and its HLS is currently healthy (it has a five-year HLS with a 10% buffer[4]).

5. It is moreover common ground[5] that Government policy imposes a qualified requirement, requiring local planning authorities ("**LPAs**") to meet OAN only where it is sustainable to do so. The presumption within the National Planning Policy Framework ("**NPPF**") is a presumption in favour of sustainable development, not simply a presumption in favour of development. Rather than requiring LPAs to meet their OAN, para. 73 of the NPPF requires them to identify a five-year HLS against "their housing requirement set out in adopted strategic policies" (emphasis added).

6. That, then, is the context in which the significance of the Scheme's housing unit mix shortcomings falls to be assessed. The final contextual point to be noted is that it is now common ground[6] that

[2] Accepted by Mr Ireland in cross-examination.
[3] Proof of evidence of Mr Ireland at para. 3.12 and Table 3.2.
[4] Proof of evidence of Mr Holt at para. 9.15.
[5] Accepted by Mr Ireland in cross-examination.
[6] Accepted by Mr Ireland in cross-examination.

when analysing the Scheme's performance against the housing unit mix policy requirements, a "family sized" unit is a unit with at least 3 bedrooms.

Affordable housing unit mix

7. Policy 3.8A of the London Plan provides that "Londoners should have a genuine choice of homes that they can afford and which meet their requirements for different sizes and types of dwellings in the highest quality environments". Policy 3.8Ba requires LPAs to ensure that "new developments offer a range of housing choices, in terms of the mix of housing sizes and types, taking account of the housing requirements of different groups and the changing roles of different sectors in meeting there". Policy 3.8Bb requires the provision of affordable family housing to be "addressed as a strategic priority in LDF policies".

8. As Mr Ireland accepted in cross-examination, the Council has addressed the provision of affordable family housing in the Local Plan, through Policy H4. As regards affordable units (i.e. shared ownership and low cost rent) that policy[7] expects the Scheme to provide the following mix:

   1-bedroom units: Not more than 20%
   2-bedroom units: 20-50%
   3-bedroom+ units: 40%

9. At para. 4.15 of his proof of evidence Mr Ireland states that "the policy affords a lower priority to the delivery of 1-bed units". As he accepted in cross-examination, however:

   9.1. The Council's "priority" is to have an appropriate mix of affordable units come forward, i.e. the mix that is specified in Policy H4a(i);

   9.2. Logically, Policy H4 impliedly requires at least 10% of the affordable units to be 1-bedroom units;[8] and

   9.3. Policy H4 does not say that it is more important that the 40% family-sized units be provided than that the (minimum) 10% 1-bedroom units be provided.

[7] Policy H4a(i).
[8] See too Table 4.2 of Mr Ireland's proof of evidence.

10. The Scheme does not provide the affordable unit mix that is expected by Local Plan Policy H4. It provides 58% 1-bedroom units[9] against a policy requirement of not more than 20% and 8% 3-bedroom+ units against a policy requirement of 40%.[10]

11. Turning to emerging policy, the Scheme also conflicts with Policy H4 of the Draft Revised Lambeth Local Plan ("**DRLLP**").

12. As regards low cost rent, DRLLP Policy H4 has "take[n] account of" the strategic and local requirement for affordable family accommodation, in accordance with Policy H10(B)(2) of the ItPLP. DRLLP Policy H4 has reached a conclusion as to what proportion of the low cost rent element should be 3-bedroom+ and has decided that it should be up to 30% (with an implied minimum of 15%[11]). As Mr Ireland agreed in cross-examination: (i) Policy H10(B)(2) of the ItPLP does not require LPAs themselves to require any particular minimum % of low cost rent units to be family-sized; and (ii) the approach taken by the Council in DRLLP Policy H4 is therefore not inconsistent with the ItPLP requirement to "take account of" the strategic and local requirement for affordable family accommodation.

13. DRLLP Policy H4 expects the low cost rent element of the Scheme to be provided in accordance with the following mix:

    1-bedroom units: Not more than 25%
    2-bedroom units: 25-60%
    3-bedroom units: Up to 30%

14. The mix of the low cost rent element of the Scheme does not reflect that expected by DRLLP Policy H4. It proposes no 1-bedroom units against an implied requirement of at least 10%; 63% 2-bedroom units against a maximum expectation of 60% and 38% 3-bedroom units against a maximum expectation of 30%.[12]

[9] These are all shared ownership units, since no 1-bedroom low cost rent units are provided. Local Plan Policy H4 sets out a unit mix requirement for both social/affordable rented (here, low cost rent) and intermediate (here, shared ownership) housing. In contrast, the DRLLP only sets out a specific unit mix requirement for low cost rent.
[10] Para. 8.6 of Ms Barnett's proof of evidence.
[11] Mr Ireland agreed that his Table 4.4 should be corrected to this effect.
[12] Table 4.1 in Mr Ireland's proof of evidence.

15. The Appellant relies on para. 5.21 of the supporting text to Local Plan Policy H4 to justify its failure to provide the affordable unit mix that is expected by that policy. Para. 5.21 acknowledges that rigid application of the Policy H4 unit mix requirements "may not be appropriate in all cases" and explains that the Council will have regard to "individual site circumstances including location, site constraints, viability and the achievement of mixed and balanced communities", although in all cases the expectation is that provision of family-sized units will be maximised.

16. Para. 5.43 of the supporting text to DRLLP Policy H4 is identically worded, save that the expectation is that the provision of family-sized units will be "considered" (as opposed to "maximised").

17. In respect of the affordable unit mix, Mr Ireland confirmed in cross-examination that the only arguments that he put forward in support of the Appellant's reliance on the above passages of supporting text were those set out at paras. 4.77 to 4.79 of his proof of evidence, in relation to "The Existing Stock Profile in the Local Area".

18. Those arguments do not justify the Appellant's failure to provide the affordable unit mix that is expected by Local Plan Policy H4 and DRLLP Policy H4. In particular:

    18.1. The reliance placed by the Appellant on ward-level data is inappropriate, for the reasons identified by Ms Barnett at para. 8.27 of her proof of evidence; and in any event

    18.2. The "over-representation" of 1-bedroom social rented stock within Princes Ward that is identified by Mr Ireland at para. 4.78 of his proof of evidence is not material, amounting to an over-representation of only 1.9% compared to the figure for Lambeth and of only 0.5% compared to the figure for London.

19. The essence of the Appellant's response to the point taken by the Council on the complete absence of any 1-bed low cost rent units is that the absence is justified because the Scheme is addressing the "priority need" for larger affordable units.

20. That argument is fundamentally misconceived. The Council has addressed the priority need for larger affordable units – through its policies. Local Plan Policy H4 expects between 80-90% of

affordable units to be 2-bedroom+. DRLLP Policy H4 expects 75-90% of low cost rent units to be 2-bedroom+. Given that the Council's policies have prioritised the provision of larger affordable units, the need to prioritise such provision cannot possibly justify departing from the expectations of the policies.

21. The Appellant also seemed to suggest in its questioning of Ms Barnett that the position "on the ground" justified a departure from the expectations of the Council's policies. For that suggestion to get off the ground itself, there would need to be evidence before this inquiry that the Council's policies fail adequately to reflect the position "on the ground". There is no such evidence. To the contrary, the Appellant's own evidence clearly shows that the Council's policies accurately reflect the reality of the need:

    21.1. Local Plan Policy H4 accords with the recommendation of the 2012 Housing Needs Assessment (CD 1-16; paras. 4.17 and 4.18 of Mr Ireland's proof of evidence) that larger family accommodation be prioritised. Provision of an affordable mix of 10% 1-bedroom units and 20% 2-bedroom units would be policy-compliant, whilst for 3-bedroom+ units the requirement is 40%. Mr Ireland agreed that Local Plan Policy H4 had been drafted to take this issue into account.

    21.2. At para. 4.31 of his proof of evidence Mr Ireland states that the 2017 Lambeth SHMA shows that the priority need for rented affordable housing is greater for 2- and 3-bedroom units. DRLLP Policy H4 reflects that point, requiring 75-90% of low cost rent units to be 2-bedroom+. As Mr Ireland accepted, the 2017 Lambeth SHMA does not establish that there is no need for 1-bedroom low cost rent units;[13] and DRLLP Policy H4 itself impliedly requires a minimum 10% provision.

    21.3. Looking at the position across London, at para. 4.42 of his proof of evidence Mr Ireland concludes that "[t]he reality of the structural imbalance between need and supply is that the most acute needs should be prioritised, and in many instances this relates to families requiring two or more bedrooms". Again, as already explained, both Local Plan Policy H4 and DRLLP Policy H4 prioritise provision of 2-bedroom+ affordable units.

[13] See Tables 4.7 and 4.8 within his proof of evidence.

21.4. At para. 4.50 of his proof of evidence Mr Ireland sets out the results of the sensitivity analysis that he has run. Even that analysis shows a need for 13% of affordable units to come forward as 1-bedroom units. Mr Ireland referred to the prospect of transfers to larger units "freeing up" 1-bedroom units but that possibility was taken into account in the production of the 2017 Lambeth SHMA.[14]

21.5. Turning to Mr Ireland's Table 4.11,[15] the "% by Dwelling Size" figures for both "Priority Need (Bands A-C1)" and "Highest Priority Bands (A and B)" accord perfectly with the percentages set out in DRLLP Policy H4 for low cost rent units. Again, these housing register figures show some need for 1-bedroom units (15% for "Priority Need" and 16% for "Highest Priority Bands"). At para. 4.55 of his proof of evidence (in relation to the Council's Housing Allocations Scheme) Mr Ireland states that "the greatest need is for 2-bed properties, and weakest for 1-bed". DRLLP Policy H4 reflects that position: the implied minimum expectations for low cost rent units are 10% for 1-bedroom units and 15% for 3-bedroom+ units but 45% for 2-bedroom units. Mr Ireland emphasised in cross-examination that his evidence was not trying to suggest that there was no need for 1-bedroom low cost rent units – and yet the Scheme does not provide any.

22. The reference at para. 4.4 of Mr Ireland's proof of evidence to the Council having requested through pre-application discussions that the low cost rent element of the Scheme be "focused on larger units" does not assist the Appellant. There is no evidence before this inquiry that the Council ever said that a complete absence of 1-bedroom low cost rent units would be acceptable.

23. The Appellant in cross-examination of Ms Barnett suggested that the Council's acceptance (on viability grounds) of a higher percentage of shared ownership units (as against low cost rent units) from the perspective of affordable housing tenure mix "had implications" for the low cost rent unit mix. Both the ItPLP and the DRLLP, however, single out low cost rent from other types of affordable housing and the DRLLP sets a specific unit mix requirement for low cost rent. It is thus incorrect to suggest that a prevalence of shared ownership units within a scheme can justify a failure to provide the unit mix expected for low cost rent units. The Council notes that the Appellant does not rely on viability arguments to justify its position on affordable (as opposed to

[14] CD 1-29 at para. 3.38.
[15] Within his proof of evidence.

market) housing mix. In any event the Appellant's viability arguments do not withstand scrutiny (below).

24. The absence of any 1-bedroom low cost rent units also fails to accord with Policy 3.8 of the London Plan, which as Mr Ireland accepted does not say that affordable family-sized units should be provided to the complete exclusion of smaller affordable units. The requirement (Policy 3.8Bb) is simply that LPAs "address" provision of affordable family housing as a strategic priority: the Council has complied with that requirement (above). In failing to provide any 1-bedroom low cost rent units, the Scheme conflicts with Policy 3.8Ba of the London Plan because it does not offer a proper range of housing choices.

25. Mr Ireland accepted in cross-examination that the absence of any 1-bed low cost rent units conflicts with ItPLP Policy H10A.

26. The harm that results from the Scheme's failure to meet affordable unit mix policy requirements is not accurately described as "very minor". There cannot be a purely "technical" or "theoretical" breach of policy in circumstances where, as explained above, the Council's policies accurately reflect the reality of the need "on the ground". Moreover the suggestion that the resulting harm is "very minor" is not consistent with Mr Ireland's acceptance in cross-examination that affordable unit mix is, like the quantum of affordable units provided, important.

