



Neutral Citation Number: [2021] EWHC 3387 (Admin)

Case No: CO/1683/2021

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 15 December 2021

**Before :**

**MRS JUSTICE LANG DBE**

**Between :**

**THE QUEEN**

**Claimant**

**on the application of**

**LONDON BOROUGH OF HILLINGDON**

**- and -**

**MAYOR OF LONDON**

**(1) INLAND LIMITED**

**(2) CLOVE HOLDINGS LIMITED**

**(3) MB HILLINGDON LIMITED**

**Defendant**  
**Interested Parties**

**Craig Howell Williams QC and Michael Brett** (instructed by **Legal Services**) for the  
**Claimant**

**Douglas Edwards QC and Isabella Tafur** (instructed by **Transport for London Legal**) for  
the **Defendant**

**Russell Harris QC** (instructed by **Pinsent Masons LLP**) for the **First and Third Interested  
Parties**

The **Second Interested Party** did not appear and was not represented

Hearing dates: 23 & 24 November 2021

**Approved Judgment**

**Mrs Justice Lang :**

1. The Claimant seeks judicial review of the decision made by the Defendant, on 30 March 2021, to grant planning permission for the construction of a mixed-used development, comprising buildings up to 11 storeys in height, at the site of the former Master Brewer Motel, Freezeland Way, Hillingdon UB10 9PQ (“the Site”).
2. The Claimant is the local planning authority for the area in which the Site is situated. It identified that the development proposal was of potential strategic importance. On 19 February 2020, it resolved to refuse planning permission for the development. On 16 March 2020, the Defendant directed that he would act as the local planning authority, pursuant to section 2A of the Town and Country Planning Act 1990 (“TCPA 1990”) and article 7 of the Town and Country Planning (Mayor of London) 2008 Order (“the 2008 Order”).
3. The Third Interested Party (“IP3”) is the owner of the Site and was the applicant for planning permission. The First Interested Party (“IP1”) is a group company of IP3, and has the benefit of a legal charge against the Site. The Second Interested Party (“IP2”) also has the benefit of a legal charge against the Site.

**Grounds of challenge**

4. The Claimant’s grounds may be summarised as follows:
  - i) The Defendant misinterpreted Policy D9 of the London Plan 2021 by concluding that, notwithstanding conflict with Part B of that policy, tall buildings were to be assessed for policy compliance against the criteria in Part C.
  - ii) The Defendant erred in failing to take into account a material consideration, namely, the Claimant’s submissions and accompanying expert evidence as to air quality.
  - iii) The Defendant acted unlawfully and in a manner which was procedurally unfair in that he failed to formally re-consult the Claimant or hold a hearing, prior to his re-determination of the application, following the adoption of the London Plan 2021.

**Planning history**

5. The Site comprises an area of some 2.48ha which formerly accommodated a public house/motel which has been demolished. It lies at the junction of Freezeland Way (which bounds the Site to the south) and Long Lane (which bounds the Site to the west), whilst the A40 forms the northern boundary of the Site. A parcel of Metropolitan Green Belt abuts the Site to the east. On the southern side of Freezeland Way and south of the junction lies the Hillingdon local centre, characterised by two storey residential and two/three storey retail premises.
6. The Site forms part of site allocation Policy SA14 in the London Borough of Hillingdon Local Plan: Part 2 - Site Allocations and Designations (2020) (“LP Allocations”).

7. The Site lies within an Air Quality Management Area declared by the Claimant in September 2003. It also falls within an air quality focus area (“AQFA”), the A4/Long Lane AQFA. AQFAs are locations that exceed the UK National Air Quality Strategy objectives and EU annual mean limit value for nitrogen dioxide (“NO<sub>2</sub>”). They are also locations with high human exposure.

### **Application for planning permission**

8. On 10 October 2019 IP3 made an application for planning permission in the following terms:

“Construction of a residential-led, mixed-use development comprising buildings of between 2 and 11 storeys containing 514 units (Use Class C2); flexible commercial units (Use Class A1/A1/A3/D1); associated car (165 spaces) and cycle parking spaces; refuse and bicycle stores; hard and soft landscaping including a new central space, greenspaces, new pedestrian links; biodiversity enhancement; associated highways infrastructure; plant; and other associated development”.

9. In support of the application, reports were submitted by Create Consulting (“Create”) on air quality issues, dated September 2019 and October 2019.
10. Given the scale of the proposed development, the application was referred by the Claimant to the Defendant under article 4 of the 2008 Order. The Defendant provided a response under article 4(2) of the 2008 Order on 2 December 2019 (“Stage 1 Report”) which *inter alia* made clear that improving air quality was a “core priority” for the Defendant, particularly in AQFAs. Given the proximity of the Site to the A40, the Site was said to be constrained in air quality terms and the Claimant was instructed to “secure appropriate air quality mitigation measures as part of any future planning permission”.

### **Claimant’s consideration of Application**

11. The Claimant’s officers prepared a report (“the OR”) to advise its Major Applications Committee, recommending that the application be refused. The OR considered that, although the principle of a residential-led development was acceptable on the Site, the application conflicted with a number of development plan policies, did not accord with the statutory development plan taken as a whole and ought not to be approved.
12. The statutory development plan at that time consisted of the “London Borough of Hillingdon Local Plan Part One – Strategic Policies” (November 2012) (“LP Part 1”); LP Allocations; “London Borough of Hillingdon Local Plan: Part 2 – Development Management Policies” (2020) (“LP DMP”) and the London Plan (2016).
13. The Defendant had also published an “Intend to Publish” (“ITP”) version of the draft London Plan on 19 December 2019.
14. The OR proposed eight reasons for refusal, of which the following are most relevant:

“1. Non Standard reason for refusal Design

The development, by virtue of its overall scale, bulk of built development and associated infrastructure works, height, density, site coverage and lack of landscaping and screening, is considered to constitute an over-development of the site, resulting in an unduly intrusive, visually prominent and incongruous form of development, which would fail to respect the established character of the North Hillingdon Local Centre or compliment the visual amenities of the street scene and openness and visual amenity of the Green Belt, the wider open context and would mar the skyline, contrary to Policies BE1 and EM2 of the Hillingdon Local Plan: Part One - Strategic Policies (Nov 2012), Policies DMHB 10, DMHB 11, DMHB 12, DMHB 14, DMHB 17, DMEI 6 of the Local Plan: Part 2 - Development Management Policies (2020); Policy SA 14 (Master Brewer and Hillingdon Circus) of the Local Plan: Part Two - Site Allocations and Designations (2020), Policies 7.4, 7.6, 7.7 of the London Plan (2016), Policies D1, D3, D4, D8 and D9 of the London Plan (Intend to Publish version 2019) and the NPPF (2019).

.....

5. Non Standard reason for refusal Air Quality

The submitted Air Quality Assessments have failed to provide sufficient information regarding Air Quality, moreover the information submitted is not deemed to demonstrate the proposals are air quality neutral and given that the site is within an Air Quality Focus Area, the development could add to current exceedances in this focus area. The development is contrary to Policy DMEI 14 (Air quality) of the Local Plan: Part 2 - Development Management Polices (2020), Policy EM8 of the Local Plan Part 1 (2012), Policy 7.14 (Improving Air Quality) of the London Plan (2016), Policy SI 1 of the draft London Plan - Intend to Publish (December 2019) and the NPPF (February 2019).”

15. Whilst the surrounding area is dominated by two-three storey buildings, the tallest element of the proposed development stands at eleven storeys. LP DMP paragraph 5.32 identifies that “high buildings and structures” are those that “are substantially taller than their surroundings, causing a significant change to the skyline”. Policy DMHB 10 applies to proposals for such buildings. The policy provides in particular that:

“Any proposal for a high building or structure will be required to respond to the local context and satisfy the criteria listed below.

