

Royal Courts of Justice
Strand, London, WC2A 2LL

18 May 2021

B e f o r e :

MRS JUSTICE LANG DBE

Between:

THE QUEEN
on the application of
HELEN ELIZABETH KINSEY **Claimant**

- and -

LONDON BOROUGH OF LEWISHAM **Defendant**
CITY OF LONDON CORPORATION **Interested Party**

Richard Harwood OBE QC (instructed by Harrison Grant) for the Claimant
Saira Kabir Sheikh QC and Charles Merrett (instructed by Womble Bond Dickinson (UK) LLP) for the Defendant
Sasha White QC and Matthew Henderson (instructed by Comptroller and City Solicitor) for the Interested Party

Hearing dates: 27 & 28 April 2021

HTML VERSION OF JUDGMENT APPROVED

Mrs Justice Lang :

1. The Claimant challenges the decision of the Defendant ("the Council"), dated 20 November 2020, to grant planning permission for the demolition of Mais House and Otto Close garages, and for redevelopment to provide 110 residential units in a part four, six and seven storey building and a part two and three storey terrace building, and associated development, at Sydenham Hill Estate, London SE26 ("the Site").
2. The Council is the local planning authority for the Site. The Interested Party ("the IP") is the owner of the land and the applicant for planning permission.
3. The Claimant lives with her family in a rented flat in Otto Close which is particularly affected by the proposed development. She is a member of the Sydenham Hill Residents Steering Group. According to Mr Murtagh, the IP's Assistant Director of Housing, the Group was established by the IP in December 2018 to ensure meaningful resident consultation and effective participation in all aspects of appraising and implementing the proposals for the Site.
4. Permission was granted on the papers on 10 February 2021.

Grounds of challenge

5. The Claimant's grounds of challenge may be summarised as follows:

Ground 1:

6. The Council erred in law and acted without regard to material considerations in failing to apply the considerable weight to harm to listed buildings and the conservation area as required by sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings and Conservation Areas Act 1990") and by the National Planning Policy Framework ("the Framework"), and failed to consider the extent of the less than substantial harm caused to those designated heritage assets as required by the Planning Practice Guidance ("PPG").

Ground 2

7. The Council failed to take into account, as it was not reported to the Planning Committee, that the Council's Senior Conservation Officer

("SCO") objected to the scheme and omitted significant parts of her advice, in breach of:

- i) the duty to take into account a material consideration;
- ii) the duty to take into account the product of a consultation which it had carried out;
- iii) the duty to have special regard to the effect of the proposal on listed buildings and conservation areas under sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 and the Framework;
- iv) the PPG's advice on considering the degree of less than substantial harm;

Ground 3

8. The Claimant did not pursue this ground.

Ground 4

9. The Council failed to make background papers available, in particular the SCO's response, on request or at all, in breach of the Local Government Act 1972 ("LGA 1972") as modified by the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020.

Ground 5

10. Given the Council's conclusions that it is preferable that the scheme should not appear from Dulwich Park above the tree canopy, but that it does so appear, the Council's conclusion that the development 'would make a positive contribution to the character and appearance of the surrounding area' was not rationally open to it.

Ground 6

11. The Council failed to ask the Design Review Panel to consider the planning application, in breach of the legitimate expectation created by the Council's Statement of Community Involvement, paragraphs 6.9 and 6.10. Consultation with the Panel at the pre-application stage was insufficient when the Panel remained critical of the pre-application schemes.

Application to amend the claim

12. At the commencement of the hearing, I heard and determined the Claimant's application to amend the Statement of Facts and Grounds.

13. I granted the Claimant permission to abandon Ground 3 (failure to take into account the objection of the Twentieth Century Society), in the light of the Council's disclosure of documents made available to Members of the Planning Committee, which included the Twentieth Century Society's objection. The Claimant maintained her criticism of the manner in which the Officer Report ("OR") dealt with the Twentieth Century Society's objection, under Ground 1.

14. The Claimant also applied for permission to add a new ground in the following terms:

"the Council failed to make all of the report to the Committee on the application available to the public, whether before or after the meeting, in breach of the Local Government Act 1972, ss 100B, 100C as modified by the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020;"

15. I refused permission on the ground that the new ground was unarguable, and the Claimant had delayed unreasonably in raising it.

16. The Planning Committee considered the application for planning permission at its meeting on 27 August 2020. The agenda for the meeting listed seven documents as "restricted enclosure", which meant that they were not made available to members of the public. Those documents comprised the officer's presentation on the application and six "public comments packs", namely, some 420 pages of consultation responses and other comments by individuals and organisations. The reason given for the restriction was that, by virtue of paragraph 3 of Part 1 to Schedule 12A of the LGA 1972, it was information relating to the financial or business affairs of any particular person (including the authority holding that information).

17. Section 100B LGA 1972 provides that copies of the agenda and any report for the meeting shall be open to inspection by the public (subject to an exclusion in subsection (2) for reports which relate to items in private sessions). Section 100C makes similar provision for inspection of agendas and reports after meetings, as well as the minutes of the meeting. The term "report" is not defined.

18. The Claimant submitted that, in this context, the term "report" includes any material provided to the Committee by officers for consideration of the item. In my judgment, the term "report" should be given its natural and ordinary meaning, having regard to its statutory context. In the context of local authority Council and Committee meetings, a report means an account given to Members, which presents information and perhaps recommendations, in

respect of an item of business on the agenda. Typically, such a report will be an officer's report. An officer's report may also include appendices containing documents. Those documents would form part of the report for this purpose. However, I do not consider it is arguable that these "public comments packs" were part of the officer's report. Nor is it arguable that the consultation responses and other comments on the planning application were themselves reports for the purpose of sections 100B and 100C LGA 1972, applying the natural and ordinary meaning of the term "report". Parliament could have enacted a provision requiring all documents before the Committee to be made available for public inspection but instead it limited the extent of the inspection to the agenda and reports.

19. I also accepted the submission made by the Council and the IP that the Claimant delayed unreasonably in making the application to amend. Although planning permission was not granted until 20 November 2020, it was apparent from the Agenda for the meeting on 27 August 2020 that seven documents were withheld from the public. So this ground could have been pleaded when the claim was filed on 31 December 2020. The Claimant's solicitor requested disclosure of the restricted documents in an email of 11 January 2021, and they were provided by the Council, with redactions, on 1 February 2021. So the Claimant ought to have applied to amend during February 2021. However, it appears that the documents were not downloaded by the Claimant's solicitors until mid-March 2021, when the Detailed Grounds of Resistance were served. The Claimant's lawyers submitted it was essential for them to see the 44 pages which have been redacted, but the Claimant's solicitor did not request the documents in unredacted form until 6 April 2021.
20. The application to amend was made on 7 April 2021. By then the hearing date of 28 and 29 April 2021 had been fixed. Instead of applying for the application to amend to be dealt with as a matter of urgency in advance of the hearing, the application requested that it be dealt with at the beginning of the substantive hearing. In consequence, if I had granted the application to amend, it would have been necessary to adjourn the substantive hearing. I would have had to rule on the disputed redactions, allow time for disclosure of any unredacted documents, and give the Council and the IP time to amend their Detailed Grounds to respond to the new ground, and file evidence in response, if so advised. The adjournment would have been prejudicial to the parties and a waste of court time. No adjournment would have been necessary if the Claimant's representatives had acted more expeditiously. For these reasons, I consider that the Claimant's delay was unreasonable and the application to amend was made too late.
21. Mr Harwood QC also applied for the grounds to be re-numbered, but as I refused permission on the new ground, this was no longer necessary.