27. At para. 4.83 of his proof of evidence Mr Ireland observes that a policy-compliant mix would deliver between 2 and 4 1-bedroom low cost rent units. It does not follow that the failure to provide those units can or should be discounted from the overall planning balance. It is precisely because the Council's policy requires a comparatively low percentage of low cost rent units to be 1-bedroom units that the expectation of the policy should be respected. That is both (i) because the position is susceptible to a developer arguing that the absence of the requisite percentage "doesn't make much difference" (because the quantum of "missing" 1-bedroom units is low); and (ii) because the policy requirement (in percentage terms) in relation to 1-bedroom units is low and is therefore not an onerous one.

Market housing unit mix

28. No family-sized market units are proposed under the Scheme. Indeed, none of the proposed market units are larger than 2-bedroom, 3-person (i.e. not only are there no 3-bedroom+ market units, there are no 2-bedroom, 4-person market units either).

29. It is common ground that the absence of any family-sized market units:

    29.1. Conflicts with Local Plan Policy H4, particularly because (as Mr Ireland acknowledged in cross-examination) providing no family-sized market units does not accord with the expectation (in para. 5.21 of the supporting text) that in all cases the provision of family-sized units will be "maximised";

    29.2. Conflicts with Policy H4 of the DRLLP;[16] and

    29.3. Conflicts with London Plan Policy 3.8.[17]

30. In the Council's submission the Scheme also conflicts with Policy H10(A) of the ItPLP because in omitting to provide any family-sized market units, it fails to provide "the appropriate mix of unit sizes".

31. Mr Ireland recognises[18] that a measure of harm results from the absence of any family-sized market units. The dispute between the Appellant and the Council thus concerns the extent of the identified harm: Mr Ireland says that it is limited; Mr Holt's view is that together with the harm resulting from the affordable unit mix, it should be given substantial weight in the overall planning balance.

32. Mr Ireland raises the following points by way of justification for his position that only limited harm results from the conflict with policy:

    32.1. Viability;

[16] Agreed by Mr Ireland in cross-examination.
[17] Also agreed by Mr Ireland in cross-examination.
[18] Para. 5.101 of his proof of evidence.

32.2. The accessibility of the Site's location;

32.3. The high-density, flatted nature of the Scheme;

32.4. Lower demand for family-sized flats as compared to houses; and

32.5. Demand for family-sized housing being focused "more towards other areas".

33. The third of these points can be dealt with very shortly: even Mr Ireland acknowledges that the high-density, flatted nature of the Scheme "does not preclude the provision of some family-sized units".[19] This consideration cannot therefore justify the provision of no family-sized market units.

34. Viability. Contrary to para. 5.5(1) of Mr Ireland's proof of evidence, there is nothing illogical in the Council's maintaining RfR3 notwithstanding its acceptance of the proposed affordable housing tenure mix on viability grounds. The Appellant's viability argument in relation to market unit mix simply does not hold water.

35. At para. 5.38 Mr Ireland reasons that "[b]y implication any changes to the scheme which reduced sales values *per* sq. ft. would have a negative impact on viability". The Appellant has not, however, shown that including some family-sized market units within the Scheme necessarily would reduce sales values *per* sq. ft. Its argument requires "oversized" (penthouse) units to be discounted from the analysis. Mr Ireland was though unable to identify a single reason why the Scheme could not include some oversized units. The majority of the comparator schemes considered by i^2 on behalf of the Appellant do include such units.[20] Mr Holt's observations at paras. 3.2 to 3.5 of his rebuttal are correct: the exclusion of oversized units from the analysis results in a distorted picture of what could be achieved on the Site.

36. Mr Ireland responded by arguing that the inclusion of some oversized units within the Scheme "wouldn't achieve the policy objectives" because those units would not be occupied by families. That is not the point, even if the factual premise of the argument is correct. The point is that the Appellant has not attempted any analysis of what including some oversized units within the Scheme would mean for viability.[21] Mr Ireland accepted that the viability analysis would be

[19] Para. 5.5(3) of his proof of evidence.
[20] See Appendix A5 to Mr Ireland's proof of evidence at paras. 4.8, 4.13, 4.18, 4.24, 4.27, 4.31, 4.37 and 4.42.
[21] Accepted by Mr Ireland in cross-examination.

different if that possibility were explored. It might be that the inclusion of some oversized units would alter the viability analysis so as also to render viable the provision of some (standard) family-sized market units. The point is that the evidence is simply not before this inquiry to establish that there is no way in which family-sized market units could viably be included within the Scheme.

37. The Appellant has also failed to demonstrate that a change in the market unit mix would necessarily reduce the rate of sales. Mr Ireland's evidence focuses on the "average unit sales / month" figures. In the Council's submission those are generally lower for family-sized units simply because a scheme will typically provide fewer family-sized units than 1-bedroom and/or 2-bedroom units.[22] The "months to sell" figures do not support the contention that sales of family-sized units have been/are slower than those of smaller units.[23]

38. The accessibility of the Site's location. Neither London Plan Policy 3.4 nor ItPLP Policy H10(A) supports the complete absence of any family-sized market units within the Scheme, even when regard is had to what those policies say about accessible locations. London Plan Policy 3.4 simply provides that development should "optimise" housing output for different types of location, taking into account local context and character, the design principles in Chapter 7 of the London Plan and public transport capacity.

39. ItPLP Policy H10(A)(6) states that "a higher proportion of one and two bed units" will be "generally more appropriate in locations which are closer to a town centre or station or with higher public transport access and connectivity". That does not constitute policy support for larger units being omitted from a scheme entirely. If the policy intent were that 1-bedroom and 2-bedroom units should be provided (in the more accessible locations identified) to the complete exclusion of larger units, the policy would be worded accordingly. It is not.

40. Demand for family-sized market units in this location. The final two points raised by Mr Ireland in support of his position (i.e. (i) lower demand for family-sized flats as compared to houses; and (ii) demand for family-sized housing being focused "more towards other areas") can be dealt with together. The short answer is that neither consideration justifies the Appellant's approach, which is to provide no family-sized market units at all. Obviously some families do choose to live in flats

[22] This can be seen from the examples that are referred to in Appendix A5 to Mr Ireland's proof of evidence at para. 4.2 ff.
[23] See Appendix A5 to Mr Ireland's proof of evidence at e.g. paras. 4.10, 4.17, 4.27, 4.31 and 4.42.

rather than in houses, as Mr Ireland accepted. As regards demand for family-sized housing being focused elsewhere, it does not follow from the fact that statistics indicate a lower proportion of families in a particular area that there is lower demand for family homes in that area. The statistics might simply reflect an existing lack of such homes in the area. Thus as to para. 5.58 of Mr Ireland's proof of evidence, if there is a lower percentage of family homes within an area one would expect to find a correspondingly lower percentage of children; and as to Mr Ireland's para. 5.67, if developers consistently provide 1-bedroom or 2-bedroom units rather than family-sized units within an area, one would expect the population of children to decrease as adults whose families are growing are compelled to move out of the area.

41. Mr Ireland's contention that only limited harm results from the complete absence of any family-sized market units within the Scheme is not made good. Moreover it flies in the face of the concern expressed by the Secretary of State in response to the ItPLP (see CD 1-20) that owing to inadequate provision for family housing, people will be driven out of London "when they want to have a family".

Inappropriate design and unacceptable impact on townscape (RfR4)

42. It is important at the outset of consideration of this RfR to acknowledge what the development plan requires as regards the design of the Scheme. Policy 7.7Ce of the London Plan requires tall buildings to incorporate the highest standards of architecture. Similarly Policy Q26a(iii) of the Local Plan requires "design excellence" to be achieved by tall buildings "in terms of form, silhouette, materials detailing etc."; Policy Q26a(v) seeks "the highest standards of architecture and materials".

43. The design of Block B falls short against these very exacting standards. Mr Black has explained how the block fails to achieve a high quality of architectural design in terms of its form, materials and finished appearance.

44. The height and massing of the block would be dominant and jarring against the low-rise, residential context[24] in which it would be situated. As regards the character of the immediate surroundings of the Site, the Appellant has failed adequately to acknowledge that the area

[24] Castlebrook Close, Dugard Way, Dante Road, Gilbert Road, George Mathers Road, Hayles Street, Longfield Road, Renfrew Road: see para. 4 of Mr Black's summary of his proof of evidence.

covered by the Elephant and Castle SPD and Opportunity Area Planning Framework ("**the OAPF**", CD 1-49) consists of several distinct character areas. In contrast to the UNCLE building, which lies within the Central character area, the part of the Opportunity Area that is adjacent to the Site lies within the Pullens character area. It is not within the "core area" that Southwark's Core Strategy identifies (in its "vision" for the Elephant and Castle) as potentially suitable for tall buildings on some sites.[25] It does form part of one of the areas that the OAPF identifies as being unable to accommodate significantly taller development.[26]

45. Mr Graham appeared to have misunderstood Policy SPD 43 of the OAPF, which relates to the Pullens character area within which the part of the Opportunity Area that is adjacent to the Site lies. That policy requires development within the Pullens character area to relate to "existing building heights which are generally 4 storeys". Mr Graham was wrong to suggest[27] that the requirement would be met provided that the Scheme "related to" the UNCLE building.

46. Whilst Mr Graham in re-examination was of the view that the position had "moved on" within the Opportunity Area since the publication of the OAPF in March 2012, Southwark's approach to the part of the OA that lies adjacent to the Site has not departed from that set out in the OAPF. By way of example, it remains the case that there are no tall buildings in that part of the OA.

47. The comments received on the application from the London Borough of Southwark itself are highly relevant in this regard. Southwark noted expressly that "Block B is of a far taller order than would be expected for this site outside the Elephant and Castle Opportunity Area, away from gateway locations into Elephant and Castle and in an area of primarily two-to-five storey properties".[28]

48. As to the Dante Road development opportunity that is identified by Mr Graham at p. 19 of his proof of evidence, that site also lies (i) within the Pullens character area; (ii) outside the "core area"; and (iii) within the area identified as being unable to accommodate significantly taller development. Its indicative use is "predominantly residential with supporting community uses" (fig. 5 in the OAPF). The site is not allocated in the emerging Southwark Local Plan (CD 1-57; hearings expected in early 2021). Nothing suggests that any redevelopment of the Dante Road

[25] Pp. 25 and 27 of the OAPF.
[26] Para. 4.5.16: "the existing character of parts of the west, south and east of the wider opportunity area comprises low scale residential development, conservation areas or open spaces. These areas cannot accommodate significantly taller development.
[27] Cross-examination by Mr Kohli.
[28] CD 5-2 at para. 7.1.13.

site is likely to result in a change in character. The site is currently occupied by low-rise residential blocks; if it is redeveloped at all it is likely to be remain in residential use and there is no policy support for a tall building on the site.

49. Similarly, Mr Graham refers to two sites in Lambeth (p. 17 of his proof of evidence), the northern one (hatched) being Wooden Spoon House and the southern one being the Jewson site. Again, nothing suggests that those sites are likely to be redeveloped in a manner that would result in a change of character. The sites are not allocated for a tall building in the DRLLP (the latest version of which Mr Graham had not consulted on this point).

50. Mr Black is correct to identify that Block B would be incongruous in its context. It would be quite distinct from the Elephant and Castle "cluster" (see p. 50 of Mr Graham's proof of evidence); Mr Graham was unable to identify any existing tall building whose relationship to the cluster was that of an isolated point block separated from the cluster by some distance.[29]

51. Block B is also distracting in key medium distance views (St Mary's Gardens, Walcot Square and West Square).[30]

52. The negative effects identified above are not mitigated by the detailed design of the block. The form created by the two elements is bulky in oblique views. The elevation treatment serves only to accentuate its height and to emphasise its incongruity; the disposition of the material palette and façade treatment visually extrudes the height of the building, to the detriment of its context. The "celluloid" inspiration has not been realised in a meaningful way. Mr Graham's evidence was that it was "not essential" that anyone outside his practice would understand what the inspiration had been and that such conceptual inspirations were "concepts for us". Having been approached on that basis the celluloid concept adds little if any value to the design of the Scheme.