It should:

i) be located in Uxbridge or Hayes town centres or an area identified by the Borough as appropriate for such buildings;

ii) be located in an area of high public transport accessibility and be fully accessible for all users; [and]

iii) be of a height, form, massing and footprint proportionate to its location and sensitive to adjacent buildings and the wider townscape context. Consideration should be given to its integration with the local street network, its relationship with public and private open spaces and its impact on local views;”

16. Policy DMHB 10 built, as a development management policy, on the strategic-level policy in Policy BE1 paragraph 11 of LP Part 1. This required that:

“Appropriate locations for tall buildings will be defined on a Character Study and may include parts of Uxbridge and Hayes subject to considering the Obstacle Limitation Surfaces for Heathrow Airport. Outside of Uxbridge and Hayes town centres, tall buildings will not be supported. The height of all buildings should be based upon an understanding of the local character and be appropriate to the positive qualities of the surrounding townscape.”

17. In accordance with Policy BE1 LP Part 1, the Claimant undertook a detailed townscape character assessment which formed the evidential basis for Policy DMHB 10 LP DMP and its identification of Hayes and Uxbridge town centres as “appropriate for tall buildings”. The Claimant has not identified any other such area.

18. The OR assessed the development against these development plan policies and identified that it was in conflict with them in that the tall buildings:

“would not be located in Uxbridge or Hayes town centres or an area identified by the Borough as appropriate for a high building and would be located in an area with a low PTAL (Level 2-3) and would also be of a height, form, massing and footprint which is considered to be out of proportion to its location, adjacent buildings and the wider townscape context.”

19. Officers therefore advised that allowing tall buildings in this location would be contrary to this policy, and also to London Plan 2016 Policy 7.7 and ITP draft London Plan Policy D9.

20. In respect of air quality, the OR referred to the advice of the Claimant’s air quality consultee, and accepted its recommendations that IP3 had not demonstrated that the development would be air quality neutral; that the existing exceedances in the AQFA would not be worsened; and that proposed mitigation would in fact reduce emissions nor to what extent. The report concluded that the development would be contrary to LP DMP Policy DMEI 14.

21. The Committee considered the application at a meeting on 19 February 2020. The recommendation of the OR was unanimously agreed. The minutes of the meeting recorded a further offer from IP3 to undertake air quality “mitigation in terms of damages contribution”, and stated:

“The Committee supported the officer’s recommendation and welcomed refusal reason given on air quality. It was emphasised that air quality could not be compromised. Concerns were raised regarding the size of the development, air pollution, and, overall, Members considered that the application was out of character with the local area.”

22. The Claimant therefore resolved to refer the application to the Defendant, under Article 5 of the 2008 Order, with a statement that it proposed to refuse to grant planning permission.

### **Defendant’s consideration of the application**

23. The Defendant in a letter dated 16 March 2020, accompanied by a report, (“Stage 2 Report”) gave a direction under article 5(1)(b)(i) of the 2008 Order that he would act as local planning authority and determine the application.
24. After the Defendant took over the determination of the application, IP3 made some amendments to the application, and provided further material, in particular, further reports from Create dated April 2020 and June 2020. A Transport Assessment dated July 2020 was also produced.
25. Prior to the hearing, officers of the Greater London Authority (“GLA”) produced a report advising the Defendant to grant the application (“the Hearing Report”).
26. The Hearing Report began with a “Recommendation Summary” in which the Defendant was invited to grant conditional planning permission for the application for the reasons set out in the “reasons for approval” section of the report. The “reasons for approval” section of the Hearing Report set out in summary form why officers had concluded that the proposal was considered to be acceptable in planning terms and to accord with the development plan (paragraph 2(ix)).
27. On the issue of tall buildings policy, the reason for approval at paragraph 2(iii) stated “the tall buildings are acceptable despite not meeting the locational requirements of policy.” It went on to find that the application generally accords with London Plan Policy 7.7, ITP draft London Plan Policy D9 (partial conflict owing to tall building location) and LP DMP Policy DMHB10 (partial conflict owing to tall building location).
28. The Hearing Report considered Policy 7.7 London Plan 2016, which provided:

“B Applications for tall or large buildings should include an urban design analysis that demonstrates the proposal is part of a strategy that will meet the criteria below. This is particularly

important if the site is not identified as a location for tall or large buildings in the borough's LDF.

C Tall and large buildings should:

a generally be limited to sites in the Central Activity Zone, opportunity areas, areas of intensification or town centres that have good access to public transport

b only be considered in areas whose character would not be affected adversely by the scale, mass or bulk of a tall or large building..."

29. At paragraph 218, the Hearing Report stated:

"GLA officers recognise that the proposed tall buildings are not in a location where they are supported in principle by Local Plan Policy DMHB 10 and that this is a policy conflict with parts (i) and (ii) of that policy, which state that tall buildings should be located within Uxbridge and Hayes town centres and areas of high public transport accessibility respectively. This is addressed in the 'planning balance' section of this report. They do however comply with the locational requirements of London Plan Policy 7.7, being in a town centre with good access to public transport ... The principle of tall buildings in this location would also conflict with the locational component of Intend to Publish London Plan Policy D9 (Part B), which states that Local Plans should identify suitable locations for tall buildings. This does not form part of the statutory development plan but is a material consideration in the determination of this application."

30. At paragraph 230, the Hearing Report assessed the other criteria in Policy DMHB 10; and at paragraph 231 addressed the relevant criteria in Policy 7.7 London Plan 2016 and Policy D9 ITP London Plan.

31. At paragraph 233, the Hearing Report concluded in respect of urban design that:

"In conclusion, the scheme is considered to be in conflict with part of Local Plan Policy DMHB 10 and Intend to Publish London Plan Policy D9 in respect of the principle of tall buildings in this location. This is addressed in the 'planning balance' section of this report. The proposal is otherwise considered to be compliant with the requirements of the London Plan Policy 7.7, Policies D9 [...] of the Mayor's Intend to Publish London Plan ...."

32. In respect of air quality issues, the reason for approval at paragraph 2(iv) stated that:

"Residents and users of the scheme would be sufficiently protected from air quality impacts arising from surrounding roads... The applicant's Air Quality Assessment has been

reviewed by GLA officers and is supported. The development would be air quality neutral, subject to the mitigation measures secured...”

33. The reasoning underpinning this reason for approval was set out at paragraphs 206-213 of the Hearing Report. At paragraph 210, the Hearing Report reported IP3’s evidence that:

“In terms of impact on future residents of the development, the Air Quality Assessment demonstrates that the only exceedance of the Air Quality Objective (AQO) limit for nitrogen dioxide is at the outer boundary of the site (40.52ug/m<sup>3</sup>), whilst at the nearest residential receptor it would be 35.25ug/m<sup>3</sup>. For particulate matter PM10, this would be an annual mean of 16.73-18.68ug/m<sup>3</sup>, so also within AQO limits. As such the Air Quality Assessment concludes that the air quality conditions do not constrain residential development and doesn’t recommend mitigation.”

34. At paragraph 211, the Hearing Report stated:

“The GLA’s air quality experts have confirmed that any potential adverse impact would be limited to one receptor on Long Lane north of the A40. The possible slight adverse impact is unlikely and any possible impact would not be significant. Overall the air quality impacts of the proposed development would not impact on the integrity of the Air Quality Focus Area.”

35. Under the heading “Conclusion and planning balance”, the Hearing Report concluded, at paragraphs 362-370, that the development was in accordance with the development plan. It identified two development plan policies “that are not fully complied with” (DMHB 10 and DMHB 18 LP DMP) but concluded that “overall, the proposal accords” with the development plan. It said:

“a conflict with two development plan policies does not necessarily mean that there is an overall conflict with the development plan as a whole as development plan policies can pull in different directions. GLA officers have considered the whole of the development plan and consider that, overall, the proposal accords with it. This report sets out all relevant material considerations, none of which, individually or cumulatively, are considered to warrant refusal of planning permission”

The material considerations considered in the report included the conflict with policy D9 of the ITP London Plan.