Facts

22. The Site, which is 1.35 ha in size, is on the Sydenham Hill Estate. The land on which the Sydenham Hill Estate stands is on the eastern side of Sydenham Hill and it was granted to the IP in 1819. Part of the land was appropriated to the IP's local authority housing function in 1953, under statutory powers.
23. Sydenham Hill Estate is 2.67 ha in size and comprises Lammas Green, Mais House, Otto Close, a Community Hall, and a hardstanding ball court/play area. It is set in landscaped wooded grounds, on a steep slope.
24. Lammas Green was constructed between 1955 and 1957. It comprises three terraces set around a village green, with views of the North Downs, and two blocks of flats to the west and north which enclose the green and serve as a buffer to the road. In 1998, it was listed Grade II, as being of special architectural and historic interest. The Sydenham Hill Community Hall and Retaining Walls were also listed Grade II at that time.
25. Mais House, which was constructed in 1973, is a part two/part three/part four storey block. It comprises 63 sheltered housing units for older people. A Sheltered Housing Review carried out by the IP between 2014 and 2016 indicated that the limited accommodation offered at Mais House did not meet modern requirements and was unpopular with the older people for whom it was designed. The option of refurbishing Mais House was considered to be uneconomic. The IP decided to close Mais House in 2016. With a view to re-development, the IP re-housed all residents, and the block was empty by June 2018.
26. Otto Close was constructed in 1976. It comprises 30 two storey residential units, which are in use. Nearby there are 38 single storey residential garages set in 7 rows, of which only about one third are in use.
27. Lammas Green and Mais House are located within the Sydenham Hill/Mount Gardens Conservation Area ("the CA"). Most of the dwellings and garages in Otto Close fall outside the CA. Thus, the western uppermost part of the Site is within the CA. Lammas Green is an Area of Special Character, characterised by large detached houses with gardens. There are many mature trees which provide a visual and historic link with Sydenham Hill Wood, a large and important remnant of the former Great North Wood which formerly stretched across this part of south London. To the west is Dulwich Wood which is designated as Metropolitan Open Land and a Local Nature Reserve of Metropolitan Importance.

28. The IP undertook wide pre-application consultation with the Greater London Authority, the Council's Design Review Panel, local residents, residents' associations, amenity groups and elected representatives. Following discussions with the Council, it received pre-application advice from the planning officer, Mr David Robinson, who is a Principal Planning Officer in the Council. The Design Review Panel considered a series of draft proposals, and made critical comments on them. As a result of the responses which it received, the IP made a number of amendments to its pre-application proposal.

29. The IP applied for planning permission on 3 January 2020. In the public consultation, some 209 objections were received, including representations from local residents and residents' associations, the Forest Hill Society, the Sydenham Society, the Council for the Preservation of Rural England (CPRE) London, the Sydenham Hill Ridge Forum and the Twentieth Century Society. The number of objections met the threshold in the Council's Statement of Community Involvement for a local meeting to be held, which took place virtually, because of the Covid 19 pandemic.

30. On 28 January 2020, the SCO, Ms Joanna Ecclestone, sent a document headed "Conservation comments" to the planning officer, describing the CA and the listed buildings, and non-designated heritage assets, and the impact of the proposal. Her formal recommendation stated:

"I have objections due to the harm caused to the CA, the setting of listed buildings and the setting of locally listed buildings, chiefly caused by the height and position on site of the proposed buildings.

I do not consider that the harm is adequately justified by the aim for highly dense scheme or its viability."

31. The OR, drafted by the planning officer, summarised the application and the consultation responses and recommended the grant of planning permission. He concluded as follows:

"641 The Proposal would provide a substantial quantum of socially rented residential units to help meet the Borough's housing needs. This is a significant benefit to be weighed in the planning balance as the proposal will assist in addressing its housing need which is set to increase substantially under the draft London Plan housing targets.

642 The proposals reflect the principles of the highest quality design, ensuring an exemplary built environment for visitors and residents. The impacts upon heritage assets in the vicinity of the application site have been fully considered and it is concluded that less than substantial harm will be caused. The officer assessment has also

identified some impacts upon occupants of neighbouring residential properties in relation to loss of light and overshadowing. However, on balance the benefits and planning merits of the scheme are considered to substantially outweigh any harm identified.

643 The proposed development would also result in the delivery of significant public realm enhancements, specifically through the delivery of the communal amenity space. Improvements to the existing highways network would also be secured by legal agreement.

644 In conclusion, the proposed development is considered to be in accordance with the relevant national planning policy guidance and development plan policies. The proposals are wholly sustainable development in accordance with the NPPF and will make an important contribution to the borough, in respect of housing supply and importantly the wider borough community. The proposals are therefore considered to be both appropriate and beneficial. Therefore, on balance, any harm arising from the proposed development is considered to be significantly outweighed by the benefits listed above."

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

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

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

Legal framework

Judicial review

34. 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 \(Admin\)](#).

Decision making

35. Section 70(2) of the Town and Country Planning Act 1990 ("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 2004 ("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."

Planning officers' reports

36. The principles to be applied when considering a challenge to a planning officer's report were 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* [\[1997\] EGCS 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."

37. 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."

38. In *R (Zins) v East Suffolk Council* [2020] EWHC 2850 (Admin) James Strachan QC, sitting as a Deputy High Court Judge, concluded that members were not materially misled by a planning officer's summary of the concerns expressed by an Environmental Health Officer ("EHO") on the issue of noise, as "the gist was communicated, along with the principal reasons for those concerns" (at [124]). He found that "it was legitimate for the planning officer to have a different view as to the overall acceptability of the noise environment ... and to communicate that view to members... It was then ultimately for members to make up their own mind on such matters exercising their own judgment" (at [112]). He considered whether the omission of words and phrases had unacceptably diluted the force of the EHO's advice, and whether members would have been aware that the EHO did not consider the concerns to be overcome by the mitigation measures proposed. He was satisfied that members would have been aware of these matters, on reading the reports as a whole. He concluded that members were not misled, and the reports were "legally adequate" (at [113] – [125]).

Heritage assets

39. Section 66(1) of the Listed Buildings and Conservation Areas Act 1990 provides:

"66. General duty as respects listed buildings in exercise of planning functions

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

40. Conservation areas are designated by local planning authorities as "areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance": section 69(1) of the Listed Buildings and Conservation Areas Act 1990. By section 72(1):

"In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

These provisions include the TCPA 1990: see section 72(2).

41. National policy on "Conserving and enhancing the historic environment" in Chapter 16 of the Framework is to be interpreted and applied consistently with the statutory duties under the Listed Buildings and Conservation Areas Act 1990.

42. The Framework is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making. It is policy, not statute, but a decision-maker who decides to depart from it must give cogent reasons for doing so.

43. The relevant policies are set out below:

"Considering potential impacts

193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.

194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.
Substantial harm to or loss of:

a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;

b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.

195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply....