53. The layout of the Scheme is also unsuccessful in that it includes an illegible public route through the Site that is unnecessary and potentially unsafe owing to the absence of effective natural surveillance in places and to its alignment together with the V-shaped columns of the Block B undercroft.

[29] Cross-examination.
[30] Para. 4 of Mr Black's summary of his proof of evidence.

54. As to the discussion around density (see para. 3.8.4 ff. of Mr Graham's proof of evidence), even if the Appellant were correct to argue that the Site should be categorised as "central" – which it is not – the density of the Site at c. 500 u/ha significantly exceeds the maximum density that is set out in the London Plan's housing density matrix for central sites (405 u/ha).[31] That calculation is based on the developable area of the Site but that is plainly the appropriate basis for the calculation. The excessive density of the Scheme reflects the fact that the Scheme in reality fails to "optimise" the Site in the manner that is required by London Plan Policy 3.4 - i.e. by (properly) taking into account not only public transport capacity but also local context and character and the Chapter 7 design principles. The Council also notes that para. 3.28 of the supporting text to Policy 3.4 states that "[i]t is important that higher density housing is not automatically seen as requiring high rise development".

55. The Appellant in its opening speech states[32] that it "simply does not accept the criticisms of the LPA regarding design" and considers it "noteworthy that the only evidence that will be called relates to a Conservation Officer of the LPA". The latter assertion is simply wrong: Mr Black has explained his architectural background, his professional experience pertaining to design issues and the urban design aspect of his current role at the Council.

56. Furthermore the design of the Scheme is criticised not only by the Council but also by the GLA, which concludes in its Stage 1 Report (CD 3-17):

    56.1. In respect of site layout, that:

        56.1.1. "[T]he applicant should improve the legibility and openness of [the] pedestrian route through the site. As currently presented the colonnade at the base of the tower restricts the ability to create sightlines through the site, impacting on legibility and perception of being a publicly accessible route" (para. 57);

        56.1.2. "The footprint of the tower raises concern and the inclusion of the colonnade is at odds with the surrounding urban grain/character and creates an overbearing sense of enclosure. Options should be explored for reducing the tower footprint

[31] See Table 3.2 on p. 101 of the London Plan.
[32] Paras. 16.17.9 and 16.7.10.

and removing or reducing the extent of colonnade coverage to achieve a more successful balance of public realm and building frontage" (para. 58); and

56.1.3. "The V-shaped columns at the base of the tower appear visually obtrusive in ground level views and they should be pared back to create a more elegant solution to how the tower meets the ground while allowing an improved sense of openness/views through the site. The height of the colonnade should also be increased as far as possible" (para. 59).

56.2. In respect of height and massing, that:

56.2.1. "the proposed tower, due to its proportion and form appears bulky in the views, resulting in negative visual impacts on the local townscape" (para. 62); and

56.2.2. "the massing of the proposed tower raises concerns because of its proportion and form. The bulk of the tower should be slimmed down to free up space at ground level to improve the public realm and residential amenity, improve residential quality, reduce the visual impact on the townscape and create an elegant building form on the skyline particularly when viewed in conjunction with the existing UNCLE tower" (para. 63).

57. The amendments recommended by the GLA to the design of the Scheme have not been made.

58. The assertion that the GLA is "completely content" with a tall building in this location is too simplistic.[33] The GLA's position in its Stage 1 Report is that the proposed height of Block B "raises no strategic issues subject to micro-climate/daylight/sunlight analysis" (emphasis added). The daylight and sunlight impacts of the Scheme are in fact unacceptable (below).

59. As Mr Considine agreed,[34] a statement that "a tall building" is acceptable in principle (under policy) is simply a statement as regards the acceptability of a building of c. 10 storeys or more; it is not a statement as to the acceptability of a 29-storey building.

[33] Opening speech of the Appellant at para. 16.7.7.
[34] Cross-examination.

60. The Appellant referred numerous times to the fact that the development potential of the Site was not governed by any supplementary planning document ("**SPD**") or similar. One would not expect a local planning authority to produce an SPD for a site that, in its view, has an indicative yield of 90 dwellings (see the Council's topic paper, CD 5-16). If the suggestion is that the Council has not been sufficiently pro-active in relation to the Site, that suggestion is groundless. In June 2016 the Council provided pre-application advice to the previous owners of the Site (CD 6-11). The Appellant then purchased the Site and pre-application discussions on this Scheme began in February 2018.

61. Whilst no policy document (such as an SPD) sets out what should happen on the Site, there is no shortage of policies that set out either (i) what should happen if a particular type of development is proposed for the Site (e.g. London Plan Policy 7.7 and Local Plan Policy Q26 in relation to tall buildings); or (ii) what should not happen on the Site irrespective of the type of development proposed (e.g. development that has an unacceptable effect on designated heritage assets).

62. It is not practicable in these submissions to summarise every instance of the Scheme design's non-compliance with policy; the analysis is presented in Mr Black's proof of evidence. Even if regard is had solely to the extant tall building policies that set the current threshold for the design quality of Block B (which is the element of the Scheme that is the subject of the Council's concerns under this RfR), there is extensive non-compliance:

    62.1. Policy 7.7 of the London Plan: the Scheme conflicts with Policy 7.7B because it has not been demonstrated that it is part of a strategy that will meet the remainder of the criteria set out in the policy. There is conflict with Policy 7.7Ca because – as Mr Considine agreed - the Site is not located in the Central Activity Zone, the Opportunity Area, an "area of intensification" or a town centre. Policies 7.7Cb through to Policies 7.7Cf are not satisfied, for the reasons explained by Mr Black at para. 5.25 ff. of his proof of evidence. Policy 7.7Db is also breached because the Scheme would adversely impact on a local view. Moreover it is common ground[35] that the Site is a "sensitive location" for the purpose of Policy 7.7E, such that the impact of the proposed tall building should be given "particular consideration". Mr Considine also fairly acknowledged that the Scheme would conflict with para. 7.27 of the supporting text to Policy 7.7 because it would not form part of a "cohesive group"; para. 7.27 states that "[i]deally, tall buildings should form part of a cohesive

[35] Cross-examination of Mr Considine.

building group that enhances the skyline and improves the legibility of the area, ensuring tall and large buildings are attractive city elements that contribute positively to the image and built environment of London".

62.2. Policy Q26 of the Local Plan. The Scheme conflicts with Policy Q26(a)(ii) because there would be an adverse impact on a local view; with Policy Q26(a)(iii) because design excellence is not achieved; with Policy Q26(a)(iv) because it would not be successful as a "distinctive landmark"; with Policy Q26(a)(v) because the highest standards of architecture are not achieved; and with Policy Q26(a)(vi) because it would have an unacceptably harmful impact on its surroundings in terms of daylight and sunlight (as Mr Holt noted,[36] the list of potential impacts that is set out in that policy is not a closed list).

63. In summary, the evidence before the inquiry shows that the Scheme would have an unacceptably adverse effect on townscape and the design of Block B fails to satisfy the policy requirements that apply to tall buildings. In these respects the Scheme conflicts with London Plan Policies 3.4, 3.5, 7.4, 7.5, 7.6 and 7.7; ItPLP Policies D3, D4, D6, D8 and D9; Policies Q1, Q2, Q3, Q5, Q6, Q7, Q14 and Q26 of the Local Plan and Policies Q1, Q2, Q3, Q5, Q6, Q7 and Q26 of the DRLLP.

Unjustified harmful impacts on the setting of heritage assets (RfR5)

64. It is common ground that the Scheme would cause harm to the significance of designated heritage assets and that the harm that would be caused lies within the "less than substantial" range for the purpose of applying the NPPF. The disagreement between the Appellant and the Council as regards heritage assets concerns (i) the number of designated heritage assets to which less than substantial harm would be occasioned; and (ii) where on the scale of less than substantial harm the harm that would be caused to the assets (considered cumulatively) lies.

The designated heritage assets that would be harmed

65. The Council's position is that 12 designated heritage assets would experience harm to their significance: Masters House; the Water Tower; the former Court House; listed buildings in Walcot Square; listed buildings in West Square; listed buildings in St Mary's Gardens; Lambeth Palace and

[36] Evidence-in-chief.

St Mary's Church Tower group; and five conservation areas (Renfrew Road; Lambeth Palace; Walcot; West Square; and Elliott's Row).

66. Dr Miele, on the other hand, identifies only 3 designated heritage assets as experiencing harm to their significance: Masters House, the former Court House and Renfrew Road Conservation Area.

67. Whether the significance of a designated heritage asset would be harmed by proposed development is ultimately a question of professional judgement. It is not, of course, a question to be resolved by majority vote. Nevertheless, precisely because the question is one of professional judgement, in the Council's submission the extent to which Dr Miele's views accord with those of other individuals who have considered the issue in a professional capacity is a highly relevant consideration.

68. Dr Miele's views are not shared by Turley Heritage & VIA, who produced the July 2019 Built Heritage, Townscape and Visual Impact Appraisal ("**HTVIA**", CD2-13) that supported the Appellant's application for planning permission. The purpose of the HTVIA is to assess "the effect of the proposed development on the built heritage, townscape and visual receptors of the Site and its surroundings" (para. 1.1). Dr Miele confirmed[37] that there was no suggestion from the Appellant that there was any issue with the methodology used by Turley or any inaccuracy in the images presented; the difference between him and Turley was one of professional judgement.

69. As Dr Miele accepted,[38] the Appellant must have been satisfied when it submitted the application for planning permission that the HTVIA was a robust foundation with which to support the application. The HTVIA identifies harm to 9 of the 12 assets identified by the Council.[39]

70. As regards the 9 assets that are the subject of disagreement between Dr Miele and the Council (the Council identifying harm and Dr Miele identifying none):

[37] Cross-examination.
[38] Cross-examination.
[39] The exceptions are Lambeth Palace; Lambeth Palace Conservation Area and Walcot Square Conservation Area. The harm to West Square Conservation Area is identified as "very minor".

70.1. The GLA,[40] Historic England[41] and Turley all identify harm to the Water Tower, as do the Victorian Society[42] (CD7-24) and Mr Velluet on behalf of the Rule 6 party[43] (CD 6-4);

70.2. The GLA agrees with the Council that less than substantial harm would be caused to the Walcot Square listed buildings;

70.3. Turley agrees with the Council that harm would be caused to the West Square listed buildings and to the listed buildings in St Mary's Gardens;

70.4. Harm to Walcot Square Conservation Area is identified (in addition to the Council) by the GLA, Turley, the Victorian Society and Mr Velluet;

70.5. Harm to West Square Conservation area is identified by the GLA, Historic England, Turley and Mr Velluet (as well as the Council); and

70.6. Harm to Elliott's Row Conservation Area is identified (in addition to the Council) by the GLA, Turley and Mr Velluet.

71. None of the several organisations/individuals who have provided a professional view of the Scheme's impact upon designated heritage assets agree with Dr Miele's assessment that only 3 such assets would experience any harm to their significance. Included amongst those organisations/individuals is Turley, the Appellant's own previous adviser.

72. Furthermore, save for the 2 Lambeth Palace assets[44] the Council's identification of harm to significance is shared by at least one other professional. For the avoidance of doubt, the Council remains of the view that the Scheme would harm the significance of the Lambeth Palace assets – but even if the Inspector finds against the Council on that point, the Council's position on the other 7 assets that are in dispute is well supported by the views of other professionals.

[40] CD 3-17 at paras. 44-46.
[41] CD 7-16.
[42] CD 7-24.
[43] CD 6-4.
[44] Lambeth Palace and St Mary's Church Tower group; and the Lambeth Palace conservation area.