36. The Claimant responded to the Hearing Report, and the issues it raised, in written representations, dated 28 August 2020. These maintained that the analysis set out in the OR was correct. At the same time as submitting the written representations, the Claimant provided the Defendant with an “Air Quality Assessment Peer Review Report” prepared by Air Quality Experts Global Ltd (“the AQE Report”), dated August

2020, in support of the Claimant's contentions that the development was still unacceptable in air quality terms.

37. The AQE Report found a number of significant problems with Create's additional air quality evidence, for example, that it:
  - i) underestimated the baseline vehicle movements near the Site (paragraph 3.2.5);
  - ii) failed properly to identify worst case receptors for exposure to emissions within the Site and along Hercies Road (paragraph 3.3.1), and along Long Lane South and Western Avenue (paragraph 3.3.5);
  - iii) failed to report on new residents' exposure levels, excluding totally new receptors within the Site (paragraph 3.5.4) and that if this had been done, it would show that emissions concentration on the site for future residents would be unacceptably high in worst-case locations (paragraphs 3.5.5-3.5.6);
  - iv) failed to differentiate between traffic emissions generated by residential uses and flexible retail (B1 and A1) uses on the Site. When this is done it is clear that the traffic emissions from B1 uses on the site are not neutral, and require mitigation measures (paragraphs 3.6.1-3.6.8).
38. The Defendant's officers then produced an Addendum Report, dated 3 September 2020 on the day of the hearing, which noted:

“In addition to this the Council has provided a technical response on air quality produced by AQE Global (August 2020). It should be noted that the Council has requested (should the GLA be minded to approve the scheme) a contribution of £218,139 to be paid to Hillingdon to deliver its air quality local action plan and or implement specific measures on/along the road network affected by the proposals that reduce vehicle emissions and or reduce human exposure to pollution levels. GLA officers note that this contribution has not been agreed and is subject to further discussion.”
39. The Addendum Hearing Report did not address the substance of the criticisms in the AQE Report.
40. The Defendant held the representation hearing on 3 September 2020. A transcript of the hearing has been provided.
41. At the hearing, GLA officers explained that the application site was within an air quality focus area; that the Claimant's draft decision included a reason related to air quality; that IP1 and 3 had worked closely with GLA officers since then to provide additional information and clarification regarding air quality impacts; that residential units and play spaces had been positioned to minimise exposure to poor air quality; that exceedances in the air quality objective limit for NO<sub>2</sub> were at the outer boundary of the site and that there would be no exceedances in respect of particulate matter.

42. Mr James Rodger, Deputy Director of Planning and Regeneration, appeared on behalf of the Claimant and made oral representations. He objected to the height of the proposed development, which he contended was contrary to Policy DMHB 10. He indicated that a section 106 contribution towards air quality mitigation was still required. A number of residents and local residents' associations made representations to the Defendant at the hearing raising concerns about *inter alia* air quality and the scale of the development.
43. At the end of the hearing, the Defendant announced that he accepted the officers' recommendation to grant planning permission. He said:

“... Can I begin by thanking everyone who has attended today and for the contributions made in particular by the local residents, the objectors, the applicant and the council? This has ensured that I am as informed as possible to make this decision.

I will begin by explaining the wider context to my consideration, which is that London is facing a housing crisis and we urgently need more housing. Particularly, genuinely affordable homes. Assessed need showed that London needs at least 66,000 new homes a year until 2030, 3,000 of which must be affordable in order to address the existing shortfall in housing and accommodate London's projected population growth.

I have made fixing the housing crisis one of my top priorities and achieving this is dependent on the approval of well-designed schemes with good levels of low-cost rented and other genuinely affordable housing. This needs to be understood not just by the government, but at local council level too. We must all ensure that we use appropriate opportunities that are available to us to build more affordable housing, particularly lower-cost rental housing.

Based on the latest figures from the London Development Database, Hillingdon Borough still has a long way to go to deliver the affordable housing targets as set out in the London Plan. The scheme that I am considering would provide 121 new London affordable rent homes and 61 shared ownership homes to people who desperately need them in Hillingdon, all of which would be genuinely affordable.

This site is an under-utilised area of brownfield land, close to a London Underground station. It is exactly the kind of site we need to intensify if we are to deliver the homes Londoners need whilst protecting the Green Belt. The council's own policy allocates this site for residential development.

As was clear to me during my site visit, the site is relatively isolated from its surroundings. The plans offer new public routes through the site, connecting to the [area] and significant areas of new and improved green space, which would be of considerable

benefit to local people. It would also provide new commercial uses and improve connections, which would benefit the local centre.

I have carefully considered the visual impact of the development. I agree with the GAL [*sic*] and council officers that there would be less than substantial harm to heritage assets, which would be out-weighted by the benefits of the scheme.

Whilst the scale and prominence would be apparent in some local views, this would not in my view be a harmful impact given the approach the massing and high-quality architecture, and would not harm the visual openness of the surrounding Green Belt. I recognise that the site is not within a location designated to tall buildings. But overall, I consider the height and massing to be acceptable.

Air quality is of course a very important issue for me. I have carefully considered the technical evidence made available to me and my view is that the barrier block form of development will ensure that future residents will not be disadvantaged, subject to the mitigation measures recommended.

Overall, the scheme will provide high-quality housing and external amenity, despite the shortfall against local policy. I have heard the concerns raised about the lack of car parking and the increase in traffic congestion. In my view, when considering development proposals, the main way to reduce congestion is to discourage the use of the private car.

Approving well-designed, car-light developments in accessible locations like this is one of the ways to achieve this objective. As well of course as other objectives around environment and health, I am satisfied that there are adequate measures secured to mitigate overspill car parking.

For these reasons I agree with the GLA planning Officer's recommendation and grant planning permission. Can I thank you all very much for your time this afternoon and today? Thank you. Stay safe."

44. In October 2020, Create sent to the Defendant a report responding to the comments and criticisms made by AQE in its report of 28 August 2020. This report was not sent to the Claimant.

#### **Post-hearing developments in planning policy**

45. On 10 December 2020, the Secretary of State for Housing, Communities and Local Government issued a set of directions, under section 337 of the Greater London

Authority Act 1999, requiring amendments to the ITP London Plan and in particular to Policy D9.

46. The Secretary of State's covering letter, dated 10 December 2020, said as follows:

“..... I am issuing a new Direction regarding Policy D9 (Tall Buildings). There is clearly a place for tall buildings in London, especially where there are existing clusters. However, there are some areas where tall buildings don't reflect the local character. I believe boroughs should be empowered to choose where tall buildings are built within their communities. Your draft policy goes some way to dealing with this concern. In my view we should go further and I am issuing a further Direction to strengthen the policy to ensure such developments are only brought forward in appropriate and clearly defined areas, as determined by the boroughs whilst still enabling gentle density across London. I am sure that you share my concern about such proposals and will make the required change which will ensure tall buildings do not come forward in inappropriate areas of the capital.”

47. DR12 set out a “Direction Overview” as follows:

“The draft London Plan includes a policy for tall buildings but this could allow isolated tall buildings outside designated areas for tall buildings and could enable boroughs to define tall buildings as lower than 7 storeys, thus thwarting proposals for gentle density.

This Direction is designed to ensure that there is clear policy against tall buildings outside any areas that boroughs determine are appropriate for tall buildings, whilst ensuring that the concept of gentle density is embodied London wide.

It retains the key role for boroughs to determine where may be appropriate for tall buildings and what the definition of tall buildings are, so that it is suitable for that Borough.”

48. The ‘statement of reasons’ for DR12 stated *inter alia*:

“.....The modification to policy D9 provides clear justification to avoid forms of development which are often considered to be out of character, whilst encouraging gentle density across London.”