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

44. The PPG advises that the degree of harm within "less than substantial harm" should be identified:

"Within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated." ID: 18a-018-20190723

45. In *Jones v Mordue* [2015] EWCA Civ 1243, Sales LJ considered paragraph 134 of the 2012 edition of the Framework (which has been replaced by paragraph 196 of the 2019 edition), and said at [28]:

"28. If one applies the correct approach in the present case, as set out in *Save Britain's Heritage and South Bucks DC v Porter (No. 2)*, it cannot be said that the reasoning of the Inspector gives rise to any substantial doubt as to whether he erred in law. On the contrary, the express references by the Inspector to both Policy EV12 and paragraph 134 of the NPPF are strong indications that he in fact had the relevant legal duty according to section 66(1) of the Listed Buildings Act in mind and complied with it. Policy EV12 reflects that duty, and the textual commentary on it reminds the reader of that provision. Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions (as the Inspector referred to paragraph 134 of the NPPF in

the Decision Letter in this case) then – absent some positive contrary indication in other parts of the text of his reasons — the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. Working through these paragraphs, a decision-maker who had properly directed himself by reference to them would indeed have arrived at the conclusion that the case fell within paragraph 134, as the Inspector did."

46. In *R (Palmer) v Hertfordshire Council* [\[2016\] EWCA Civ 1061](#), Lewison LJ held:

"7. The existence of the statutory duty under section 66(1) does not alter the approach that the court takes to an examination of the reasons for the decision given by the decision maker: *Jones v Mordue* [\[2015\] EWCA Civ 1243](#); [\[2016\] 1 WLR 2682](#). It is not for the decision maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has. Where the decision maker refers to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan there is an inference that he has complied with it, absent some positive indication to the contrary: *Jones v Mordue* at [28]. In examining the reasons given by a local planning authority for a decision, it is a reasonable inference that, in the absence of contrary evidence, they accepted the reasoning of an officer's report, at all events where they follow the officer's recommendation: *R (Fabre) v Mendip DC* (2000) 80 P&CR 500, 511; *R (Zurich Assurance Ltd) v North Lincolnshire Council* [\[2012\] EWHC 3708](#) at [15]."

47. In *R (LOGS CIC) v Liverpool City Council* [\[2019\] EWHC 55](#), [\[2020\] EWCA Civ 861](#), the Court of Appeal upheld Kerr J.'s conclusion that the Council's application of section 66(1) of the Listing Buildings and Conservation Areas Act 1990 and the Framework to the heritage assets was flawed by the manner in which it dealt with the advice from the Council's conservation team. The officer report advised that "any harm to the setting of Beechley Stables and any other heritage assets would be classed as less than substantial, being outweighed by the wider public/regeneration benefits delivered from the proposed development as a whole" (High Court judgment, at [21]). The considerable weight and clear and convincing justification tests (now in paragraphs 193 and 194 of the Framework) had been referred to early in the report (High Court judgment at [46], [47], [68], [69], see also the Court of Appeal judgment at [65]). The conservation team's comments had not been reported as a separate internal consultee (High Court judgment, at [51]) and their objection to the planning

application had not been mentioned (High Court judgment, at [53], [54]). The conservation team analysis appeared to have been included in the planning officer's assessment (High Court judgment, at [61], [62], [64]). However Kerr J. said that there were contra-indications that the statutory duty had not been applied: the conservation team views were not credited (at [71]); there was a false impression given that they had no objection (at [71], [73], [74]); "[a] balanced report would have summarised the view of the conservation team as a negative internal consultation response", at [77]. The formulation of the balancing exercise placed emphasis on what is now paragraph 196 of the Framework, dealing with cases of "less than substantial harm", without mentioning paragraph 132 containing the words "great weight" and "clear and convincing justification" (at [79], [80] to [83]). Kerr J. had "at the very least, a substantial doubt" (at [85]) and quashed the permission.

48. In the Court of Appeal, Lindblom LJ emphasised that the Framework and the PPG expected the local planning authority to have proper expert advice on heritage issues (at [61]). He held that the planning officer's failure to tell the committee of the "strong conservation objections" raised by the conservation team "was enough to displace the presumption that the section 66(1) duty had been properly performed" (at [74]). Omitting to take into account the conservation response was "to disregard national policy and guidance relevant to the section 66(1) duty (at [76], [81]). The failure to report the conservation officer's firm objection was a failure to take into account an obviously material consideration (at [77], [78]). The failure in the assessment to give any steer about giving considerable importance and weight to the harm also strengthened the considerable doubt (at [82]). Accordingly, the Council's appeal was dismissed.

49. In *City and County Bramshill Ltd v Secretary of State for Housing, Communities and Local Government* [\[2021\] EWCA Civ 320](#) Lindblom LJ observed, at [73], that the concept in paragraph 193 of the Framework that "great weight" should be given to the conservation of the designated heritage asset and that "the more important the asset the greater the weight should be" does not predetermine the appropriate amount of weight to be given to the conservation of the heritage asset in a particular case, which is a question left to the decision maker as a matter of planning judgment on the facts of the case, bearing in mind the relevant case law, including *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [\[2014\] EWCA Civ 137](#).

Grounds of challenge

50. Because of the overlap between Grounds 1 and 2, I consider that Ground 2 should be considered first, before Ground 1.

Ground 2

Submissions

51. Under Ground 2, the Claimant submitted that the Council failed to take into account, as it was not reported to the Planning Committee, that its own conservation officer objected to the scheme and omitted significant parts of her advice, in breach of:
- i) the duty to take into account a material consideration;
 - ii) the duty to take into account the product of a consultation which it had carried out;
 - iii) the duty to have special regard to the effect of the proposal on listed buildings and conservation areas under sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 and the Framework;
 - iv) the PPG's advice on considering the degree of less than substantial harm.
52. The Council and the IP submitted in response that there was no requirement to disclose the SCO's comments to the Planning Committee; nor was there any requirement to set them out in full in the OR. The OR accurately summarised the SCO's comments, setting out the gist of them, which according to the case of *Zins*, was sufficient. The SCO herself confirmed that all her "areas of objection" had been included in the OR.

Conclusions

53. The SCO's document headed "Conservation comments", dated 28 January 2020, is appended as Appendix 1 to this judgment. It is careful and detailed. As well as the application for planning permission, the SCO had the benefit of seeing the IP's supporting documents, in particular the Planning Statement, the Heritage Statement ("HS") and the Townscape and Visual Impact Assessment ("TVIA"). I do not know whether she had the benefit of seeing the conservation objections from external consultees.
54. Under the heading "Significance", the SCO described the heritage assets in the area of the Site, namely, the Grade II listed buildings, the Conservation Area; and the non-designated heritage assets. She expressed some disagreement with the IP's HS. The planning officer drew extensively on this part of the SCO's comments in drafting paragraphs 295 to 306 of the OR.
55. Under the heading "Impact", the SCO gave her opinion on the likely impacts of the proposed development on those heritage assets, in some detail. She

applied the policy in the Framework by classifying the harm as "less than substantial", and applied the guidance in the PPG by classifying the extent of the harm within the "less than substantial" category e.g. "low", "moderate", "high". She expressed some disagreement with the IP's HS.

56. Under the heading "Justification", the SCO summarised the relevant statutory provisions, the Framework and local policies, and stated:

"Justification

The number of units is justified by the ambition to maximise new dwelling numbers and by viability, and thus does not provide a design or heritage based clear and convincing justification for the harm to the setting of the LBs or CA. No convincingly different alternative options have been provided to demonstrate that a scheme of lower density could be viable and the scheme is driven by achieving high housing numbers.

Recommendation

I have objections due to the harm caused to the CA, the setting of listed buildings and the setting of locally listed buildings, chiefly caused by the height and position on site of the proposed buildings.

I do not consider that the harm is adequately justified by the aim for highly dense scheme or its viability."