73. Dr Miele's conclusion that there would be no harm (at all) to the significance of the Water Tower is particularly inappropriate. His is the lone voice of dissent on this point (above). The list entry for the Water Tower (CD 1-52/2) states that it is designated for a number of "principal reasons", including that it is "of special architectural interest as an imposing and distinctive water tower in the Venetian Gothic style, constituting a rare feature in inner London" (emphasis added). Mr Black is correct to acknowledge at para. 7.15 of his proof of evidence that towers are "by their very nature" appreciated in silhouette against the sky and that a clear sky backdrop to the tower is very important to its significance because "it allows the architectural silhouette to be appreciated as the designer intended". Dr Miele's attempt to distinguish the Water Tower from e.g. a church tower as "a piece of functional kit" / "an object building" does not give adequate recognition to the fact that the imposing nature of the asset is (together with its distinctiveness and its Venetian Gothic style) one of the principal reasons for its listing. Consideration of the original layout of the Site in the Victorian period (see Mr Graham's proof of evidence at 6.3) shows that in the original workhouse scheme the Water Tower enjoyed prominence as a result of its height in contrast to its immediate surroundings, which were lower.

74. Historic England's Good Practice Advice 3 *The Setting of Heritage Assets* (2nd ed.) ("**GPA3**", CD 1-24) sets out a non-exhaustive check-list (p. 11) of "potential attributes of a setting that may help to elucidate its contribution to significance". Included within the check-list of attributes of a heritage asset's setting that might contribute its significance are: topography, aspect, scale and the "grain" of surrounding streetscape, landscape and spaces (under the heading "[t]he asset's physical surroundings"); and: surrounding landscape or townscape character, views, visual dominance and prominence (under the heading "[e]xperience of the asset").

75. It is unrealistic – and at odds with GPA3 - to suggest that the significance of a listed water tower gains nothing from the fact that it is surrounded by lower built development. That spatial relationship not only enables the heritage asset to be more readily appreciated in a general sense (because it appears more clearly in views); it also allows the original role/function of the asset to be better understood and appreciated. Part of the significance of the Water Tower here at present is its height and scale when contrasted against the immediate (lower) surrounding townscape; that spatial relationship gives the Water Tower a degree of prominence and the "imposing" character that is expressly identified in the list entry.

76. The strength of that contrast would be fundamentally eroded by the development of Block B. The Water Tower would lose the degree of prominence that it presently enjoys. Notwithstanding Dr Miele's dissent, the other professionals who have considered the question are plainly correct to identify that the Scheme would harm the heritage significance of the Water Tower.

77. Finally as regards the assets that would experience less than substantial harm to their significance, the suggestion that the Council has failed adequately to assess the significance of the affected assets is unfounded. As Mr Black explained,[45] the assessment is set out in his proof of evidence. He provides a summary of his methodology at paras. 7.2 to 7.6, including reference to the NPPF, to GPA3 and to the British Standard *Guide to the Conservation of Historic Buildings* (BS7913:2013). There has been no challenge from the Appellant either (i) to the methodology itself; or (ii) to Mr Black's confirmation that it is based on established best practice.[46]

The location of the total harm to designated heritage assets within the scale of "less than substantial harm"

78. The Council's position (evidence-in-chief of Mr Black) is that when the affected designated heritage assets are considered cumulatively, the harm to their significance that would result from the Scheme lies more towards the middle of the scale of less than substantial harm than at the lower end of that range. Masters House and the Water Tower would experience harm closer to the middle of the range, with the harm to the other 10 assets lying closer to the low end of the range.[47]

79. Dr Miele contends that the harm to significance that would result from the Scheme lies low within the less than substantial scale.[48]

80. The Council's position should be preferred, for the following reasons.

81. First, Dr Miele confirmed that his conclusion of a low level of less than substantial harm was premised on an analysis whereby the level of harm to significance initially identified was then reduced, by factoring in the identified heritage benefits. I.e. the heritage benefits identified by Dr

[45] Cross-examination.
[46] Para. 7.2 of this proof of evidence.
[47] Cross-examination of Mr Black.
[48] Proof of evidence para. 11.4.

Miele were "netted off" against the harm to significance, to give the conclusion of a low level of less than substantial harm. That approach is contrary to the recent High Court judgment in ***City & Country Bramshill Limited v SSHCLG*** [2019] EWHC 3437 (Admin) (see [110] to [120] of the judgment).[49]

82. Dr Miele was only prepared to accept that the cumulative harm to significance would move "slightly" further up the less than substantial scale if one approached the point in accordance with ***Bramshill*** and did not take any heritage benefits into account in the initial assessment of the degree of harm to significance. The Appellant's case, however, is that substantial weight should be given to the heritage benefits of the Scheme in the overall planning balance. The Council does not agree. Yet if the Appellant is correct and the heritage benefits do merit substantial weight, leaving them out of account in assessing the degree of harm to significance would surely result in more than a "slight" shift up the less than substantial scale.

83. Second, Dr Miele's conclusion of a low level of less than substantial harm is premised on only 3 designated heritage assets experiencing harm to their significance. If the number of designated heritage assets that would be harmed is higher - as the Council and the other professionals who have considered the point conclude – logically the cumulative harm must lie higher within the less than substantial scale. Dr Miele acknowledged that he had taken an "overall view" and had not sought to break down the analysis so as to account individually for each of the 3 assets that he identified as harmed; he agreed,[50] though, that the Inspector is required to account for the individual harms.

Conclusion in respect of designated heritage assets

84. The Scheme would cause less than substantial harm to the significance of 12 designated heritage assets, by causing harm to their setting. Taking the individual instances of harm to significance cumulatively, the resulting harm lies more towards the middle of the scale of less than substantial harm than at the lower end of that range.

85. The harm that the Scheme would cause to the significance of designated heritage assets is not outweighed by the public benefits of the proposal: this is explained below. It follows that the

[49] Currently being appealed to the Court of Appeal.
[50] Cross-examination.

Scheme fails to accord with London Plan Policies 7.7 and 7.8; ItPLP Policies D9, HC1 and HC3; Local Plan Policies Q5b, Q7ii, Q20ii, Q21ii, Q22ii, Q25 and Q26iv; and DRLLP Policies Q5b, Q7ii, Q20ii, Q21ii, Q22ii, Q25 and Q26iv.

Adverse impact on existing residential amenity – daylight and sunlight (RfR6)

86. Mr Considine in his proof of evidence accepts that some weight should be given in the overall planning balance to the harms identified by the Council under RfR6, although his position on this point is not consistent: at para. 7.6.3(l) he says that the weight to be attached to breaches of daylight and sunlight "can only be moderate" (in the overall context) whereas in his table at para. 7.7.12 he ascribes limited weight to the daylight and sunlight impacts. What is clear from Mr Considine's proof of evidence is that the dispute between the Appellant and the Council in relation to this RfR concerns the weight to be given to the harms that both parties acknowledge. The Council's position[51] is that substantial weight (against the Scheme) should be given to daylight and sunlight impacts in the overall planning balance.

Loss of daylight amenity to existing habitable rooms

87. From a daylight and sunlight perspective the context of the Site plainly displays some suburban characteristics. This is evidenced by the low-rise massing of surrounding properties (shown in Appendix E to Mr Dias's proof of evidence) and by the number of gardens that surround the Site (see Appendix C to Mr Dias's proof of evidence).

88. It is also evidenced by the fact that, on a fair analysis, the existing VSC values in the vicinity of the Site do not correspond to the mid-teens range that the Appellant considers[52] to be acceptable for "inner urban areas". This is explained further below.

89. The Council is not contending – and indeed has never contended – for full adherence to the BRE Guide (CD 1-33). Images 3.2 and 3.3 within Mr Lane's proof of evidence (following para. 3.19 on p. 16) are, therefore, irrelevant to the analysis.

[51] Rebuttal of Mr Holt at para. 2.10.
[52] Para. 4.45 of Mr Lane's proof of evidence.

90. The debate around para. 123c of the NPPF is also ultimately irrelevant because the Council has fulfilled the requirements of that paragraph, in that it has taken a flexible approach to the application of the BRE Guide.

91. First, the Council has applied an alternative target (retained) VSC value of 20, as against the BRE Guide target (retained) VSC value of 27 (reductions below this value should be considered with reference to the BRE Guide).

92. The alternative target value of 20 used by Mr Dias is appropriate for the Site.

93. Mr Lane in his proof of evidence sets out the existing VSC values for 17 locations within the vicinity of the Site (Table 4.1). The average existing VSC value across those 17 locations is 15.1 (applying Appendix F to the BRE Guide), or 16.0 using façade mapping.

94. However as Mr Lane accepted in cross-examination, a fair analysis of existing VSC values within the vicinity of the Site would also include the locations identified by Mr Dias in Table 1 within Appendix A to his proof of evidence. As Mr Dias explains at para. 6.4 of his proof of evidence, the existing VSC value at those locations is typically just below c. 30 (for ground floor windows).

95. Thus on a fair analysis, the average existing VSC value for locations within the vicinity of the Site is c. 22.5 (i.e. the mid-point between Mr Lane's 15 and Mr Dias's 30).

96. The alternative target value of 20 used by Mr Dias is clearly sufficiently flexible. It is lower than the average existing VSC value for locations within the vicinity of the Site. There is neither any need nor any justification for the use of an alternative target value of 15 in relation to the Site:

    96.1. The "mid-teens" are 15.0 to 17.9 – 15 is thus at the very bottom of the alternative target value that would be appropriate even if the Site were accurately described simply as an "inner urban area" (which it is not);

    96.2. Mr Lane has used 15 even though (as he accepted in cross-examination) the average existing VSC value (for his 17 locations) calculated from façade mapping – of 16 – is probably more accurate than the 15.1 value calculated from Appendix F to the BRE Guide;

96.3. The fact that the Council recently applied an alternative target value of 15 to a site in Brixton[53] is nothing to the point. As Mr Dias explained, that site is in the centre of Brixton between two railway lines; the context is dense and urban;

96.4. The same goes for the numerous cases identified by Mr Lane at para. 4.23 ff. of his proof of evidence. As Mr Lane acknowledged, no information as to the site context of these other cases is before the inquiry.

97. Secondly (and furthermore), in response to the Site's location Mr Dias has discounted from his analysis "minor adverse" percentage reductions (from existing VSC) of >20 – 29.9%, notwithstanding that in reality some harm does result from that category of reduction (which is itself a departure from the BRE Guide). Indeed, Mr Dias has also discounted "moderate adverse" VSC reductions (reductions of 30 – 39.9%) and "major adverse" VSC reductions (reductions of 40% or greater) where a retained VSC value of 20 or above is still achieved, notwithstanding that in reality greater harm results from these categories of reductions (which are more significant departures from the BRE Guide).

98. Mr Lane agreed in cross-examination that percentage reduction (from existing VSC) was "an important component of unacceptable harm". As discussed with Mr Lane, that point is reflected at para. 1.3.46 of the Housing SPG (CD 1-36).

99. Turning to consider whether the loss of daylight amenity to existing habitable rooms that would result from the Scheme amounts to "unacceptable harm", two preliminary points fall to be made. First – as Mr Lane accepted – "unacceptable harm" is not defined in policy by reference to the number of properties affected; one could in theory have harm to a single property that was sufficiently severe to justify a conclusion of "unacceptable harm". Secondly, as regards the no-sky line ("**NSL**"), it is not the case that an adverse impact to VSC values alone is incapable of constituting "unacceptable harm" – in other words, a conclusion of unacceptable harm can be justified even where there is little or no adverse impact on the NSL.

[53] CD 7-21; CD 7-22.

100. The Scheme would cause unacceptable harm in terms of the loss of daylight amenity to existing habitable rooms. Even applying the alternative target value of 15 for which the Appellant contends, the Scheme would result in:[54]

100.1. 12 instances of a retained VSC value of less than 15 together with a percentage reduction (from existing VSC) of 40% or more;

100.2. 20 (additional) instances of a retained VSC value of less than 15 together with a percentage reduction of 30% or more;

100.3. 22 instances of a retained VSC value of less than 14 (including values as low as 7.7, 7.8 and 10.3); and

100.4. 10 percentage reductions of 45% or more (including one 60% reduction).