49. Further to these directions, the Defendant published a further version of the draft London Plan, the ‘Publication London Plan’ on 21 December 2020 incorporating the amendments to Policy D9, which in consequence read as follows:

“Definition

A Based on local context, Development Plans should define what is considered a tall building for specific localities, the height of which will vary between and within different parts of London but should not be less than 6 storeys or 18 metres measured from ground to the floor level of the uppermost storey.

Locations

B

1) Boroughs should determine if there are locations where tall buildings may be an appropriate form of development, subject to meeting the other requirements of the Plan. This process should include engagement with neighbouring boroughs that may be affected by tall building developments in identified locations.

2) Any such locations and appropriate tall building heights should be identified on maps in Development Plans.

3) Tall buildings should only be developed in locations that are identified as suitable in Development Plans.

Impacts

C Development proposals should address the following impacts:

1) visual impacts [...]

2) functional impact [...]

3) environmental impact [...]"

50. The text underlined above was added pursuant to the Secretary of State's direction, DR12.
51. On 2 March 2021, the London Plan 2021 was adopted and published as the spatial development strategy for London, replacing the London Plan 2016 and it became part of the statutory development plan for the application.

### **Reconsideration of Application**

52. In the light of these significant changes in relevant planning policy, the Claimant wrote to the Defendant on 26 February 2021 and 4 March 2021, requesting that he reconsider the application.
53. On 5 March 2021, the Defendant wrote to the Claimant confirming that he intended to reconsider the application in the light of the changes in the policy "and any representations received" since the hearing.
54. On 9 March 2021, the Claimant wrote to the Defendant requesting him to hold a further representation hearing. By a letter dated 23 March 2021, the Defendant declined to hold

a further hearing, and stated that the application would be redetermined on an unspecified date on or after 29 March 2021. In the light of this indication, the Claimant's officers hurried to put together urgent representations to submit to the Defendant, which were submitted under cover of a letter from the Claimant dated 26 March 2021.

55. No further reports or recommendations were published by the GLA officers, meaning that the Claimant could not comment on the approach proposed by them.
56. The application was reconsidered and redetermined on 29 March 2021, and the planning permission was issued on 30 March 2021. The permission decision was published on the Defendant's website alongside two further reports from the GLA officers: an "Update Report" dated 29 March 2021 and an "Update Report Addendum"
57. In respect of tall buildings policy, the Update Report identified that Policy D9 of the London Plan 2021 should now be given full statutory weight (paragraph 21) and that the Secretary of State's direction "primarily sought to ensure that tall buildings are only brought forward in appropriate and clearly defined areas as determined by the boroughs" (paragraph 13). It went on to identify that as a consequence "there is now a further element of conflict with the development plan in that the scheme does not fully accord with new London Plan Policy D9". Nevertheless, the Update Report gave significant weight to the fact that the proposals would however comply with the other criteria in Policy D9 (paragraphs 16 and 22). It advised that a conflict with some development plan policies does not necessarily mean that there is an overall conflict with the development plan as a whole, as policies can pull in different directions (paragraph 17). The Update Report identified additional conflicts with the London Plan and Local Plan policies in respect of heritage, but concluded that the less than substantial harm was outweighed by the public benefits of the development. At paragraph 23, the Update Report concluded that "overall, the proposal accords" with the development plan. None of the material considerations, as set out in the Hearing Report and the Update Report, warranted refusal of planning permission.
58. The Update Report said at paragraph 24:

"The scheme provides a high standard of residential accommodation .... The new public spaces and routes would be of high quality. Given the circumstances of this site, the scale and massing is considered acceptable within this accessible local centre, marks the location of the station and would have an acceptable visual impact."
59. The Claimant's further evidence on air quality was not mentioned in the Update Report, but it was briefly addressed in the Update Report Addendum. It noted the receipt of the Urgent Representation and the AQE Report and commented as follows:

"...the Council raises concerns that its Air Quality Peer Review was not considered by GLA officers because it is not mentioned in the Representation Hearing Report. This is because this information was submitted to the GLA by the Council on 28 August 2020 along with its pre-hearing representation, more than one working day after the Representation Hearing Report

was published. The Council's pre-hearing representation and Air Quality Peer Review was addressed in the addendum report published on the day of the hearing.

GLA officers consider the application to be in accordance with planning policy regarding air quality and as such the 'damage cost' payment requested by the Council is not justified...."

## **Legal framework**

### **Judicial review**

60. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. A legal challenge is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC 74 (Admin).

### **The development plan and material considerations**

61. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act ("PCPA 2004") provides:

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

62. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

"Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters....

By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission..... By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should

be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted....

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

“What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations.”

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

.....

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will

have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.”

63. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17] (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed).

64. Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said, at [18], that development plans should be “interpreted objectively in accordance with the language used, read in its proper context”. They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.

65. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

“That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann).”

66. In *BDW Trading Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493, Lindblom LJ summarised the principles to be applied, at [20]-[21]:

“20. Without seeking to be exhaustive, I think there are five things one can fairly say in the light of the authorities.

21. First, the section 38(6) duty is a duty to make a decision (or “determination”) by giving the development plan priority, but

weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1458D to p.1459A, and p.1459D-G). Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1459D-F, the judgments of Lord Reed and Lord Hope in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, respectively at paragraphs 19 and 34, and the judgment of Sullivan J., as he then was, in *R. v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] J.P.L. 470, at paragraphs 48 to 50). Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides “whether the development plan should or should not be accorded its statutory priority”, and secondly, “if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration” (see Lord Clyde's speech in *City of Edinburgh Council*, at p.1459H to p.1460D). Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole (see the judgment of Richards L.J. in *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, at paragraph 28, and the judgment of Patterson J. in *Tiviot Way Investments Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at paragraphs 27 to 36). And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance (see the judgment of Richards L.J. in *Hampton Bishop Parish Council*, at paragraph 30).”

67. In *Gladman v Canterbury City Council v Secretary of State* [2019] EWCA Civ 669, Lindblom LJ set out the general principles to be applied at [21], and added at [22]:

“22 If the relevant policies of the plan have been properly understood in the making of the decision, the application of those policies is a matter for the decision-maker, whose reasonable exercise of planning judgment on the relevant considerations the court will not disturb: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1005] 1 WLR 759, 780. The interpretation of development plan policy,

however, is ultimately a matter of law for the court. The court does not approach that task with the same linguistic rigour as it applies to the construction of a statute or contract. It must seek to discern from the language used in formulating the plan the sensible meaning of the policies in question, in their full context, and thus their true effect. The context includes the objectives to which the policies are directed, other relevant policies in the plan, and the relevant supporting text. The court will always keep in mind that the creation of development plan policy by a local planning authority is not an end in itself, but a means to the end of coherent and reasonably predictable decision-making, in the public interest (see the judgment of Lord Reed in *Tesco v Dundee City Council*, at paragraphs 18 and 19; the judgment of Lord Gill in *Hopkins Homes*, at paragraphs 72 and 73; the judgment of Richards L.J. in *Ashburton Trading Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 378, at paragraphs 17 and 24; and the judgment of Richards L.J. in *R. (on the application of Cherkley Campaign Ltd.) v Mole Valley District Council* [2014] EWCA Civ 567, at paragraphs 16 and 21).”

68. The requirement to take into account material considerations was recently reviewed by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, in the judgment of the Court delivered jointly by Lord Hodge and Lord Sales:

“116. ... A useful summation of the law was given by Simon Brown LJ in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, 1049, in which he identified three categories of consideration, as follows:

“... [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, ... that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process.”

117. The three categories of consideration were identified by Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

“What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.”

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, “there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] ... would not be in accordance with the intention of the Act.”

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the *Hurst* case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar *Wednesbury* irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).”