57. The planning officer referred to the SCO's comments on "Impact" at paragraphs 307 to 316 of the OR, but there were some significant omissions and changes, namely:

i) The SCO's criticisms of the siting in the plot and proximity to the road (page 322) were not mentioned (even though these are included in the conservation recommendation at page 325), nor the SCO's suggestion that the orientation should be changed. Instead the report says that the floorplan is cranked to reduce impacts, at OR 312.

ii) The SCO's reference to a "prominent and anomalous visual presence" (page 322) in views to the conservation area is omitted from the OR.

iii) The OR advised Members that "the edge of the Conservation Area along Sydenham Hill is significant" (OR 312) when the SCO advised it was "highly significant", and also disagreed with the assessment in the HS as "very minor" (pages 322-323).

iv) The harm to views from Lammas Green to the south east is mentioned at OR 308, but the report does not say this is caused by the southernmost house of the proposed Otto Place and that the SCO's advice was that it was

necessary to omit this or reduce it in width/height (page 323). Although the OR states that the blocking of the view from Lammas Green would "cause a degree of less than substantial harm to the setting of the listed building", it omits the SCO's advice that this harm is "moderate" (page 324).

v) On the view from within Lammas Green towards the 6/7 storey building, OR 309 states:

"the view.....demonstrates that the buildings will be visible and that the proposed height is at odds with the scale of the listed buildings. Whilst it is not harmful in principle to see new development beyond the boundary of Lammas Green the proposed relationship would cause a degree of less than substantial harm to the setting of the listed buildings."

This passage omits the SCO's advice that "the height appears out of scale and context with its surroundings and is particularly prominent on this high land", and that this will cause a "moderate degree" of less than substantial harm (page 324).

vi) The OR fails to refer to the "moderate to high degree of less than substantial harm" to the conservation area advised by the SCO (page 324), merely describing it as "a degree of less than substantial harm" at OR 313.

vii) The OR does not mention the SCO's advice that "[b]eing the edge of the CA it is particularly important to reinforce its characteristics so as to prevent erosion which this scheme fails to do" (page 324).

viii) In OR 315, the planning officer refers to the harm to non-designated heritage assets as causing "a degree of less than substantial harm to their setting", and omits the SCO's advice that the harm is "moderate" (page 324).

58. The OR made no reference to the requirement for "clear and convincing justification" for harm to the significance of a designated heritage asset (Framework, paragraph 194). The planning officer omitted the SCO's advice that the proposed development was driven by the ambition to maximise the number of dwellings and "did not provide a design or heritage based clear and convincing justification for the harm to the setting of the [listed buildings] or CA". The planning officer also omitted any reference to alternative options with a lower density.

59. The OR made no mention of the SCO's formal objection to the proposal and her reasons for it.

60. The planning officer did not mention anywhere in the OR that the SCO had been consulted and provided detailed comments. The SCO's document was

not referenced in the Agenda as a background paper, nor was it among the documents made available to Members, at or before the meeting. It was not posted on the Council's website.

61. In the *Liverpool City Council* case, Lindblom LJ said, at [73] – [78], [81]:

"73. Mr Tucker submitted that the judge had adopted an "overly analytical" approach to the officer's report, had applied an "incorrect test", contrary to the test of "substantial doubt" set by this court in *Palmer*, and had not recognised the committee's own expertise and its experience of making decisions on proposals affecting heritage assets (see *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500). The omission to report the objection of the Urban Design and Heritage Conservation team was not a "positive factor" capable of displacing the presumption that the section 66(1) duty had been performed. It was not clear what other factors the judge had seen as relevant "contra-indications".

74. I cannot accept those submissions. As Mr Westaway submitted, the judge was rightly troubled by the officer's failure to tell the committee of the "strong conservation objections" raised by the Urban Design and Heritage Conservation team to the construction of three houses in the setting of Beechley House, and right to conclude that this was enough to displace the presumption that the section 66(1) duty had been properly performed.

75. I acknowledge that the Urban Design and Heritage Conservation team objected only to this element of the scheme; and that, having made their observations, they recognised it was for the city council as decision-maker "to consider the public benefits of the scheme against the identified harm to the significance of the listed buildings and structures at the Beechley site" – an exercise not within their remit. I also acknowledge that it would have been open to the Interim Head of Planning – when reporting to the Planning Committee – and to the members themselves, to differ from the opinion of the Urban Design and Heritage Conservation team, or to find that it would not be enough to justify refusing planning permission.

76. However, this was an objection provided in response to the formal consultation of a team of professional officers employed by the city council for their expertise in the conservation of heritage assets, including listed buildings and their settings. The purpose of the consultation was to draw upon that expertise so that it could assist the city council in discharging its duty under section 66(1) when making its decision on the application for planning permission. This was consistent with the policy in paragraph 129 of the NPPF referring to the need for authorities to take into account "any necessary

expertise", and with the guidance in the Planning Practice Guidance stressing the value of "expert advice", and the seeking of "[advice] ... from appropriately qualified staff and experienced in-house experts ...". Omitting to take into account the response of the Urban Design and Heritage Conservation team was not only to ignore their objection. It was also to disregard national policy and guidance relevant to the section 66(1) duty.

77. Whether the failure to bring the objection to the attention of the members was simply an oversight or deliberate does not matter. It is the more striking because the officer took care to refer in his report to three other internal consultation responses. And it was, I think, a significant omission (see *Mansell v Tonbridge and Malling Borough Council* [2019] PTSR 1452, at paragraph 42(3)). This was not a perfunctory response to consultation. It was a detailed and carefully considered assessment of the effects the development would have on the listed buildings and their settings. It differed from the assessment presented to the committee by the Interim Head of Planning, and in a significant way. It articulated "strong conservation objections" to the proposed construction of three houses within the setting of Beechley House. That the Interim Head of Planning himself acknowledged there would be some harm to the setting of the listed building does not overcome the omission. The fact remains that the city council's own conservation officers had expressed a firm objection, which was neither confronted nor even noted in the officer's report or in debate at the committee meeting.

78. In my view, that objection – both the fact of it and its substance – was, in the circumstances, an "obviously material" consideration of the kind referred to in *In re Findlay* [1985] A.C. 318 (see the speech of Lord Scarman at pp.333 and 334; and also the judgment of Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P. & C.R. 343, at p.352). Quite apart from the section 66(1) duty, this was a matter to which the city council had to have regard in reaching its decision on the application for planning permission, giving it such weight as it saw fit. It could have made a difference to the outcome. But it was overlooked. That was an error of law.

...

81. The error was not merely a failure to have regard to a material consideration. It was also a significant default in the city council's performance of its duty under section 66(1). It indicates that despite the reference made in the officer's report to the statutory duty, the policies in paragraphs 132 and 134 of the NPPF and Policy HD5 of

the UDP, the duty to have "special regard" to the desirability of preserving the setting of the listed building was not complied with. Even if one could excuse the other shortcomings to which the judge referred – including the "unweighted formulation of the balancing exercise" in the officer's assessment – I think this would be a sufficiently powerful "contra-indication" on its own to displace the presumption that the section 66(1) duty was discharged. For this reason, like the judge, I am left in "substantial doubt" that the duty was performed."