101. This level of impact is unacceptable. No document that is before the inquiry justifies a retained VSC value of less than 15. The "eaves" point upon which Mr Lane relies is a red herring; he was not able to identify any document (including the BRE Guide) that states that it is acceptable to take into account eaves (etc.) as a justification for not even meeting an alternative target value at the very bottom of the "mid-teens" range.

102. It might be argued that the overall impact is acceptable because only a small number of windows (as a proportion of all those affected by the Scheme) would be affected in a manner that could fairly be described as unacceptable. In the Council's submission that approach fails adequately to acknowledge the impact that the Scheme would have upon the residents who actually live in the properties that are, on a fair analysis, unacceptably harmed. The Inspector has heard first-hand accounts of the concerns that are held by some of these residents.

103. In summary, the Council has adopted an appropriately flexible approach to this point but even applying that approach, the Scheme would cause unacceptable harm.

104. Finally, as regards the draft report produced by Schroeders Begg in November 2019 (CD 5-13), Mr Dias has explained that in producing that draft he flagged that "some 'adjustment

[54] Appendix B to the proof of evidence of Mr Dias.

consideration' [was] needed to reference to the more immediate slightly suburban density spacing and typology context"[55] – but did not at that stage "drill down in to the detail" and actually make those adjustments, *inter alia* because he anticipated that the Scheme might be amended following discussions between the Appellant and the case officer. At that point in time Mr Dias had not decided whether an alternative target value of 15 was appropriate or not,[56] hence why the draft report states "if that [i.e. the mid-teens were] used as an absolute minimum benchmark" (emphasis added). The suggestion that Mr Dias had "signed off" on an alternative target value of 15 in the draft report is incorrect; so too is any suggestion that Mr Dias "drastically changed" his position once he was instructed in respect of this appeal. As Mr Dias explained,[57] the November 2019 draft report was a "working document"; his position has evolved since that point in time as he has undertaken more detailed analysis, as one would expect.

Loss of sunlight amenity to existing gardens

105. Although Mr Lane demurred on this point, the Council remains of the view that – in a locational context that displays some suburban characteristics – the BRE Guide threshold of 50% of a garden being able to receive 2 hours of direct sunlight is not a difficult one to meet, even on 21 March.

106. In any event, the adverse impacts that are of concern to the Council are not constituted solely of a failure to meet the 50%/2h BRE Guide threshold on 21 March. They additionally involve a reduction of at least 30% in the percentage of the garden that is able to receive 2 hours of direct sunlight on that date: see Table 3 in the proof of evidence of Mr Dias. The magnitude of that reduction is a relevant consideration: see para. 3.3.11 of the BRE Guide (CD 1-33), which provides that "[i]f an existing garden or outdoor space is already heavily obstructed then any further loss of sunlight should be kept to a minimum. In this poorly sunlit case, if as a result of new development the area which can receive two hours of direct sunlight on 21 March is reduced to less than 0.8 times its former size, this further loss of sunlight is significant".

107. Applying para. 3.3.11 to the facts here, the loss of sunlight to both 7 George Mathers Road and 8 George Mathers Road should be recognised as significant. Arguably 3 Castlebrook Close and 144 Brook Drive (second garden area) also fall into that category; only 39.9% of 3 Castlebrook

[55] See para. 2 of the Executive Summary to the draft report.
[56] Cross-examination.
[57] Cross-examination.

Close's garden is currently able to receive 2 hours of direct sunlight on 21 March and that area would be reduced by 52%; only 48.6% of the garden at 144 Brook Drive is currently able to receive 2 hours of direct sunlight on 21 March and that area would be reduced by 31%.

108. In addition to the harm to these 4 gardens (which do not currently meet the 50%/2h BRE Guide threshold on 21 March), the Scheme would result in 7 gardens[58] that do currently meet the 50%/2h BRE Guide threshold on 21 March (and so would currently be classed under the BRE Guide as being "adequately sunlit throughout the year") falling below that threshold. 4 of those 7 reductions are appropriately assessed as "major adverse" (2 and 4 Castlebrook Close; 136A and 138 Brook Drive – these gardens would experience reductions ranging from 49% to 83%).[59] The remaining 3 reductions (from above the threshold to below the threshold) are appropriately assessed as "moderate adverse" (130A, 132 and 144[60] Brook Drive – these gardens would experience reductions ranging from 37% to 39%).

109. Taken together, these reductions are not acceptable.

110. Mr Lane's reliance on tree cover (e.g. para. 5.11 of his proof of evidence) is not supported by the BRE Guide: see para. 3.3.9, which also identifies that "the dappled shade of a tree is more pleasant than the deep shadow of a building".

111. As regards Table 5.3 of Mr Lane's proof of evidence, which compares the Scheme to 20-storey, 15-storey and 10-storey options, that table is concerned only with the position on 21 March. Point 2's transient overshadowing analysis shows that on 21 June (when the Appellant contends that residents are more likely to make use of their gardens), a lower option (with fewer storeys) would impact fewer gardens. On a similar note, the mansion block option illustrated in Image 5.3 within Mr Lane's proof of evidence is, as he acknowledged, simply one potential mansion block scheme; it does not significantly "step down" at the edges of the Site, even though that approach is commonplace.

112. Overall, the impact that the Scheme would have in terms of loss of sunlight amenity to existing gardens is unacceptably harmful. The number of gardens that would experience either a "major

[58] This figure excludes 7 Dante Road because it is a front/side garden rather than a rear garden.
[59] Table 3 in Mr Dias's proof of evidence.
[60] First garden area.

adverse" or "moderate adverse" effect (11[61]) is a not insignificant proportion of the number of gardens assessed by Point 2 (69). In any event, again it is not simply a numbers game – sufficient weight must be given to the impact that the Scheme would have upon the residents who live in the properties to which those 11 gardens belong. Some of those residents have expressed very serious concerns directly to the inquiry.

Inadequate residential amenity for future occupiers of the Scheme (RfR7)

113. Dealing first with overlooking and privacy, it is appropriate in this instance to apply the guidance set out in the Mayor's Housing SPG (CD 1-36 at para. 2.3.36) to the effect that a minimum distance of 18-21m between facing homes can be a "useful yardstick" for visual privacy. The majority of development immediately surrounding the Site has separation distances of at least 18m, or is arranged so that any windows directly facing each other do not serve habitable rooms. Furthermore the Site is large with a regularly-shaped developable area, giving a degree of flexibility over how new development is arranged. That being so, reference to instances of shorter separation distances within the Bellway development does not suffice to justify departure from the 18-21m yardstick here.

114. The Scheme results in numerous instances where the separation distance between Block A and Block B would be well under the yardstick of 18-21m, at only 13.8m or 15.5m. These separation distances would result in intrusive overlooking and would not provide an acceptable level of privacy to the occupiers of the affected units. Some of the affected units do not have an alternative aspect to provide relief from this issue.

115. Turning to daylight levels, on the Appellant's updated analysis 31% of the habitable rooms within Block A do not meet the minimum ADF value applicable to the room use in question. Whilst that is a reduction from 37.8% on the Appellant's previous analysis, the response from Mr Dias to the updated analysis shows that 16 rooms now "need to improve" (as opposed to 15 previously) and whilst one fewer bedroom now falls within that category, the number of living / kitchen / dining rooms ("**LKDs**") within the category has increased from 2 to 4. Daylight levels are more important in LKDs than in bedrooms; the minimum ADF value is higher for the former than for the latter.

[61] Para. 6.17 of the proof of evidence of Mr Dias.

116. The apparent suggestion from the Appellant that the Inspector should concern himself only with the "pass rate" for the entire Scheme (which Mr Lane identifies as 95%[62]) and ignore entirely the position in respect of Block A and Block B individually is, frankly, untenable. As Mr Lane accepted, given the low-rise nature of the Site's surroundings and the "tower" form of Block B, one would expect Block B to meet the applicable minimum ADF values beyond the first few floors. Moreover the fact that the "pass rate" for Block B – which contains market and intermediate units – is 100% whilst the "pass rate" for Block A – which contains, solely, low cost rent units – is 69%, is relevant. Unlike the units in Block B, the units in Block A will be allocated to their occupiers. It is regrettable that Block A is to be occupied by the very category of Scheme resident for whom electing to avoid sub-optimal levels of daylight will be least straightforward. At para. 7.6.6c of his proof of evidence Mr Considine contends that "[i]t is reasonable and has been held at appeal that the weight to [be] ascribed to the amenity of future occupiers is lesser and that they are less likely to be concerned about amenity than existing residents, and are able to make decisions about such in an overall balance". That reasoning does not apply to the future residents of Block A because it is premised on the assumption that future residents will be able to choose whether or not to live in the homes in question. As Mr Considine accepted in cross-examination, the future residents of Block A will not have free choice.

117. It is common ground that in analysing daylight levels for future residents, one must consider both the "pass rate" (percentage of rooms meeting the applicable minimum ADF value) and also the extent of any shortfalls against the minimum values (e.g. is a minimum value of 1.5% missed by only 0.1%, by 0.5%, by 1%?).

118. In some instances the ADF value that would be achieved is zero. This outcome is unacceptable, particularly given that the massing of properties surrounding the Site is low-rise i.e. existing surrounding properties only minimally obstruct the Site. There are no examples of an achieved ADF value of zero within Mr Lane's Table 7.1.[63] That table in any event does not provide the full picture (by way of example, only 1 bedroom within the Knights Walk scheme achieved an ADF value of 0.2%).

119. Whilst Mr Dias acknowledged that the "driver" for the daylight levels problem was the Block A balconies, his evidence was that the siting/massing of Block B also contributed to the problem

[62] Para. 7.5 of his proof of evidence.
[63] Proof of evidence.

to some extent.[64] Even if there is no solution to the difficulty posed by the balconies, the physical relationship between Block A and Block B could be reconsidered.[65]

120. Having regard to the above, the Scheme fails to accord with Policy Q2 of the Local Plan and Policy Q2 of the DRLLP.

Poor quality communal amenity space and playspace (RfR8)

121. The approach to the layout and design of the open areas around the Scheme buildings results in one small communal garden (between Block A and Block B), with the remainder of the open areas proposed as one multi-functional space that has to attempt to satisfy a wide range of needs, including disabled car parking; access and manoeuvring space for service and delivery vehicles; and a through route for pedestrians and cyclists. In consequence of this approach the majority of the communal amenity space and playspace within the Scheme is not properly useable; the result is a poor quality environment for future residents.

122. The Scheme requires future residents to share c. two-thirds of their communal amenity space with the general public (including patrons of the Cinema Museum). This arrangement fails appropriately to reflect the high density of the Scheme, which ought to result in the amenity space that is available on the Site being prioritised for resident use.[66] Most of the pedestrian-only space on the Site (i.e. excluding the buildings and vehicular parking/turning areas) is occupied by the new public route through the Site. This space is of limited amenity and playspace value to residents because it is neither private nor secure. With vehicular parking and turning areas at either end, it is not particularly safe for younger children either. The space is largely paved and some of it is the undercroft to Block B. Having regard to all of these characteristics, it does not lend itself to the need that the wide range of future residents will have for comfortable relaxation. Nor will it "encourage an appropriate sense of ownership", as para. 2.2.11 of the Mayor's Housing SPG requires (CD 1-36).

[64] See too para. 8.63 of Mr Holt's proof of evidence.
[65] *Ibid.*
[66] A similar point is raised by the GLA at para. 38 of its Stage 1 Report: "Winter gardens are proposed rather than external private amenity space. While this could be justifiable given that units are being provided within a tall building, this creates greater need to ensure the ground level amenity and public space is of the highest quality for all residents to use" (emphasis added).

123. Whilst the quantum of playspace provided is policy-compliant, as Mr Black explains in his evidence it does not amount to good quality play provision for the c. 50 children of the Scheme.