69. The duties under section 38(6) TCPA 1990 and section 70 PCPA 2004 continue to bind a decision maker right up until the issuance of a notice granting planning permission. In *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370; [2003] 1 P & CR 19, Jonathan Parker LJ held:

“122. In my judgment, an authority's duty to “have regard to” material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind — albeit that the application was not specifically placed before it for reconsideration.

123. The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.

124. At one extreme, it cannot be a sensible interpretation of section 70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could not* have regard prior to the issue of the decision notice.

125. On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a “material consideration” for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision.”

## Planning officers' reports

70. In light of the Claimant's criticisms of the GLA officers' reports, I have reminded myself of the principles to be applied, as summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

“42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxtou Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's

decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer’s advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer’s advice, the court will not interfere.”

71. The level of detail to be expected in officer reports was considered by Sullivan J. in *R v Mendip DC ex parte Fabre* [2017] PTSR 1112, at 1120B:

“Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer's report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer's report setting out in great detail background material, for example, in respect of local topography, development planning policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much

information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail.”

## **Ground 1**

72. Ground 1 turned on the interpretation of Policy D9 in the London Plan 2021.

### **Claimant’s submission**

73. The Claimant submitted that the ordinary meaning of the words in Policy D9, read as a whole, in the light of its context and objectives, sets out a clear process for the grant of planning permission for tall buildings. It gives primacy to the planning judgment of the local planning authority at the plan-making stage in terms of the definition and location of tall buildings, and does not permit the Defendant to claim any policy support for overriding that judgment when determining an application for planning permission.

74. Mr Howell Williams QC said, at paragraphs 37 to 42 of his skeleton argument:

“37. Turning then to the wording of Policy D9 [SB/E1], the following is apparent:

- a. Policy D9 Part A states that the definition of “what is considered a tall building for specific localities” is a matter for individual boroughs through their local development plan. The only limit on that planning judgment is that the definition of a tall building is subject to a “floor” of 6 storeys or 18 metres. When arriving at this definition, it is implicit that a borough planning authority will need to consider the potential impacts of buildings of different heights in specific localities: that this is the case is supported by paragraph 3.9.3 in the supporting text [CB/E5] which elucidates what is meant by buildings being “tall” by reference to their relative height compared to “their surroundings” and their impact on the skyline.
- b. Policy D9 Part B, paragraph 1 is linked to Part A in so far as in addition to determining what a tall building is in planning policy terms, boroughs are given the sole responsibility for determining “if there are locations where tall buildings may be an appropriate form of development” within their area i.e. in specific localities. Boroughs are not obliged to identify any such locations, nor is there a presumption that at least one area of a borough will be appropriate. The matter is left entirely to the planning judgment of the borough through the development plan process. Moreover, even in areas identified, there is no presumption that tall buildings will be consented, because, as paragraph 3.9.3 explains (building on Policy D9 Part B paragraph 1) “such proposals will still need

to be assessed in the context of other planning policies... to ensure that they are appropriate for their location and do not lead to unacceptable impacts”.

- c. When deciding whether and where tall buildings “may be an appropriate form of development”, boroughs will necessarily have to take into account the impacts of buildings of defined heights or features. This is obviously implicit in the word “appropriate” (referring to the appropriateness of the form of development given the particular characteristic of the locality) and “suitable” (in Policy D9 Part B paragraph 3, referring to the suitability of a particular locality *for tall buildings* given its particular characteristics and the impact of tall building on them). The supporting text at paragraph 3.9.2(1) supports this interpretation (that boroughs necessarily have to take into account impacts of potential development) since it instructs boroughs to identify locations “by assessing potential visual and cumulative impacts”. That impact assessment is intrinsic to appropriateness is also reflected in paragraph 3.9.1 of the supporting text, which recognises that tall buildings can “have detrimental visual, functional and environmental impacts if in inappropriate locations” (underlining added).
- d. Policy D9 Part B paragraph 3 then gives force and meaning to the judgments reached by boroughs under Part A and Part B paragraph 1, by stating in clear terms that tall buildings (as defined in Part A) “should only be developed in locations that are identified as suitable in Development Plans” by boroughs under Part B. In this case it is not in dispute that the only areas identified as suitable for tall buildings in Policy DMHB10 LP DMP are Uxbridge and Hayes town centres, which identification was justified by a Townscape Character Study evidence base.....
- e. Policy D9 Part C .... then requires “development proposals” to satisfactorily address a number of stipulated impacts, grouped into categories (visual, functional, environmental, and cumulative). Some of these impacts are familiar because they include some (visual and cumulative) that boroughs will have already had regard to when determining the heights/localities appropriateness/suitability question. The term “development proposals” does not mean *any* development proposal of *any* type: it has to be read in the context of Policy D9 as a whole, and thus logically in line with Parts A and B which precede it, and the assessment process at local plan level that is contemplated by those two parts (and explained further in the supporting text). Thus the “development proposals” which must address the stipulated impacts can only be understood to mean development

proposals (i) for tall buildings as defined by boroughs under Part A (as explained in paragraph 3.9.3, “this policy applies to tall buildings as defined by the borough”....; and (ii) in locations identified as suitable by boroughs under Part B. Part C of the process for tall building regulation in London requires further examination of the detail of particular proposals that have come forward in compliance with Parts A and B: this is (amongst other things) what paragraph 3.9.3 of the supporting text is referring to when it speaks of “such proposals [i.e. proposals in areas identified as suitable] will still need to be assessed in the context of other planning policies... to ensure that they are appropriate for their location and do not lead to unacceptable impacts”.

- f. There is nothing in the wording or in the supporting text which suggests that the detailed criteria in Policy D9 Part C is to be used to assess the policy compliance of a development proposal that is not a tall building or not in a location identified as suitable. There is nothing that suggests that, through consideration of these “impacts”, a decision-maker is entitled to reopen a borough’s planning judgment on definition/applicability of the policy and or location.
- g. Finally, Policy D9 Part D, which requires the incorporation into tall buildings of publicly-accessible space “if appropriate” naturally applies to tall buildings as defined in Policy Part A, in locations identified in accordance with Part B, and which are acceptable in terms of the criteria set out in Part C. It could not sensibly be suggested that the provision of publicly-accessible space so as to engage Part D could make a development in breach of Parts B and C compliant with Policy D9 taken as a whole.

38. That this is the correct interpretation to give to Policy D9, and in particular to the role of Part C within it, is strongly reinforced having regard to the policy’s “full context” and the “objectives to which the policies are directed”, as required by Gladman.

39. In terms of the objectives to which the policy is directed, these are clear from the wording of the policy: (i) to ensure that boroughs have responsibility for the definition and location of tall buildings within their area; (ii) that tall buildings should only be constructed in areas which boroughs identify as suitable; and (iii) that even in those areas, tall buildings should satisfactorily address their increased potential adverse planning impacts.

40. The wording of Policy D9 is noticeably different from its predecessor in the London Plan 2016, Policy 7.7....., under which the Application was initially assessed in the Hearing Report. That policy did not provide any wording to compare with

the “Definition” and “Locations” parts of Policy D9 and the allocation of responsibility to local planning authorities in those regards but, under the then heading “Planning decisions”, set out a list of criteria in paragraph B and C which applications should meet, which was said to be “particularly important if the site is not identified as a location for tall or large buildings” in the borough development plan. At least two of those criteria, (a) and (b), relate to location. Policy D9 is different, and obviously so – in its wording and in its objectives.

41. Should any further support be required for these new and different objectives, however, the Court can have regard as part of the full context to the Secretary of State’s Direction ..... as did D at Update Report paragraph 13.... DR12 required changes to the wording of D9 “to strengthen the policy to ensure such developments are only brought forward in appropriate and clearly defined areas, as determined by boroughs” ..... and “to ensure that there is a clear policy against tall buildings outside any areas that boroughs determine are appropriate for tall buildings” .....