62. In my judgment, many of Lindblom LJ's observations are apt here, despite the factual distinctions between the two cases. The SCO is employed by the Council for her professional conservation expertise, and the purpose of the consultation was to draw upon her expertise, to assist the Council in discharging its duties under the Listed Buildings and Conservation Areas Act 1990 and the Framework. Thus, that advice ought to have been available to Members when they were deciding the application, in accordance with paragraph 129 of the Framework and the passages in the PPG referred to by Lindblom LJ. The SCO's advice on justification, applying paragraph 194 of the Framework, and her formal objection to the proposal, were considerations which Members ought to have taken into account, in a fair and balanced decision-making process, but they did not do so, because they were not informed of the existence of the SCO's comments. The planning officer was, of course, entitled to differ from the SCO's views, and advise Members accordingly, but he should not have withheld the SCO's advice from them, as the Members were the ultimate decision-makers, not the planning officer. The failure was compounded by the fact that the planning officer did not, in terms, direct himself to paragraph 194 of the Framework which requires "clear and convincing justification" for harm to a heritage asset, and that he expressly stated at OR 111 that the scheme had support from the Council's design team. The views of other internal consultees were summarised at OR 60 to 82. The Council distinguished the SCO from these internal consultees on the ground that she was employed within the Planning Department and so was part of a team which contributed to the OR, rather than giving independent advice. In my view, this approach is inconsistent with the observations of Lindblom LJ in the Liverpool City Council case, which I have referred to above, and per Kerr J. in the decision of the High Court, at [71] – [77]. The adoption of that approach in this case led to Members making a decision on incomplete information.
63. When an objector requested disclosure of the SCO's comments under the Freedom of Information Act 2000, the SCO replied in an email dated 27 August 2020, which was also copied to other officers and councillors, as follows:

".....

We do not, as a matter of course, make public the advice that internal consultees provide to the planning case officer, instead the advice is incorporated into the Officers report with comment on how any objections have been weighed against planning benefits of the scheme, as required by NPPF.

I have re-read both my advice and the committee report and can confirm that all of my areas of objection regarding harm to the setting of listed buildings and to the Conservation Area have been included in the Heritage section of the report.

....."

64. The Council relied upon the SCO's email in support of its submission that the gist of the SCO's advice was adequately summarised in the OR, and so members had sufficient information and were not materially misled. In considering this email, I have taken into account the possibility that the SCO, as an employee of the Council, may have felt that she ought to be reticent in her response to an external objector. I agree with Mr Harwood QC's observation that the SCO's assertion that "all of my areas of objection" were reported is curiously phrased, referring to "areas of objection" rather than "objections". In any event, whether the SCO's advice was adequately reported is a matter of objectively comparing the comments and the OR.
65. Although the OR fully set out the SCO's description of the significance of the heritage assets, and much of her description of the impact, I consider that the omissions in respect of the impact, which I have summarised at paragraph 57 above, meant that the Members were given an incomplete picture. Certain aspects of the harm to heritage assets were simply left out, for no apparent reason.
66. Furthermore, the planning officer's decision to edit out the SCO's classification of the extent of the harm within the "less than substantial" category was particularly significant. Members had to consider the significance of the heritage harm identified in the report and the weight to attach to it in the balance. If Members were advised that the harm had been assessed as "moderate" or "moderate to high", that would add to the weight to be given to that harm. If Members were merely advised that there was "a degree" of harm, that would suggest to them that the harm was towards the lower end of the spectrum and so would attract less weight. I consider that the SCO's approach was in accordance with the guidance in the PPG (see also at paragraphs 88 and 89 below).

67. As Members did not have access to the SCO's comments, the planning officer had an added responsibility to ensure that nothing of significance had been omitted from his summary of her comments in the OR.
68. Although the Council and the IP relied on *Zins*, I consider that the decision in that case turned on its own facts. Mr James Strachan QC, sitting a Deputy High Court Judge, correctly asked himself the question whether the Members had been materially misled on the issue of noise and the EHO's advice, and concluded that they had not.
69. On the facts of this case, applying the principles in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42], I consider Members were materially misled on some aspects of the heritage issues, because of the withholding of the SCO's comments from them, which could have made a difference to their assessment.
70. For these reasons, Ground 2 succeeds.

Ground 1

Submissions

71. The Claimant submitted that the Council erred in law and acted without regard to material considerations in:
- i) failing to apply the considerable weight to harm to listed buildings and the conservation area as required by sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 and by the Framework, and thereby failed to apply the strong presumption against the grant of planning permission which arises from the statutory provisions;
 - ii) failing to consider the extent of the less than substantial harm caused to those designated heritage assets as required by the PPG;
 - iii) failed to consider the need for a "clear and convincing justification" for harm, under paragraph 194 of the Framework;
 - iv) acted in breach of the duty to pay special regard or special attention in sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 by:
 - a) failing to summarise the representations from the Twentieth Century Society and failing to say whether they were neutral, objecting, or supporting;

b) as pleaded in Ground 2, failed to give close consideration to the SCO's expert advice.

72. In response, the Defendant and the IP submitted that the OR correctly set out the relevant statutory and policy framework, which does not include a strong presumption against the grant of planning permission. The OR then properly considered the impact of the proposed development on the significance of the heritage assets; reached a judgment that the proposed development would cause less than substantial harm; but was outweighed by the public benefits of the housing which the development would provide. In undertaking the balancing exercise, the planning officer placed considerable weight on the less than substantial harm identified. On a fair reading, section 7.4.4 of the OR incorporated and applied paragraph 194 of the Framework.
73. There was no legal requirement to classify the extent of the harm within the "less than substantial" category e.g. "low", "moderate", "high". The PPG was not binding on the Council (see *Solo Retail Ltd v Torridge DC* [2019] EWHC 489 (Admin)).
74. The representations made by the Twentieth Century Society were available to Members. The Defendant and IP's response to Ground 2 (the SCO's report) is set out above.

Conclusions

75. The planning officer correctly summarised the wording of sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 at OR 289 and 290. He summarised the policies in the Framework at OR 291 in the following way:

"Relevant paragraphs of Chapter 16 of the NPPF set out how LPAs should approach determining applications that relate to heritage assets. This includes giving great weight to the asset's conservation, when considering the impact of a proposed development on the significance of a designated heritage asset. Further, Paragraph 196 states that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset that harm should be weighed against the public benefits of the proposal."

76. At OR 292 to 294, he summarised the local policies as follows:

"292. LPP 7.8 states that development should among other things conserve and incorporate heritage assets where appropriate. Where it would affect heritage assets, development should be sympathetic to

their form, scale, materials and architectural details. DLPP HC1 reflects adopted policy.

293. CSP 16 ensures the value and significance of the borough's heritage assets are among things enhanced and conserved in line with national and regional policy.

294. DMP 36 echoes national and regional policy and summarises the steps the borough will take to manage changes to Conservation Areas, Listed Buildings, Scheduled Ancient Monuments and Registered Parks and Gardens so that their value and significance as designated heritage assets is maintained and enhanced."

77. The planning officer then considered the heritage assets (as I have described under Ground 2), and reached the following conclusions:

"Impact on Heritage Assets Conclusion

317. In light of the above, officers consider that the current proposal would lead to less than substantial harm to the Sydenham Hill Conservation Area, Grade II Listed buildings at Lammas Green and Non-designated Heritage Assets on Sydenham Hill.

318. The applicant has provided substantive evidence of the wider public benefits of the proposal including most significantly, the provision of 110 socially rented new homes, which meet an evidenced and clear identified need in place of the existing Mais House building which is again clearly evidenced as not serving local need or demand.

319. As such, officers must weigh the public benefits of the scheme against the harm identified to heritage assets as identified above. The harm is weighed against the public benefits in the report conclusion and urban design conclusion below."

78. The urban design conclusion was as follows:

"Urban Design Conclusion

327. The overall design approach has sought to ensure that in urban design terms, the scheme would result in a form of development that sits comfortably the wider character and appearance of the local area.