124. None of the playspace shown on the relevant drawings is dedicated solely for the use of children.

125. The areas indicated for the 5-11 and 12+ age ranges (see CD 7-14 at p. 101, section 7.2) would resemble the hard and formal play experience of a school yard, rather than that of a residential environment. Furthermore whilst the Council acknowledges that playable public space has an important role,[67] the balance between space reserved to future residents and space available to the general public within the Scheme is wrong. The play environment for these age ranges is too heavily focused on playable public space and as regards the 5-11 age range,[68] is insufficiently safe for that reason (in addition to its proximity to parking / turning areas). Both areas indicated lie within the part of the Site that will be available to the general public. This renders them less "playable": see the definition of "playable space" within the Mayor's Play and Informal Recreation SPG (CD 1-7):

> "…Playability is not just a matter of the physical characteristics of a space. It can also be influenced by social and cultural characteristics. For instance a space that is dominated by people hostile to children's presence is not playable, whatever its physical characteristics".

126. The approach taken fails to recognise the difference between incidental playspace[69] and genuinely dedicated playspace. Mr Black was correct to observe that an approach whereby a rectangle is drawn on public realm and the area identified as "dedicated playspace" is one that fails children. The Mayor's Play and Informal Recreation SPG requires all dedicated play spaces to be "genuinely playable and attractive to count as play provision". Given the competing demands that will be put upon these two areas, it is not realistic to contend that they will be genuinely playable.

127. The communal garden is indicated as playspace for the under 5s. It provides limited space for energetic play on soft surfaces.[70]

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[67] Mr Black's proof of evidence at para. 6.25.
[68] *Ibid.* para. 6.35.
[69] Defined in the Glossary to the Mayor's Play and Informal Recreation SPG (CD 1-7) as "a public space where recreational features such as landscaping or high quality public art make it playable".
[70] Mr Black's proof of evidence at para. 6.6.

128. Furthermore whilst it is far from the only shortcoming of the approach taken to playspace, the proposals conflict with para. 5.28 of the supporting text to Policy H5 of the Local Plan, which states that "[p]lay areas should be easily accessible, overlooked by habitable rooms and enclosed either through fencing, railings or other safety features" (emphasis added). The role of playable public realm is acknowledged (above). Enclosed playspace is however very important, for the reasons explained by Mr Black during the inquiry session on this RfR (keeping small children, in particular, safe; preventing fouling, etc.). The Appellant's approach ignores the fact that there is value in enclosure, especially from a safety perspective. Mr Farrer's description of dedicated play zones as "incredibly unsafe, unused areas" was exaggerated and inaccurate.

129. The Council's difficulty with the playspace proposals is not, however, simply a complaint that no fencing is proposed. The overly heavy reliance that is placed on playable public realm deprives children of the opportunity to experience "a bit of jeopardy";[71] swinging, climbing, crawling and tumbling are important aspects of children's development and the Scheme as proposed does not offer adequate opportunities for stimulation in that regard.

130. It was suggested at the inquiry session on this RfR that a redesign of the public realm could be conditioned, with the public route through the Site being omitted so as to allow the open spaces around the Scheme buildings to meet the needs of future residents much more effectively. However if the public route through the Site were to be omitted in a subsequent redesign of the public realm, any public benefit from that element[72] would need to be omitted from the overall planning balance.

131. The design of the communal amenity space and playspace fails to respond adequately to the needs of future residents. What is proposed is, realistically, mostly public realm rather than the truly residential environment that is required for a residential scheme of this density. The design philosophy of the Scheme is flawed in that it prioritises an unnecessary public route through a residential scheme over the provision of quality communal amenity and playspace for the residents of the scheme.[73]

[71] Mr Black, inquiry session on RfR8.
[72] For the avoidance of doubt the Council does not accept that the proposed public route is a public benefit, for the reasons explained in Mr Black's evidence.
[73] Proof of Mr Black, para. 6.39.

132. As Mr Black explains in his proof of evidence, the poor quality of the proposed communal amenity space and playspace conflicts with Policies 3.5 and 3.6 of the London Plan, with Policies D4 and D6 of the ItPLP, with Policies H5 and Q1 of the Local Plan and with Policies H5 and Q1 of the DRLLP. It is also contrary to the Mayor's Play and Informal Recreation SPG (CD 1-7).

CONCLUSIONS

The Scheme does not accord with the development plan

133. The Scheme does not accord with the statutory development plan. In assessing the Scheme's overall compliance/non-compliance with the latter, it is important to acknowledge that the London Plan forms part of the statutory development plan and that the GLA's view is that the Scheme does not accord with the London Plan. As is noted at para. 85 of the GLA's Stage 1 Report (CD 3-17), under the arrangements set out in art. 4 of the Town and Country Planning (Mayor of London) Order 2008 the Mayor was required to provide the Council with a statement setting out whether he considered that the application (for planning permission for the Scheme) complied with the London Plan. The Stage 1 Report provides that statement: the formal recommendation is that the application does not fully comply with either the London Plan or the ItPLP. The ItPLP attracts significant albeit not full weight.[74]

134. The formal recommendation (dated 20 January 2020) also states that "the possible remedies set out in [para. 87 of the Stage 1 Report] could address these deficiencies". To a significant extent, those remedies remain unimplemented:

134.1. Under the "Housing" heading, the GLA advised that "[t]he residential quality should be improved and useable play space should be provided". The corresponding section within the body of the Stage 1 Report is paras. 37 to 40. This points overlaps very significantly with RfR8 (communal amenity space and playspace) and as explained above, has not been resolved.

134.2. Under the "Heritage" heading, the GLA's position was that "the harm caused to the heritage assets should be outweighed by further public benefits, including the delivery of a scheme of exemplary design in terms of visual impact on townscape, quality of the

[74] Para. 5.1.2 of the Council's statement of case.

public realm and residential amenity and detailing of architecture; securing a long term future for the Cinema Museum and the provision of genuinely affordable homes". A scheme of exemplary design has not been delivered – in particular, there have been no changes to the design of Block B since the GLA issued the Stage 1 Report. The Cinema Museum should not actually be included in the public benefits analysis, for the reasons explained below. The affordable housing offer is not policy-compliant as regards unit size mix.

134.3. As regards "Urban design", the GLA advised that "[t]he bulk of the tower should be slimmed down to free up space at ground level to improve the public realm and residential amenity, improve residential quality, reduce visual impact on townscape and create an elegant building form on the skyline particularly when viewed in conjunction with the existing UNCLE tower". This has not been done.

Material considerations do not indicate that planning permission should nevertheless be granted

135. S.38(6) of the Planning and Compulsory Purchase Act 2004 provides that the appeal must be determined in accordance with the development plan "unless material considerations indicate otherwise". Before examining those material considerations it is however important to recognise that another statutory duty is engaged here: s. 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("**S. 66**"), which in the context of this appeal requires "special regard" to be had to the desirability of preserving the settings of the affected listed buildings. This is considered further below.

136. Turning to the NPPF, which is an important material consideration, the Appellant accepts that all of the development plan policies are up-to-date and should be given full weight.[75] Para. 11d of the NPPF does not, therefore, apply (it has purchase only where "there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date").

137. Para. 196 of the NPPF requires the harm that the Scheme would cause to the significance of designated heritage assets ("**the heritage harm**") to be weighed against the public benefits of the Scheme. This stage of the analysis requires the public benefits to be weighed against the heritage

[75] Cross-examination of Mr Considine.

harm alone (i.e. independently of the other harms that would result from the Scheme): see ***Monkhill Ltd v SSHCLG*** [2020] PTSR 416 at [39(13)] *per* Holgate J.

138. S. 66 requires "considerable importance and weight" to be given to the harm that the Scheme would cause to the significance of the listed buildings. The position in relation to the conservation areas is governed by para. 193 of the NPPF, which requires "great weight" to be given to their conservation.

139. Para. 193 of the NPPF expressly requires great weight to be given to the conservation of designated heritage assets "irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance".

140. The heritage harm here lies towards the middle of the scale of less than substantial harm. The Council emphasises that the less than substantial harm "scale" is an extremely broad one, ranging from harm that only just passes the *de minimis* threshold (at the bottom) to harm that falls just shy of "substantial harm" (at the top). The threshold of substantial harm is a high one: referring to the ***Bedford*** judgment, Dr Miele defines it as "harm that only just avoids the complete or near complete removal of significance".[76]

141. Even if the Appellant were correct to contend that the heritage harm lies low in the less than substantial harm scale, however, the starting point for determination of this appeal would remain that there is a strong presumption against granting planning permission for the Scheme. See ***R (o.a.o. Lady Hart of Chilton) v Babergh DC*** [2015] JPL 491 *per* Sales J (as he then was) at [14]:

> "The NPPF creates a strong presumption against the grant of planning permission for development which will harm heritage assets, requiring particularly strong countervailing factors to be identified before it can be treated as overridden".

142. According the requisite great weight to the conservation of the designated heritage assets, the public benefits of the Scheme do not outweigh the heritage harm. They cannot persuasively be described as particularly strong countervailing factors. The "clear and convincing justification" that the NPPF requires in respect of any harm to the significance of a designated heritage asset[77] is in consequence lacking.

[76] Proof of evidence para. 5.7.
[77] *Ibid.* para. 194.

143. Mr Considine in his proof of evidence contended for the following analysis of the public benefits of the Scheme:[78]

Development in a highly sustainable location:	Substantial weight
Use of previously developed land:	Substantial weight
Optimisation of the use of the land:	Substantial weight
Provision of market housing:	Substantial weight
Provision of affordable housing:	Substantial weight
Car-free development:	Moderate weight
Economic benefits:	Substantial weight
Social benefits:	Substantial weight
Environmental benefits:	Moderate weight
Regeneration:	Substantial weight
Heritage:	Substantial weight
High quality design:	Substantial weight
Provision of open space and improved accessibility:	Moderate weight
Securing the future of the Cinema Museum:	Substantial weight

144. Before addressing the detail of that analysis, the Council notes that it is common ground[79] that:

144.1. An absence of harm is not a benefit – it should be weighed neutrally in the overall planning balance;

144.2. Not every instance of policy compliance will amount to a benefit that should be weighed in favour of the Scheme;

144.3. A benefit that exceeds the relevant policy requirement attracts greater weight in the overall planning balance than a benefit that simply meets the relevant policy requirement; and

[78] Para. 7.7.12.
[79] Points accepted by Mr Considine in cross-examination.

144.4. Whilst the resolution of 7 of the 13 original RfR means that the overall planning balance has shifted in favour of the Scheme, it remains open to the Inspector to conclude that the overall planning balance has not shifted far enough in that direction – i.e. to conclude that on the basis of the remaining RfR, the planning balance still weighs against the Scheme overall.

145. Development in a highly sustainable location. As discussed with Mr Considine in cross-examination, it would not be consistent with the approach taken by the Secretary of State in the Vauxhall appeal decision (CD 7-8) to give any weight to this consideration as a distinct benefit in the overall planning balance. The site in the Vauxhall appeal had the very highest PTAL rating (6b)[80] and yet the Secretary of State did not give any weight to the sustainable location of the site as a separate benefit in the overall planning balance.[81] The same approach should be followed here.

146. Use of previously developed land. The Council acknowledges that substantial weight should be given to this consideration.

147. Optimisation of the use of the land. This consideration should not be included in the assessment of the public benefits of the Scheme. It is conceptually impossible for "optimisation" to be assessed as a pure benefit when – and this is common ground[82] - the very notion of optimisation involves delivering the maximum quantum of development possible without causing unacceptable harm. Optimisation is a (potential) conclusion to an assessment of the benefits of a proposal against its harms. It is not in and of itself a benefit. The Council adds that in view of the emphasis that the Appellant's case places upon (claimed) optimisation, it is troubling that Mr Considine has entirely failed to understand this point.

148. Provision of market housing; provision of affordable housing. The Council acknowledges that significant weight should be given to these considerations.

149. Car-free development. This amounts to an absence of harm and is an example of an instance of policy compliance that should weigh neutrally in the overall planning balance. Mr Considine "took the point"[83] that there is no evidence before this inquiry that the Scheme would result in

[80] See para. 46 of the inspector's report.
[81] See paras. 16 to 28 and 31 to 33 of the Secretary of State's decision letter.
[82] Cross-examination of Mr Considine.
[83] Cross-examination.

there being fewer cars on the road. Potential occupiers of the Scheme who already have cars are likely to be deterred by the absence of parking and to look elsewhere.