42. C’s interpretation of Policy D9 as set out above is the only reading which can properly give effect to these objectives: if a development to which the policy applies under Part A is not in a suitable location defined in accordance with Part B, Part C is not relevant to the question of compliance with Policy D9 by virtue of the mandatory wording of Part B paragraph 3, which cannot be ignored.”

75. The Claimant then went on to submit that the Defendant erred in law when, after accepting that the proposed development was not in a location identified as suitable by the Claimant, he nonetheless proceeded to assess the proposal against the detailed criteria in Part C, and gave weight to “partial compliance” with Policy D9 in the planning balance.

### **Conclusions**

76. It was common ground that the interpretation of Policy D9 was a question of law for the Court, and that a development plan policy should be interpreted objectively, in accordance with the natural and ordinary meaning of the words used, in the light of its context and objectives. It should not be interpreted as if it was a contract or statutory provision.
77. In *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2016] 1 WLR 85, Lord Hodge (giving the judgment of the Supreme Court) set out the principles applicable to the use of extrinsic material when interpreting documents. He said:

“33. ....There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford*

*Borough Council, Ex p Shepway District Council [1999] PLCR 12*, per Keene J at pp 19C–20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions [2003] JPL 1048*, per Buxton LJ at para 13 and Arden LJ at para 27. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions.

34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.”

78. I was referred to the judgment of Lindblom J. (as he then was) in *R (Phides Estates (Overseas) Ltd) v Secretary of State for Communities and Local Government [2015] EWHC 827 (Admin)*, at [56]:

“I do not think it is necessary, or appropriate, to resort to other documents to help with the interpretation of Policy SS2. In the first place, the policy is neither obscure nor ambiguous. Secondly, the material on which Mr Edwards seeks to rely is not part of the core strategy. It is all extrinsic – though at least some of the documents constituting the evidence base for the core strategy are mentioned in its policies, text and appendices, and are listed in a table in Appendix 6. Thirdly, as Mr Moules and Mr Brown submit, when the court is faced with having to construe a policy in an adopted plan it cannot be expected to rove through the background documents to the plan's preparation, delving into such of their content as might seem relevant. One would not expect a landowner or a developer or a member of the public to have to do that to gain an understanding of what the local planning authority had had in mind when it framed a

particular policy in the way that it did. Unless there is a particular difficulty in construing a provision in the plan, which can only be resolved by going to another document either incorporated into the plan or explicitly referred to in it, I think one must look only to the contents of the plan itself, read fairly as a whole. To do otherwise would be to neglect what Lord Reed said in paragraph 18 of his judgment in *Tesco Stores Ltd. v Dundee City Council* : that “[the] development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it”, that the plan is “intended to guide the behaviour of developers and planning authorities”, and that “the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained”. In my view, to enlarge the task of construing a policy by requiring a multitude of other documents to be explored in the pursuit of its meaning would be inimical to the interests of clarity, certainty and consistency in the “plan-led system”. As Lewison L.J. said in paragraph 14 of his judgment in *R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9, with which Mummery and Aikens L.JJ. agreed, “this kind of forensic archaeology is inappropriate to the interpretation of a document like a local plan ...”. The “public nature” of such a document is, as he said (at paragraph 15), “of critical importance”. The public are, in principle, entitled to rely on it “as it stands, without having to investigate its provenance and evolution”.”

79. All parties contended that the meaning of Policy D9 was clear and unambiguous, despite the differences in their interpretation of it. In those circumstances, applying the principles set out above, I consider that I ought not to have regard to the letter from the Secretary of State to the Defendant dated 10 December 2020 (paragraph 46 above) as it is not a public document which members of the public could reasonably be expected to access when reading Policy D9. Furthermore, it is of limited value as, taken at its highest, it sets out the Secretary of State’s intentions, whereas the Court must consider the meaning of the words actually used in Policy D9, as amended by DR12, which in my view did not give effect to the expressed intentions in the letter. However, I do consider that it is appropriate to have regard to the ITP draft London Plan Policy D9, which was referred to in the Hearing Report, and the Secretary of State’s Direction which is in the public domain and was referenced in the Update Report, and the introduction to the London Plan 2021. This demonstrates the differences between the ITP draft version of Policy D9, on the basis of which the initial decision to grant planning permission was granted, and the final version of Policy D9, following the Secretary of State’s direction, on the basis of which the reconsideration decision was made.
80. In my judgment, the Claimant’s interpretation of Policy D9 cannot be correct, for the reasons given by the Defendant and IP1 and 3.

81. Read straightforwardly, objectively and as a whole, policy D9:
- i) requires London Boroughs to define tall buildings within their local plans, subject to certain specified guidance (Part A);
  - ii) requires London Boroughs to identify within their local plans suitable locations for tall buildings (Part B);
  - iii) identifies criteria against which the impacts of tall buildings should be assessed (Part C); and
  - iv) makes provision for public access (Part D).

82. There is no wording which indicates that Part A and/or Part B are gateways, or pre-conditions, to Part C. In order to give effect of Mr Howell Williams QC's interpretation, it is necessary to read the words underlined below into the first line of Part C to spell out its true meaning:

“Development proposals in locations that have been identified in development plans under Part B should address the following impacts.”

But if that had been the intention, then words to that effect would have been included within the policy. It would have been a straightforward exercise in drafting. It is significant that the Secretary of State's direction only required the addition of the word “suitable” to Part B(3). It did not add any text which supports or assists the Claimant's interpretation, even though the Secretary of State had the opportunity to do so.

83. In my view, the context is critical to the interpretation. Policy D9 is a planning policy in a development plan. By section 70(2) TCPA 1990 and section 38(6) PCPA 2004, there is a presumption that a determination will be made in accordance with the plan, unless material considerations indicate otherwise. Thus, the decision-maker “will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it”: per Lord Clyde in *City of Edinburgh* at 1459G. Furthermore, the decision-maker must understand the relevant provisions of the plan “recognising that they may sometimes pull in different directions”: per Lindblom LJ in *BDW Trading Ltd* at [21], and extensive authorities there cited in support of that proposition. As Lord Reed explained in *Tesco Stores Ltd v Dundee City Council*, “development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another”.
84. The drafter of Policy D9, and the Defendant who is the maker of the London Plan, must have been aware of these fundamental legal principles, and therefore that it was possible that the policy in paragraph B(3) might not be followed, in any particular determination, if it was outweighed by other policies in the development plan, or by material considerations. It seems likely that policy provision was made for such cases, given the importance of the issue.
85. In considering whether to grant planning permission for a tall building which did not comply with paragraph B(3), because it was not identified in the development plan, it

would surely be sensible, and in accordance with the objectives of Policy D9, for the proposal to be assessed by reference to the potential impacts which are listed in Part C. The Claimant's interpretation leads to the absurd result that a decision-maker in those circumstances is not permitted to have regard to Part C, and must assess the impacts of the proposal in a vacuum.

86. In these circumstances, it is unsurprising that there are at least three decisions, both prior to and since the Defendant's decision in this case, in which the Claimant's planning officers have interpreted Policy D9 in the same way as the Defendant, in considering other tall building proposals in Hillingdon.
87. In this case, the extracts from the officer reports which I have referred to above, explain that the Mayor found that the proposal did not fully accord with Policy D9, because it had not been identified as suitable in the development plan under Part B. Notwithstanding the non-compliance with Part B of Policy D9, the Defendant determined that the proposal accorded with the provisions of the development plan when read as a whole. That was a planning judgment, based on the benefits of the proposal, such as the contribution of much-needed housing, in particular affordable housing, and the suitability of the Site (brownfield and sustainable, with good transport). The Defendant was satisfied, on the advice of the GLA officers, that sufficient protection from air quality impacts would be achieved. The Defendant was entitled to make this judgment, in the exercise of his discretion.
88. For the reasons set out above, Ground 1 does not succeed.