328. The proposals achieve a high quality design in both the proposed building and public realm, and the scheme overall presents significant planning benefits as outlined in detail above. In accordance with Paragraph 196 of the National Planning policy Framework the harm to heritage assets has been weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.

329. Whilst less than substantial harm to heritage assets has been recognised above, the significant public benefits presented by the proposed development in the provision of 110 new social rented homes are considered in this instance, to outweigh this harm.

330. As such, it is considered that on balance that the proposal is acceptable with regard to urban design and impact upon heritage assets, and accords with the Development Plan."

79. The final conclusion in the OR was as follows:

"Conclusion

639. The application has been assessed against the adopted Development Plan, as required by Section 38(6) of the Planning and Compulsory Purchase Act.

640. The proposals have been developed in the context of extensive pre-application consultation with Council Officers, the Greater London Authority and following two presentations to Lewisham's Design Review Panel. The applicant has also held three public exhibitions to which local residents and stakeholders were invited.

641. The Proposal would provide a substantial quantum of socially rented residential units to help meet the Borough's housing needs. This is a significant benefit to be weighed in the planning balance as the proposal will assist in addressing its housing need which is set to increase substantially under the draft London Plan housing targets.

642. The proposals reflect the principles of the highest quality design, ensuring an exemplary built environment for visitors and residents. The impacts upon heritage assets in the vicinity of the application site have been fully considered and it is concluded that less than substantial harm will be caused. The officer assessment has also identified some impacts upon occupants of neighbouring residential properties in relation to loss of light and overshadowing. However, on balance the benefits and planning merits of the scheme are considered to substantially outweigh any harm identified.

643. The proposed development would also result in the delivery of significant public realm enhancements, specifically through the delivery of the communal amenity space. Improvements to the existing highways network would also be secured by legal agreement.

644. In conclusion, the proposed development is considered to be in accordance with the relevant national planning policy guidance and development plan policies. The proposals are wholly sustainable development in accordance with the NPPF and will make an important contribution to the borough, in respect of housing supply

and importantly the wider borough community. The proposals are therefore considered to be both appropriate and beneficial. Therefore, on balance, any harm arising from the proposed development is considered to be significantly outweighed by the benefits listed above."

80. Applying the guidance in *Jones v Mordue* and *Palmer*, where the decision-maker refers to the statutory duty under the Listed Buildings and Conservation Areas Act 1990, the relevant parts of the Framework and any relevant policies in the development plan, there is an inference that he has complied with it, absent some positive indication to the contrary. The onus rests on the Claimant to demonstrate that there is a substantial doubt whether the decision-maker has done so.
81. In my judgment, a substantial doubt arises in this case, for the following reasons:
- i) The failure of the planning officer to advise Members to apply paragraph 194 of the Framework which provides:

"194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification...."
 - ii) The failure of the planning officer to advise Members that they were required to apply a weighted or tilted balancing exercise, giving the assessed degree of harm to the heritage assets "considerable importance and weight" as against the benefits of the proposed development.
82. In *Barnwell*, Sullivan LJ, analysed the authorities at [20], [23], [28] and concluded that the duty to pay "special regard" or "special attention", in sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990, means that there is a "strong presumption" against the grant of planning permission where it would cause harm to a heritage asset. Sullivan LJ held that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when carrying out the balancing exercise. It is not open to the decision-maker merely to give the harm such weight as he thinks fit, in the exercise of his planning judgment.
83. In *Barnwell*, the Inspector erred in not giving the harm to the listed building "considerable importance and weight" in the planning balance, and instead treating the less than substantial harm to the setting of the listed buildings as a less than substantial objection to the grant of planning permission (at [29]).

84. Thus the decision-maker must apply a weighted or tilted balancing exercise, giving the assessed degree of harm to the heritage asset "considerable importance and weight" as against other considerations. The same principles apply to a finding of harm to conservation areas under section 72.
85. In the *Liverpool City Council* case, the High Court held (per Kerr J. at [46] – [48], [78] – [85]) that, although the OR set out the relevant statutory provisions and the Framework provisions, when the planning officer later undertook the balancing exercise, he simply weighed the "less than substantial harm" to heritage assets against the public benefits of the proposal, without mentioning the need to apply "considerable importance and weight" to the harm to the heritage assets and without mentioning a "clear and convincing justification" for any such harm (paragraph 194 of the Framework). Kerr J.'s decision on this ground was upheld on appeal.
86. In this case, the balancing exercise was referred to on three occasions in the OR: at OR 319, OR 328-330, and OR 641 - 644. On a fair reading of the OR, taken as a whole, I conclude that the planning officer undertook an unweighted balancing exercise, weighing the "less than substantial harm" to heritage assets against the "significant" benefits of the proposed housing development. Unsurprisingly, the conclusion was that the harm was significantly outweighed by the benefits. As in the *Liverpool City Council* case, the effect was to "play down the part of the exercise represented by [paragraph 193 and 194 of the Framework] and to tilt the balance towards emphasising the absence of substantial harm and the public benefits to be weighed on the other side of the balance" (per Kerr J. at [81]).
87. In the *Liverpool City Council* case, Kerr J. was not satisfied that the Planning Committee would have remembered the isolated references to "great weight" and "clear and convincing justification" earlier in the officer's report (at [85]). Similarly, I am not persuaded that the reference to "great weight" at OR 291 was sufficient to correct the misleading approach to the balancing exercise demonstrated later in the OR. In this case Members were never expressly advised as to the need for a "clear and convincing justification" and regrettably the SCO's reference to the need for a "clear and convincing justification" was withheld from Committee Members. Even if the reference to relevant paragraphs in Chapter 16 in OR 291 could be said to incorporate paragraph 194 of the Framework, I consider that Committee Members would need much explicit guidance on how to give effect to the statutory duties under the Listed Buildings and Conservation Areas Act 1990.
88. A further flaw was that the OR did not disclose the SCO's classifications of the level of harm within the category of "less than substantial harm", and instead referred to "a degree of less than substantial harm". The effect of

those omissions was to downplay to Committee Members the level of heritage harm and the weight to be attached to it, as I found under Ground 2 (see paragraph 66 above).

89. I would have reached that conclusion even in the absence of the guidance in the PPG that the extent of the harm within each category should be articulated, as it may vary. The PPG is only guidance, and not binding. However, where a planning officer decides to depart from national guidance, I consider that he should give reasons for doing so, especially if he is departing from the approach taken by the Council's conservation expert. I do not consider that this part of the PPG ought to be treated with "considerable caution", as suggested by Lieven J. in respect of a different part of the PPG in *Solo Retail Limited v Torridge DC* [2019] EWHC 489 (Admin).
90. The Claimant submitted that the Council acted in breach of the duties in sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 by failing to give close consideration to the SCO's expert advice. I refer to my conclusions on Ground 2 where I found that Lindblom LJ's observations at [73] – [78] and [81] in the *Liverpool City Council* case, where he found a breach of the duty under section 66, applied to this case, for the reasons I set out.
91. The Claimant also submitted that the Council acted in breach of the duties under sections 66 and 72 of the Listed Buildings and Conservation Areas Act 1990 by failing to give close consideration to the letter from the Twentieth Century Society.
92. The Twentieth Century Society objected to the proposed development in a letter dated 16 April 2020. After describing the significance of the heritage assets, it said:

"Comments

The Society's principal concern is the height of the residential block proposed to replace Mais House, and how views of this new block will intrude on the Lammas Green's idyllic atmosphere, which we consider to be a key aspect of its significance.