150. Economic benefits. Very little – if any – weight should be given to this consideration as a distinct benefit in the overall planning balance. First, to give substantial weight to this factor would, as Mr Considine accepted in cross-examination, be inconsistent with the approach taken by the Secretary of State in the Brentford appeal decision (CD 7-12). At para. 23 of his decision letter the Secretary of State reasoned as follows:

> "[The Secretary of State] further notes […] that construction would bring 250 jobs, though agrees that these would be short term, and that there is little evidence that the proposal would bring a massive uplift to the area around it […] The Secretary of State agrees that economic activity and regeneration would be further benefits but taken together these add little to the substantial benefits of housing provision […] As such he agrees with the Inspector that relative to his conclusions on the importance of housing and of protecting the historic environment, the other benefits attract a little weight in favour of the scheme".

151. Secondly, whilst the precise number of jobs that the proposal would generate during its construction phase was known to the Secretary of State in the Brentford appeal, it has not been calculated here. Mr Considine simply cannot credibly contend for "significant" weight to be given to the economic benefits of the Scheme in circumstances where he has not troubled to ascertain how many jobs the construction phase of the Scheme would generate.

152. Social benefits. Mr Considine agreed[84] that this heading should be deleted from his list because it amounted to double-counting of considerations that were accounted for under his other headings.

153. Environmental benefits. These should be given only limited weight. Aside from the environmental benefit identified by Mr Considine at para. 7.5.10c of his proof of evidence, this category of benefits again simply double-counts matters that are accounted for elsewhere in his list.

154. Regeneration. This consideration should not be weighed in the overall planning balance as a distinct benefit. Mr Considine was unable to identify any additional benefits that fell to be

[84] Cross-examination. Any suggestion that the line of questioning that led to this concession was in any way improper is rejected entirely and should not be pursued further. As was explained at the time, the Council has neither any note, nor any recollection of Mr Holt having made a concession in the other direction. In any event, whether to include the heading in the list is ultimately a matter for the Inspector.

assessed under this heading – beyond the amorphous concept of "regeneration" itself – that were not accounted for under the other headings. In any event, to give substantial weight to this factor would, again, be inconsistent with the approach taken by the Secretary of State in the Brentford appeal decision. as Mr Considine accepted in cross-examination.

155. Heritage. This category of benefits is set out by Mr Considine at para. 7.5.12 of his proof of evidence. Again, it double-counts the matters that are accounted for under his other categories. The entries at para. 7.5.12a(iii) and (iv) of Mr Considine's proof of evidence should on any view be deleted because the benefits that are described in those entries do not form any part of the Scheme. Overall the Appellant has not identified any heritage consideration that properly attracts weight as a distinct, additional benefit in the overall planning balance.

156. High quality design. The Scheme would not deliver high quality design. Even if the Inspector finds against the Council on that point, no weight should be given to that consideration as a separate, additional benefit. Any other approach would – as Mr Considine conceded in cross-examination – be inconsistent with that taken by the Secretary of State in the Vauxhall appeal (CD 7-8). At para. 20 of his decision letter the Secretary of State noted that his Inspector considered the quality of the architecture to be "undeniable" and the scheme to be "outstanding" in townscape terms. Nevertheless he did not give any weight to that the design quality of the scheme as a distinct benefit in the overall planning balance.

157. Provision of open space and improved accessibility. Given the shortcomings of (i) the public route through the Site and (ii) the layout of the open space within the Site (as identified in the Council's evidence), this consideration does not attract any weight as a benefit of the Scheme. In reality this aspect of the Scheme will not be beneficial.

158. Securing the future of the Cinema Museum. As is explained in the officer report,[85] the Council is supportive of the Cinema Museum and is keen to facilitate its retention at Masters House in order to secure the long term sustainable use of the building and as a key cultural venue in the borough. However, the lease offer to the Cinema Museum that is proposed under the unilateral undertaking cannot lawfully be taken into account as a material planning consideration. Mr Considine confirmed in cross-examination that the extent of the benefit claimed by the Appellant in relation to the Cinema Museum was the lease offer.

[85] CD 5-2 at paras. 10.1.19, 10.4.81 and

159. Under the terms of Sch. 9 to the unilateral undertaking, the Appellant is required to write to the Cinema Museum and offer to lease Masters House (along with other buildings within the red line boundary of the Site (see Plan 1 within Sch. 2 to the unilateral undertaking): together, "**the Buildings**") to it for a term of 999 years at peppercorn rent, in return for a premium of £1 million. The Cinema Museum has five years from the date of the offer to accept it. For convenience this arrangement is hereafter referred to as "**the Lease Proposal**".

160. Had the Council granted planning permission for the Scheme, the £1 million premium that is to be paid by the Cinema Museum if it accepts the lease offer was to be reinvested (presumably by the Appellant) back into "development works" for the refurbishment and upgrade of the Buildings. The £1 million premium is no longer to be reinvested for that purpose, being (according to the Appellant) "needed to fund the appeal process": see the letter from the Appellant to the Cinema Museum dated 23 December 2019 that is appended to the officer report on the Scheme (CD 5-2) as Appendix 4 ("**the December 2019 letter**").

161. The Lease Proposal is not a material consideration in the determination of the appeal and cannot lawfully be taken into account as a "public benefit" under para. 196 of the NPPF. Nor does it satisfy the requirements of Reg. 122(2) of the Community Infrastructure Levy Regulations 2010 ("**Reg. 122**" and "**the CIL Regulations**"): the Lease Proposal as set out in the unilateral undertaking cannot therefore lawfully be taken into account as a reason for granting planning permission.

162. In this regard it is highly significant that both the Appellant's Planning Statement[86] and Mr Considine in his proof of evidence[87] recognise that "the lease itself is not a planning issue".

163. Pursuant to Reg. 122, a s. 106 obligation may only constitute a reason for granting planning permission for development if it is (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development.

164. Reg. 122 was considered by the High Court in ***Good Energy Generation Limited v SSCLG*** [2018] EWHC 1270 (Admin). The claimant challenged the Secretary of State's dismissal of its appeal

[86] CD 2-24 at para. 6.4.3.
[87] Para. 7.5.15c.

against a refusal of planning permission for a wind farm. It submitted that in assessing the planning balance, the Secretary of State had erred in law by disregarding a package of community benefits offered by the claimant in a (unilateral) s. 106 obligation. The Secretary of State had disregarded the community benefits package because he concluded that it did not meet the tests in Reg. 122.

165. Lang J took as "[a] useful starting point" the following "well-known dictum" of Cooke J in ***Stringer v Minister of Housing and Local Government*** [1971] 1 All ER 65 at 77:

"In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration which falls within that broad class is material in any given case will depend on the circumstances."

166. Lang J went on to note that in ***Westminster City Council v Great Portland Estates PLC*** [1985] AC 661 at 670, Lord Scarman referred to the principle that "when considering whether there has been a change of use 'what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier'".

167. Lang J then observed that the ***Newbury***[88] criteria, originally concerned with the validity of planning conditions, had since been applied to planning obligations. Those criteria require that the conditions/obligations "must be for a planning purpose and not for any ulterior one, and [...] they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them...".

168. Lang J continued to review the case-law authorities but held (at [71]) that the Reg. 122 tests were "more stringent" than the common law tests that she had set out (by reference to the case-law authorities). She agreed with the following observations of Gilbart J in ***R (o.a.o. Working Titles Films Limited) v Westminster City Council*** [2016] EWHC 1855 (Admin):

"[20] The test of necessity in Regulation 122(2) (a) was originally not a test in law of the materiality of a planning obligation. Indeed that was the reason why the challenge failed in ***R v Plymouth City Council ex p Plymouth and S Devon Coop Society Ltd*** [1993] 67 P and CR 78. It was a test of policy, and not a test in law – see Hoffman LJ in ***Plymouth*** at page 90, and Lord Keith in ***Tesco Stores v Environment Secretary*** [1995] 1 WLR 759 at 769 D-770 A, Lord Hoffman at p 777 B-C, 780 A-781C. The tests in (b) and (c) in Regulation 122 also go wider than the law did before its enactment. The test of materiality in law was hitherto that to be material, the provisions in a 106 obligation (a) had to have a planning purpose, (b) be related to the permitted development and (c) not be ***Wednesbury*** unreasonable (see Russell LJ in ***Plymouth*** at page 82 and Hoffman LJ at page 87). It follows that there are now tests in law which to some degree were not tests of law before their

[88] ***Newbury DC v Secretary of State for the Environment*** [1981] AC 578 at 599 *per* Viscount Dilhorne.

enactment. While I agree with him that the effect of Regulation 122 was drawn from previous Circulars, I respectfully disagree with Bean J in ***Welcome Break Group and Others v Stroud DC and Gloucestershire Gateway Ltd*** [2012] EWHC 140 at paragraphs 49 and 50 where he treats the ratio of the ***Tesco*** case on the issue of necessity as still holding good. It is clear that the question of what is "necessary" is now a test in law, which it was not beforehand."

169. Lang J also (at [72]) observed that the Encyclopedia of Planning Law and Practice accurately described Reg. 122 as having "developed considerably the previously evolved case law relating to when a planning obligation could be a material consideration".

170. On the facts in ***Good Energy***, Lang J noted ([82]) that "[a]s Lord Collins said in ***Sainsbury's Supermarkets Ltd***, there must be a real rather than a fanciful or remote connection between the benefit and the development if the benefit is to be treated as a consideration weighing in favour of the grant of planning permission. This nebulous proposal did not meet that requirement". The community benefits package had not been necessary to make the development acceptable in planning terms under Reg. 122.

171. The judgment of the Supreme Court in ***R (Wright) v Forest of Dean DC*** [2019] 1 WLR 6562 considers the circumstances in which a proposed public benefit will be a "material consideration" in determining an application for planning permission. In ***Wright*** the local planning authority ("**LPA**") had granted planning permission for a community-scale wind turbine. In doing so it expressly took into account an annual community fund donation promised by the applicant ("**the Donation**"). The claimant challenged the grant of planning permission on the ground that the Donation was not a material planning consideration and the LPA had acted unlawfully by taking it into account. He argued that the Donation did not serve a planning purpose, was not related to land use and had no real connection to the proposed development.

172. The Supreme Court upheld the claim. The salient parts of the judgment are the following:

172.1. The test of what is a material consideration in the control of development is whether it serves a planning purpose. A planning purpose is one that relates to the character of the use of land (at [36], citing the decision of the House of Lords in the ***Westminster*** case *per* Lord Scarman at 670);

172.2. A consequence of that approach is that planning permission cannot be bought or sold. This is "axiomatic".[89] There is a public interest in not allowing planning permissions to be sold in exchange for benefits which are not planning considerations or do not relate to the proposed development.[90]

173. The Supreme Court observed at [39] that:

"A principled approach to identifying material considerations in line with the ***Newbury*** criteria is important both as a protection for landowners and as a protection for the public interest. It prevents a planning authority from extracting money or other benefits from a landowner as a condition for granting permission to develop its land, when such payment or the provision of such benefits has no sufficient connection with the proposed use of the land. It also prevents a developer from offering to make payments or provide benefits which have no sufficient connection with the proposed use of the land, as a way of buying a planning permission which it would be contrary to the public interest to grant according to the merits of the development itself".

174. At [42] the Supreme Court explained that:

"The protection for landowners on the one hand and for the public interest on the other has been held to be established by Parliament through statute, as interpreted by the courts. Parliament has itself in this way underwritten the integrity of the planning system. In ***Tesco*** [1995] 1 WLR 759 Lord Hoffmann pointed out that the question of whether something is a material consideration is a question of law: p 780. Statute cannot be overridden or diluted by general policies laid down by central government (whether in the form of the NPPF or otherwise), nor by policies adopted by local planning authorities".