## **Ground 2**

### **Claimant's submission**

89. The Claimant submitted that the Defendant erred in law in failing to take into account a material consideration, namely, the Claimant's consultation response and accompanying expert evidence – the AQE Report – on the issue of air quality, which was submitted on 28 August 2020.

### **Conclusions**

90. On the evidence, I accept the Defendant's submission that it did not fail to take account of the Claimant's evidence on the air quality impacts of the proposed development. Rather, on the advice of GLA officers, the Defendant exercised his planning judgment to conclude that the development would comply with relevant policy in respect of air quality impacts, and that additional mitigation in the form of a "damage cost" payment was not justified. That was a legitimate exercise of planning judgment which discloses no error of law, particularly in circumstances where the Claimant had previously agreed that no such payment was required.
91. In September and October 2019, Create produced their initial air quality assessments.

92. The Claimant refused the application for planning permission on the ground, *inter alia*, that the air quality assessments provide insufficient information and air quality neutrality was not demonstrated.
93. In April and June 2020, Create produced further assessments. They concluded that the proposal would be air quality neutral such that a damage cost payment would not be required.
94. The Defendant's Hearing Report expressly recorded comments made by AQE in respect of air quality, including concerns raised regarding air quality neutrality, and a calculated £294,522 payment to deliver the air quality local action plan (paragraph 79). This was when the application for planning permission was being considered by the Claimant. The Defendant did not receive the August 2020 AQE Report in time to include reference to it in the Hearing Report.
95. The Hearing Report had a section devoted to air quality, which stated, *inter alia*, at paragraph 2(iv):
- “The applicant's Air Quality Assessment has been reviewed by GLA officers, and is supported. The development would be air quality neutral, subject to the mitigation measures secured.”
96. On 28 August 2020, the Claimant provided the Defendant with the AQE Report, together with representations requesting refusal of the application; alternatively an air quality section 106 contribution of £218,139. AQE concluded in its Report that the proposal gave rise to significant air quality constraints, that it would not be air quality neutral and that a damage cost payment would be required.
97. The GLA's Addendum Hearing Report dated 3 September 2020 stated:
- “In addition to this the Council has provided a technical response on air quality produced by AQE Global (August 2020). It should be noted that the Council has requested (should the GLA be minded to approve the scheme) a contribution of £218,139 to be paid to Hillingdon to deliver its air quality local action plan and or implement specific measures on/along the road network affected by the proposals that reduce vehicle emissions and or reduce human exposure to pollution levels. GLA officers note that this contribution has not been agreed and is subject to further discussion.”
98. The Addendum Hearing Report did not address the substance of the criticisms in the AQE Report. However, as the AQE Report had only just been sent to the Defendant, and the Addendum Hearing Report was published on the day of the hearing, it seems likely that there had been insufficient time to analyse it in any depth. The Addendum Hearing Report recorded that all representations had been made available to the Mayor.
99. At the hearing on 3 September 2020, the presenting officer expressly drew attention to the Claimant's air quality reason for refusal and he devoted a section of his presentation to the air quality issue.

100. The Claimant's Head of Planning spoke in objection to the application. He explained that the Claimant had "concerns" regarding air quality impacts on future occupiers and that it considered there to be "various technical flaws" in the IPs' air quality assessment. He added: "I would stress that the Claimant considers an air quality section 106 contribution is still required." Residents and residents' association representatives also raised concerns about air quality.
101. The representative for IP1 and 3, Mr Johnson, addressed air quality during his representations. The Mayor expressly stated that the issue of air quality was a concern and he directly questioned Mr Johnson about it.
102. When announcing his decision to grant planning permission, the Mayor said:

"Air quality is of course a very important issue for me. I have carefully considered the technical evidence made available to me and my view is that the barrier block form of development will ensure that future residents will not be disadvantaged, subject to the mitigation measures recommended."
103. On 10 September 2020, the Claimant's solicitor sent the solicitors for IP1 and 3 an updated draft section 106 agreement. In reply, the solicitors took the point that the development had been found to be air quality neutral and so an air quality contribution was not required. They invited the Claimant's solicitor to take officer instructions. In an email dated 13 October 2020, the Claimant's solicitor stated:

"Air Quality – My clients instructions are that we agree for these to be deleted from the [section 106] agreement."
104. In October 2020, Create produced a Technical Note in response to the criticisms in the AQE Report. It was not provided to the Claimant for comment, and I address that issue under Ground 3.
105. The Claimant made further submissions on air quality in its representations on reconsideration on 26 March 2021. It argued that the GLA officers had been wrong to advise in the Hearing Report that the proposal was air quality neutral. It complained that there was no evidence that the AQE Report had been considered, and it re-submitted it.
106. The Update Report did not refer to the issue of air quality. The Update Report noted the receipt of the Urgent Representation and the AQE Report and commented as follows:

"...the Council raises concerns that its Air Quality Peer Review was not considered by GLA officers because it is not mentioned in the Representation Hearing Report. This is because this information was submitted to the GLA by the Council on 28 August 2020 along with its pre-hearing representation, more than one working day after the Representation Hearing Report was published. The Council's pre-hearing representation and Air Quality Peer Review was addressed in the addendum report published on the day of the hearing.

GLA officers consider the application to be in accordance with planning policy regarding air quality and as such the ‘damage cost’ payment requested by the Council is not justified....”

107. I conclude that there is ample evidence that the GLA officers and the Mayor had sufficient regard to the air quality issues, including those raised by the Claimant. Although the Claimant’s representations and evidence were noted, not analysed, in the officer reports, such reports should be read benevolently and without undue rigour (*Mansell*, per Lindblom LJ at [42]), bearing in mind that it is part of a planning officer’s expert function to make an assessment of how much information needs to be included in his or her report. On the balance of probabilities, I am satisfied that the specialist air quality officers at the GLA will have considered the AQE Report and Create’s Technical Note in response to it. Ultimately, the GLA officers and the Defendant preferred Create’s expert evidence to that of the AQE, which they were entitled to do.
108. For the reasons set out above, Ground 2 does not succeed.

### **Ground 3**

#### **Claimant’s submission**

109. The Claimant submitted that the Defendant acted unlawfully and/or in a manner which was procedurally unfair in that he failed either to (a) formally re-consult the Claimant; or (b) give the Claimant a right to be heard prior to his re-determination of the application.
110. The Claimant submitted that the Defendant should have followed the procedure set out in section 2F TCPA 1990, which sets out in law the procedure by which a local planning authority is to be consulted before the Defendant may determine an application in respect of which he has made a section 2A direction. This procedure envisages, prior to any decision, the publication of the Defendant’s officers’ report and recommendations at least 7 days prior; the opportunity to make written representations in the light of that report and those recommendations; and the opportunity to make oral representations at a mandatory further representations hearing. On the requirement for an oral hearing, the Claimant referred to the principles set out in the case of *Osborne v Parole Board* [2013] UKSC 61, per Lord Reed at [67]-[68], [71], which were applicable here.
111. As a matter of fairness, the Update Report ought to have been published prior to the Claimant making its submissions, to enable the Claimant to know how the GLA officers intended to advise the Mayor. The Claimant was unable to comment on the Defendant’s new planning balance, reached in the light of the new London Plan policies and other material considerations.
112. Furthermore, the Claimant should have been given an opportunity to comment on Create’s Technical Note, produced in October 2020.