Visitors to Lammas Green experience an astonishing sense of seclusion and calm, with surrounding trees creating a pleasant backdrop from viewpoints around the central green. The scale, aesthetic, layout and green qualities of the estate set it apart from most other housing schemes built in this period, and it is remarkable that even after over 60 years the sense of peace remains undisturbed by insensitive alterations. Views of the proposals submitted by the

applicant show that the proposed block of flats will be dominant above the roofline of the listed terraced houses and will be a substantial interruption to the tree canopy that serves as the estate's current backdrop.

The Society ... remain unconvinced that a similar number and size of residential units could not be provided in a different arrangement that would have a lower roofline and therefore reduce the level of harm caused to Lammas Green's historic significance. Removing the pitched roof would be an obvious way to reduce the proposed block's height, reducing the visibility of the proposed development in views from within Lammas Green.

Summary

The Society wishes to object to the above application as we consider the proposals to cause unnecessary harm to a Grade II listed heritage asset. We recommend that planning permission be refused, or the scheme be amended to reduce the height of the proposed residential block, so the historic and architectural significance of Lammas Green is sustained."

93. Section 5.2 of the OR dealt with publicity and representations. OR 52 stated:

"In total 209 representations have been received in objection to the proposed development. These objections include representations from the Forest Hill Society, the Sydenham Society and MP Helen Hayes. Representations were also received from the London Countryside Charity, the Sydenham Hill Ridge Forum and the 20th Century Society."

94. The Twentieth Century Society's representations were not individually summarised, nor were the discrete points which they made included in the general listing of public responses in OR 53. Their view that the height of the proposed building, and so its heritage impact, could be reduced without compromising the number and size of units was not reflected in any of the other summaries provided. The general summary of objections only contained 21 words on heritage.

95. I accept the Claimant's submission that, as the National Amenity Society for the Lammas Green listed buildings, the views of the Twentieth Century Society were necessarily material to the determination of a planning application which affected them, and the conservation area of which they are part. I consider that, as a matter of good practice, the OR ought to have summarised the key points which the Society made, to bring them to the attention of Committee Members. However, as the letter was available to Committee Members, in the restricted "public comments packs", I do not

consider that the failure to do so amounted to a breach of the duties under the Listed Buildings and Conservation Areas Act 1990.

96. For the reasons set out above, Ground 1 succeeds, other than in respect of the Twentieth Century Society.

Ground 4

Submissions

97. Under Ground 4, the Claimant submitted that the SCO's comments were a "background paper" for the OR, and therefore should have been listed in the OR and made available for inspection, pursuant to section 100D LGA 1972.

98. In response, the Defendant and the IP submitted that the SCO's comments were not a background paper within the meaning of section 100D LGA 1972. In his witness statement, Mr Robinson, the planning officer, said that he did not treat the SCO's comments as a background paper because:

"15. Reports to Committee and recommendations are given by the Director of Planning, albeit that other officers within the Planning Service will write and contribute to the report on the Director's behalf.... The Conservation Officer is a member of the Planning Service, as am I. Comments received from the Conservation Officer are treated as the opinion of one officer within the Planning Service, provided to another, as a contribution towards the Director of Planning's overall response to an application for planning permission...."

Legal framework

99. Subsection 100D(4) LGA 1972 provides:

"For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

100. The Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020, regulation 15 addresses the

difficulty of access to council premises to view documents during the Covid-19 pandemic by providing that these provisions apply as if there was a section 100L which provides:

"(c) a document being "open to inspection" includes being published on the website of the council;

(d) the publication, posting or making available of a document at offices of the council include publication on the website of the council."

101. Access to reports and background papers not only allow the public to be informed, but to participate by making written representations to councillors and officers in advance of the meeting and also assisting the preparation of oral representations. A breach of these provisions is significant: see *R (Joicey) v Northumberland County Council* [\[2014\] EWHC 3657 \(Admin\)](#), [\[2015\] PTSR 622](#) at [47] per Cranston J.:

"The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making."

102. This decision was recently affirmed by Dove J. in *R (Holborn Studios Limited) v London Borough of Hackney (No2)* [\[2020\] EWHC 1509 \(Admin\)](#), [2021] JPL 17 at [71].

103. The mere fact of a failure to disclose information strictly in accordance with the duties under sections 100B and 100D will not by itself necessarily require the quashing of any decision made at a relevant meeting. It is necessary to consider the significance of the failure, having regard to the purpose of the duty: see *R (McCann) v Bridgend County Borough Council* [\[2014\] EWHC 4335 \(Admin\)](#) per HHJ Keyser QC at [27].

Conclusions

104. At the beginning of the OR, the background papers were listed as the Case File, the Framework, the London Plan and Local Development Framework Documents.

105. Plainly, the policy documents did not fall within the statutory definition of background papers, as subsection 100D(5) excludes any published works.

106. The only documents in the Case File were documents submitted in support of the planning application and notes of the local meeting with residents. None of the consultation responses were included.

107. I accept the Claimant's submission that Mr Robinson misdirected himself in law in deciding that the SCO's comments were not a background paper because she was an officer in the Planning Service providing him with advice, under the overall direction of the Director of Planning. The definition of background papers is any document which "disclose any facts or matters on which ... the report or an important part of the report is based, and ... have ...been relied on to a material extent in preparing the report". The definition is not concerned with the source of a document, except that it excludes published works. In particular, the definition does not exclude documents because they were produced by the same council department as the final report.

108. In this case the text of the OR indicates that Mr Robinson relied heavily on the facts and matters contained in the SCO's comments when drafting the heritage section of the OR, particularly in relation to the significance of the heritage assets. Therefore it seems likely that the SCO's comments were a background paper, within the meaning of subsection 100D(5). However, it is the function of the proper officer to decide what, in his opinion, constitutes a background paper, and the Court should not supplant his role.

109. For the reasons set out above, Ground 4 succeeds.

Ground 5

110. Under Ground 5, the Claimant submitted that the Council's conclusion, in OR 274, that the development "would make a positive contribution to the character and appearance of the surrounding area" was not rationally open to it, in the light of its conclusion, in OR 273, that it was preferable that the proposed development should not appear from Dulwich Park above the tree canopy.

111. OR 273 and 274 read as follows (*emphasis added*):

"273. The TVIA outlines that in relation to views from the opposite side of the ridge, to the northwest of the application site at Dulwich Park, that the proposed development would just be visible above the existing tree canopy. Whilst it would be preferable that no part of the development was visible at all, only a very small portion of the proposals would be visible from very long-range views. It is also acknowledged that further north east and south west of the application site along Sydenham Hill, that some buildings (the highest of such being 9 storeys in height) can also be seen on the horizon through tree canopy. Additionally, it is acknowledged that the building would also be visible on the horizon when viewed from the

opposite side of the ridge, from the south. Whilst the proposals will just be visible and would have some impact upon the appearance of Sydenham Ridge, no unreasonable harm is identified here that would warrant refusal of the scheme. Impact of the proposals on heritage assets specifically is considered below.

274. Whilst the scale of the proposed development is generally larger and more dense than that of the existing built context. (*sic*) The design team have sought to reduce the buildings impact on the surrounding area by through (*sic*) careful articulation of the massing, combined with a very high quality of detail and materiality as outlined below. Overall, the proposals are considered to sit relatively comfortably within the existing built context and would make a positive contribution to the character and appearance of the surrounding area whilst optimising the quantum of development on site...."