175. At [41] the Supreme Court in ***Wright*** referred to its own decision in the ***Aberdeen*** case [2017] PTSR 1413, noting that Lord Hodge JSC had there reasoned (*inter alia*) that if "a developer could seek to obtain a planning permission by unilaterally undertaking a planning obligation not to develop its site until it had funded extraneous infrastructure or other community facilities unconnected with its development[, that] could amount to the buying and selling of a planning permission".

176. On the facts in ***Wright*** the Supreme Court held (at [38]) that "a condition or undertaking that a landowner pay money to a fund to provide for general community benefits unrelated to the proposed change in the character of the use of the development land does not have a sufficient

[89] ***City of Bradford Metropolitan Council v Secretary of State for the Environment*** (1986) 53 P&CR 55 *per* Lloyd LJ at 64.
[90] ***Plymouth*** 67 P&CR 78 *per* Hoffmann LJ at 90.

connection with the proposed development as to qualify as a "material consideration" in relation to it". The Donation did not qualify as a material consideration ([44]):

176.1. The benefits were not proposed as a means of pursuing any proper planning purpose, but for the ulterior purpose of providing general benefits to the community;

176.2. Moreover, they did not fairly and reasonably relate to the development for which permission was sought; the community benefits to be provided did not affect the use of the land;

176.3. Instead, "they were proffered as a general inducement to the Council to grant planning permission and constituted a method of seeking to buy the permission sought, in breach of the principle that planning permission cannot be bought or sold".

177. ***Wright*** and ***Good Energy*** establish that it is not lawful for a decision-maker simply to take into account the entire package of public benefits that is offered by an applicant for planning permission. Before any proffered public benefit can lawfully be taken into account, the decision-maker must be satisfied that it passes the test of what is a material consideration for development control purposes. It must serve a purpose that relates to the character of the use of land (i.e. a planning purpose). That is distinct from the particular purpose of any particular occupier. The proposed benefit must have a sufficient nexus to the proposed development, i.e. to the proposed change in the character of the use of the land.

178. Where it is proposed to secure the public benefit by way of a s. 106 obligation, the latter can only lawfully be taken into account as a reason for granting planning permission if the requirements of Reg. 122 are satisfied. The s. 106 obligation must therefore be necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development.

179. Para. 196 of the NPPF has not altered the above analysis. It does not follow from the requirement in para. 196 of the NPPF that heritage harm "be weighed against the public benefits of the proposal" that all public benefits proposed by the applicant must be taken into account, irrespective of whether in law they are material considerations in the determination of the application. Policy cannot make a consideration material if it does not satisfy the test that is

established in the case-law: see ***Wright*** at [42] (this point is also discussed in ***Good Energy***). Nor can policy "trump" a statutory instrument such as the CIL Regulations.

180. The Appellant has not established that there is a sufficiently close connection between the Lease Proposal and the proposed change in the character of the use of the Site here. Although the Buildings are within the red-line boundary of the Site, no "development" (as defined by the Town and Country Planning Act 1990) is proposed to the Buildings themselves under the Scheme: no operational development, no change of use.

181. On the evidence, it appears that the only connection between the Scheme and the Lease Proposal is that:

181.1. If planning permission is refused on this appeal the unilateral undertaking (which is the document that puts the Appellant under an obligation to make the lease offer) will not come into effect; and

181.2. The Appellant has said that it will sell the Site if it does not obtain planning permission for the Scheme through this appeal (see the December 2019 letter).

182. That connection is not a connection between the Lease Proposal and the change in the character of the use of the Site that is proposed under the Scheme.

183. The Lease Proposal is, in reality, a private law matter: it is a commercial deal between landlord (the Appellant) and tenant (the Cinema Museum). The evidence does not disclose any reason why the Appellant could not make the lease offer to the Cinema Museum tomorrow, if it so chose.

184. The Lease Proposal does not, in the planning sense, relate to any land. It does not relate to the character of the use of any of the land within the Site. It is an offer to the current occupier of Masters House; it goes (potentially) only to influence the identity of the occupier - not to influence the use of the Buildings. The distinction between the character of the use of land and the particular purpose of a particular occupier was emphasised by the House of Lords in ***Westminster*** (above). That distinction can (and should) be drawn here. The planning permission that authorises the Cinema Museum's use of Masters House is not a personal permission: another "cinema museum" entity could lawfully use Masters House pursuant to it.

185. Neither the inclusion of the Buildings within the red-line boundary of the Site nor the reference to the retention of the Buildings within the description of development in the application for planning permission alters the above analysis.

186. For the above reasons, it has not been established that the Lease Proposal is a material consideration in the determination of the appeal. Nor does the Lease Proposal satisfy the requirements of Reg. 122. Notwithstanding the inclusion of the Buildings within the red-line boundary for the Scheme, the Lease Proposal is not “directly related” to the development (above). Even if the contrary conclusion is reached, there is no evidence before the inquiry on which it can be said that the Lease Proposal is "fairly and reasonably" related "in scale and kind" to the development. Moreover the Lease Proposal can only be said to be "necessary" to make the Scheme acceptable in planning terms if it can lawfully be taken into account (as a public benefit) under para. 196 of the NPPF. That cannot happen if it is not a material consideration.

187. As explained above, the Council is supportive of the Cinema Museum and is keen to facilitate its retention at Masters House in order to secure the long term sustainable use of the building and as a key cultural venue in the borough. Nevertheless, however desirable that outcome might be, the Lease Proposal cannot lawfully be taken into account as a material planning consideration in circumstances where it has not been shown that the proposal is sufficiently closely connected to the change in the character of the use of the Site that is proposed here. Nor can it lawfully be taken into account as a reason for granting planning permission when the requirements of Reg. 122 are not satisfied.

188. If (contrary to all of the above) the Lease Proposal can lawfully be taken into account as a public benefit of the Scheme, it should be given limited weight in the overall planning balance. Even if planning permission is granted and the unilateral undertaking takes effect, it will not place the Cinema Museum under any obligation to accept the lease offer. Only very limited information is before the inquiry as regards the terms of the lease that is to be offered: there are no details as to break clauses or clauses authorising the Cinema Museum to sub-let. The Appellant has not explained to what extent (if at all) the £1m premium represents a material discount off a “commercial” premium.

189. It is for the Appellant to put before the inquiry the analysis that is necessary for it to prove its case. The Council explained clearly in the officer report (i) that its view was that insufficient evidence had been provided in respect of the Lease Proposal;[91] and (ii) that even if the Lease Proposal were to be accepted as a public benefit of the Scheme, the Council considered that it should be given limited weight.[92] The Appellant had ample opportunity to respond to those points.

190. It should also be noted that the Cinema Museum has previously survived a change of ownership of the Site (i.e. its purchase by the Appellant), despite being on a one-year rolling lease. The Appellant itself has not sought to evict the Cinema Museum; indeed, it has accommodated the continued presence of the latter on the Site within its redevelopment proposals. It cannot be assumed that if the Site were sold, the approach taken by any subsequent owner would necessarily be any different.

191. The Council notes finally on this point that Dr Miele contends only for "modest" weight to be given to the Lease Proposal.[93]

192. Mr Considine has very significantly overstated the public benefits of the Scheme in his proof of evidence. In reality the position is as follows:

Use of previously developed land:	Substantial weight
Provision of market housing:	Significant weight
Provision of affordable housing:	Significant weight
Economic benefits:	Little – if any - weight
Environmental benefits:	Limited weight

193. These public benefits do not outweigh the heritage harm that would result from the Scheme, according the requisite great weight to the latter. The Council makes 2 final observations on this point:

193.1. First, the GLA in its Stage 1 Report similarly concluded that "[f]urther public benefits should be demonstrated to outweigh the harm caused to the heritage assets". As has already been explained, those public benefits have not been provided (above).

[91] CD 5-2, para. 11.7.
[92] *Ibid.*
[93] Para. 7.43 of his proof of evidence.

Furthermore, the GLA in reaching its conclusion failed to appreciate that the Lease Proposal was required to be left out of account. As Mr Considine accepted in cross-examination, if the Lease Proposal had been left out of account entirely by the GLA, the balance struck by the latter in the Stage 1 Report would have been even further away from a conclusion that planning permission should be granted.

193.2. Secondly, the Appellant's analysis under para. 196 of the NPPF is predicated on Dr Miele's conclusion that only 3 designated heritage assets would experience less than substantial harm to their significance. Dr Miele accepted in cross-examination that the extent of public benefits required to countervail heritage harm under para. 196 of the NPPF increases in correspondence with the number of assets that will experience harm to their significance. Therefore if the Council is correct to contend that more than 3 assets would be harmed, the public benefit "threshold" will be higher than that assumed by the Appellant to be necessary.

194. Even if (contrary to the Council's case) the public benefits of the Scheme do outweigh the heritage harm considered alone, the other harms identified by the Council must also be taken into account in drawing the overall planning balance, namely: (i) the harm resulting from the non-policy-compliant housing unit mix; (ii) the harm in terms of design and townscape; (iii) the harm to the daylight and sunlight amenity of neighbouring residents; (iv) the shortcomings of the Scheme as regards the amenity of future residents, in terms of privacy/overlooking and daylight; and (v) the harm resulting from the inadequate quality of the communal amenity space and playspace. Each of those harms should be given substantial weight in the overall planning balance.[94]

195. When all of the harms that would result from the Scheme are taken into account, they are plainly not outweighed by its public benefits. The overall planning balance lies against granting planning permission for the Scheme and the appeal should be dismissed.

Concluding remarks

196. In cross-examination of Mr Holt the Appellant took issue with para. 39 of the Council's opening statement, which states that "the Appellant has failed adequately to acknowledge […] that this

[94] Rebuttal of Mr Holt at para. 2.10.

appeal falls to be determined in a plan-led system, where the quantum of residential development that can appropriately be brought forward in the Council's area is determined by the development plan".

197. The Council stands by that statement, which is correct for the reasons explained by Mr Holt.[95] The statement does not say that the development plan imposes a "ceiling" on housing numbers; such a stance would be incorrect and has not been taken by the Council anywhere in its evidence. The Council well understands that its housing requirement is minimum. The appropriate "maximum" – optimisation of land - is however determined by the development plan, through the application of its policies on matters such as housing unit mix, design, heritage assets, daylight and sunlight and amenity space.

198. The Appellant's case is marked by hyperbole. Mr Holt's evidence alone was described as "extraordinary", "perverse", "outrageous" and as being "exactly why" Lambeth remained in the "most deprived" category. It is none of those things. The descriptions deployed are unjustified and, frankly, unfair.

199. The Council does not need to resort to such exaggeration in order to make good its case. Contrary to the assertion made by the Appellant in its opening speech, it is not "obsessed with saying no" and its DNA is not "one of negativity, refusal and obfuscation". By way of example reference can be made both to the Council's recent approval of the Brixton scheme (above) and also to its track-record in exceeding its housing target (summarised above).

200. The NPPF[96] seeks to ensure that sufficient land of the right type is available in the right places and at the right time. Far from being (accurately) described as "fabulous", "fantastic", "brilliant" or "superb", the Scheme would be in the wrong place, at the wrong time. The change in context that has occurred over at Elephant and Castle has not extended to the Site. None of the evidence that is before the inquiry suggests that it is likely to do so in the near future (or indeed at any point thereafter).

201. Fundamentally the Scheme is simply the wrong scheme. The most significant benefit that it would secure is housing provision. However the units that the Scheme would provide are not even

[95] Cross-examination.
[96] Para. 8.

the units that Lambeth needs, failing to comply with its housing mix policy – and that is before any other considerations such as impact on heritage assets and on daylight and sunlight are taken into account. The analysis is, of course, not as simple as "London needs more housing and this is a residential proposal". The fundamental premise in support of the Scheme – that it is a residential scheme responding to a need for residential development – does not get off the ground in circumstances where even the Appellant itself acknowledges that the Scheme fails to comply with housing policy.

202. For all of the above reasons, the Inspector is respectfully requested to refuse planning permission for the Scheme.

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7 December 2020