## Conclusions

113. In this case, the Defendant clearly accepted that the *Kides* principle applied and that the application ought to be re-determined in the light of the adoption of the London Plan 2021, as amended pursuant to the Secretary of State's direction, which was now part of the development plan.
114. It was common ground that the application should be re-determined in accordance with the requirements of fairness. The issue is what were the requirements of fairness in these circumstances?
115. Where an act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. What fairness demands is dependent on the context of the decision (*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, per Lord Mustill, at 560 D – G).
116. In *Keep Wythenshawe Special Ltd v NHS Central Manchester CCG* [2016] EWHC 17 (Admin), Dove J. helpfully set out the established principles on consultation, at [65]-[68]:

“65. The basic requirements of a lawful consultation have now been settled for some considerable time and are derived from the decision of Hodgson J in *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168. They are, firstly, that the consultation should be undertaken at a time when the proposals are still at a formative stage. Secondly, the body undertaking the consultation should provide sufficient reasons and explanation for the decision about which it is consulting to enable the consultees to provide a considered and informed response. Thirdly, adequate time to allow for consideration and response must be provided. Fourthly, the responses to the consultation must be conscientiously taken into account in reaching the decision about which the public body is consulting. These principles, known as the Sedley criteria as a result of the author of the submissions upon which they were based, have recently been endorsed by the Supreme Court in *R(Moseley) v Haringey London Borough Council* [2014] UKSC 56; [2014] 1 WLR 3947 at paragraph 26.

66. In his judgment in *Moseley* Lord Wilson JSC emphasised that however the duty to consult arises, the manner in which it is conducted will be informed by the common law requirements of fairness. He observed at paragraph 24 as follows:

“Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R(Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of the person's legal rights. Nevertheless the first two of the

purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, that requirement “is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested”: para 67. Second, it avoids “the sense of injustice which the person who is the subject of the decision will otherwise feel”: para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: ‘yes or no, should we close this particular care home, this particular school etc?’ It was: ‘Required as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?’”

67. In his judgment Lord Reed JSC placed greater emphasis upon the statutory context and the purpose of the particular statutory duty to consult and less on the common law duty to act fairly. In paragraph 36 of his judgment, having noted that the case under consideration was not one where the duty to consult arose as a result of a legitimate expectation he stated:

“This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provisions in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth...”

Having noted that in that case the local authority was discharging an important function in relation to local government finance which affected its residents generally (the case centred on the authority's decision in relation to a revised scheme for council tax benefits) Lord Reed concluded that the purpose of the statutory duty to consult in that case was “to ensure public

participation in the local authority's decision-making process". He went on to observe in paragraph 39:

“In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme.”

He concluded that in the particular circumstances of that case the second of the Sedley criteria (the provision of adequate and appropriate information) had been breached.

68. The differences in emphasis between Lord Wilson JSC and Lord Reed JSC were resolved in the joint judgment of Baroness Hale JSC and Lord Clarke JSC in the following terms:

“We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed JSC, in para 39. In these circumstances we can we think safely agree with both judgments.””

117. Dove J. went on to consider the case law on the adequacy of a consultation procedure, at [77]:

“77. Having observed all of the above in relation to the legal principles governing consultation it is important to recognise, as the courts have on several occasions, that a decision-maker will have a broad discretion as to how a consultation exercise may be structured and carried out. As Sullivan J (as he then was) observed in *R(on the application of Greenpeace Limited) v Secretary of State for Trade and Industry* [2007] EWHC 311 at paragraphs 62 and 63:

“A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. That is most emphatically not the test. It must also be

recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out...In reality, a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went ‘clearly and radically wrong’.”

Subsequently in the case of *R(JL and AT Beard) v The Environment Agency* [2011] EWHC 939 Sullivan LJ confirmed that the “test is whether the process was so unfair as to be unlawful”.”

118. In the planning context, the courts have recognised that it is possible to amend planning applications during the course of their determination subject to two constraints, one substantive and one procedural. Permission should not be granted for development that would be substantially different from that which the application envisaged and persons affected by the change should not be deprived of the opportunity to comment on it. Where there is a statutory duty of consultation, the question of whether re-consultation is required if there is a change to the proposal depends on what fairness requires (*R (Holborn Studios) v Hackney Borough Council* [2017] EWHC 2823 (Admin) at [64], [70], [76]; [86]).
119. I do not consider that the provisions of section 2F TCPA 1990 apply to a re-consideration, when they have already been complied with at the first consideration. The procedure to be followed on a re-consideration is to be decided by the Defendant, in the exercise of his discretion. The requirements of fairness will vary depending on the nature of the re-consideration and the identity of those affected.
120. In my judgment, in the circumstances of this case, fairness required that the Claimant should have been given an opportunity to make representations on the developments which gave rise to the re-consideration, before the GLA officers made their recommendation to the Mayor, and before the Mayor made his re-determination. This was a development proposal of strategic importance, the Claimant is the local planning authority and it had been a key participant throughout.
121. The Defendant did comply with these requirements. The Claimant was given an opportunity to make written representations before the Update Report and its Addendum were issued and before the Mayor made the re-determination.
122. The Claimant submits that fairness required that it had sight of the Update Report before it submitted its further representations. I do not agree. It is clear from the Claimant’s cogent letters of 26 February, 4 March and 9 March 2021, and its detailed written representations, that it was well aware of the issues to be addressed, and did so effectively.
123. In my judgment, fairness did not require another oral hearing. There was no “live” evidence, and the issues of planning policy and the planning balance to be considered were better suited to written representations, because of their detail and complexity. Members of the public, who might have struggled to make written representations, were not invited to participate in the re-consideration. Mr Rodger, Deputy Director Planning

and Regeneration, who had already made oral representations at the previous hearing, was well able to draft written representations on behalf of the Claimant.

124. The Technical Note from Create, dated October 2020, was not disclosed to the Claimant for comments. In my view, it ought to have been disclosed to the Claimant, as it was a response to the AQE Report submitted by the Claimant. The Claimant could then have commented upon it in its own representations to the Defendant, if it wished to do so. The failure to disclose was procedurally unfair and unlawful.
125. In determining whether any relief should be granted for the failure to disclose the Technical Note, section 31(2A) of the Senior Courts Act 1981 has to be considered. The effect of that provision is that the court must refuse to grant relief if it appears to the court to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.
126. The approach to be taken to this provision has been considered by the courts, most notably in *R (Goring-on-Thames PC) v South Oxfordshire DC* [2018] EWCA Civ 860 and *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, at [272], [273].
127. The “conduct” complained of here is the failure to disclose the Technical Note to the Claimant in advance of the Defendant’s decision of 29 March 2021. The “outcome” is the decision of the Defendant to grant planning permission. The issue is whether, had the Claimant been provided with the Technical Note, so that the Claimant had the opportunity to consider it and make further submissions in advance of the decision, it is “highly likely” that the Defendant nonetheless would have granted planning permission for the proposed development.
128. In my judgment, it is “highly likely” that the Defendant would nonetheless have granted planning permission on 29 March 2021.
129. The Technical Note did not introduce anything new. It did no more than correct misunderstandings in the AQE Review and indicated where the concerns raised by AQE had in fact been the subject of consideration, discussion and agreement with GLA officers at an earlier stage of the process, or were addressed and answered elsewhere.
130. I have already found that the Defendant lawfully concluded, in the exercise of his planning judgment that the development was acceptable in respect of air quality impacts, and he did so in knowledge of the Claimant’s position and representations, and after receiving extensive information and advice from GLA officers. The advice he received was unequivocal. Realistically, it is highly unlikely that any further representations from the Claimant in response to the Technical Note would have made any difference to the Defendant’s decision to grant planning permission.
131. Therefore, I refuse relief under section 31(2A) of the Senior Courts Act 1981 as it appears to me to be highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred.
132. For the reasons set out above, Ground 3 only succeeds in respect of the failure to disclose the Technical Note from Create, dated October 2020. No relief is granted.

### **Final conclusions**

133. The claim succeeds solely in respect of the Defendant's failure to disclose to the Claimant the Technical Note, dated October 2020, prior to his re-determination of the decision to grant planning permission on 30 March 2021 (see paragraph 65 of the Claimant's skeleton argument). However, relief is refused under section 31(2A) of the Senior Courts Act 1981.
134. The claim for judicial review is dismissed on all other grounds.