112. OR 273 and 274 were in a section of the report headed "Urban Design", and in a sub-section headed "Form and Scale", which began at 7.4.2. On my reading, the sentence in OR 274 which is underlined above is the planning officer's conclusion in respect of the entire subsection on "Form and Scale", not only the matters raised in OR 273. Thus, I accept the submission of the Defendant and IP that OR 274 forms part of the overall balancing exercise undertaken in the OR, which included the full assessment of the impacts of the proposals on urban design. In the circumstances it was perfectly reasonable, and a quintessential exercise of planning judgment open to the Council, to conclude that the scheme would make a positive contribution to the character and surrounding area as whole, notwithstanding that it was "preferable that no part of the development was visible at all".

113. For these reasons, Ground 5 does not succeed.

Ground 6

Submissions

114. Under Ground 6, the Claimant submitted that the Council's failure to ask the Design Review Panel ("the Panel") to consider the planning application was in breach of the legitimate expectation created by paragraph 6.9 of the Council's Statement of Community Involvement ("SCI"). Consultation with the Panel at the pre-application stage was insufficient when the Panel remained critical of the pre-application schemes.

115. The Defendant and the IP submitted that the SCI was sufficiently flexible to permit the Council, in the exercise of its planning judgment, not

to refer the planning application to the Panel, as it had already considered the pre-application proposals on three occasions, and made its views clear.

116. The provisions in the SCI did not amount to a clear and unambiguous representation sufficient to found a legitimate expectation. In the alternative, the Council did not breach the representation, as referrals at pre-application and post-application stages were part of a single iterative process.

117. Further, in the alternative, it was reasonable and fair to resile from the representation, because of the pre-application referrals. The breach (if any) did not frustrate any reliance by the Claimant on paragraph 6.9 of the SCI. Whilst reliance is not a prerequisite of a legitimate expectation claim, it is a matter which is relevant to the question of fairness.

118. Finally, even if there was a breach of a legitimate expectation which was unlawful, it was immaterial to the decision, as the Council concluded that the IP had taken into account and addressed the comments from the Panel (see OR 111).

SCI: the legal framework

119. A local planning authority is required by section 18(1) of the PCPA 2004 to prepare a statement of community involvement.

120. Section 18(2) provides:

"The statement of community involvement is a statement of the authority's policy as to the involvement in the exercise of the authority's functions under ... and Part 3 of the principal Act of persons who appear to the authority to have an interest in matters relating to development in their area."

The principal Act is the TCPA 1990 and Part 3 sections 55 to 106C, including the handling and determination of planning applications.

121. Section 18(3) provides that the statement of community involvement is a development plan document. The local planning authority is bound by its policy on community involvement, once it has been formally adopted.

122. Paragraph 129 of the Framework provides that local planning authorities should ensure that they make appropriate use of processes for assessing and improving the design of development, and gives illustrations. It adds that, in assessing applications, "local planning authorities should have regard to the outcome from these processes, including any recommendations made by design review panels".

123. In *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029, [2010] JPL 621, the Court of Appeal held that a promise in a statement of community involvement to act in a certain way in handling a planning application gives rise to a legitimate expectation that this will be done. Sullivan LJ said, at [12] to [15]:

"(1) Legitimate expectation

12. Mr Harwood suggests that this is a paradigm case of a breach of legitimate expectation. The Statement is part of the respondent's local development scheme (see section 17 of the 2004 Act) and was prepared, submitted for independent examination, and adopted in accordance with the procedures which are set out in sections 19, 20 and 23 of the 2004 Act. The Statement sets out how the respondent intends to involve local communities in the consideration of planning applications: see paragraph 1.1. It sets out who is going to be involved, see paragraph 1.2; and it tells the public that when the Statement is adopted "the council is required to follow what it says".

13. There can be no doubt that the appellant should have been notified of the planning application in accordance with the terms of Annex 6, see above. The sole reason why he was not notified is the respondent's administrative error. On the face of it, therefore, one has a case of both a promise to notify and a practice to notify in accordance with Annex 6 of the Statement, both the promise and the practice being underpinned by the provisions of the 2004 Act, which required the respondent to prepare the Statement.

14. On behalf of the respondent and the interested party, Mr Beard and Mr Kolinsky submitted that there was no legitimate expectation. It was submitted that, since there was a specific statutory code — the General Development Procedure Order ("GDPO") — which regulates the balance between the various interests, applicants and local residents, as to who should and who should not be notified, it would be wrong to impose some rigid requirement to notify in accordance with the terms of Annex 6. It was submitted that this would upset the balance that had been struck by the statutory requirements. It seems to me that reference to the statutory requirements is of no real assistance. Legitimate expectation comes into play when there is no statutory requirement. If there is a breach of a statutory requirement then that breach can be the subject of proceedings. Legitimate expectation comes into play when there is a promise or a practice to do more than that which is required by statute. It seems to me that the Statement is a paradigm example of such a promise and a practice. As I understood it, Mr Beard accepted that this appellant falls within Annex 6. Although he submitted there was an element of discretion, that is not relevant in the circumstances of the present case. No doubt

if an officer had given consideration to the matter and had concluded that, for example, this appellant was so far away from the proposed development that he could not fairly be described as an adjoining occupier then, absent Wednesbury unreasonableness, the court would not interfere with that exercise of discretion. In the present case no discretion was exercised and administrative mistake was made. It was submitted by the respondent and the interested party that, even though there was a clear statement that a person in the position of the appellant would be sent a letter, there was nevertheless no unequivocal assurance that they would be notified. I am quite unable to accept that submission given the clear terms of paragraph 1.3 of the Statement which tells the public that when the Statement is adopted by the council it is "required to follow what it says". It would be difficult to imagine a more unequivocal statement as to who would, and who would not, be notified.

15. There was therefore, in my judgment, a clear breach of the appellant's legitimate expectation that he would be notified of planning applications, such as the application made by the interested party, in accordance with the terms of annex 6 to the Statement. The appellant therefore succeeds on issue 1. It does not necessarily follow that the grant of planning permission was unlawful. It is unnecessary in the circumstances of this particular case to decide whether a claimant in the appellant's position must, in order to establish procedural unfairness, also demonstrate prejudice as a result of failure to notify him, because the question whether the appellant was prejudiced by the failure to notify him in accordance with the Statement (and, if so, to what extent) is plainly relevant to the exercise of the court's discretion as to whether the permission should be quashed or whether declaratory relief should be granted (see issue (5) below)."

Legitimate expectation – the law

124. In *Council of Civil Service Unions v Minister for the Civil Service* [\[1985\] AC 374](#), Lord Fraser held, at 401B:

"Legitimate...expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the Claimant can reasonably expect to continue."

125. In order to found a claim of legitimate expectation, the promise or practice relied upon should be "clear, unambiguous and devoid of relevant qualification" (*R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [\[1990\] 1 WLR 1545](#), per Bingham LJ at 1569G; *United Policyholders*

Group v AG of Trinidad and Tobago [\[2016\] 1 WLR 3383](#), per Lord Neuberger, at [37]).

126. A legitimate expectation may be enjoyed by an individual or a class. Detrimental reliance on a promise or practice is not necessary. It is a relevant consideration to take into account when deciding whether the adoption of a policy in conflict with the promise would be an abuse of power (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [\[2008\] UKHL 61](#), [\[2009\] 1 AC 453](#), per Lord Hoffman at [60]). In *Re Finucane's Application for Judicial Review* [\[2019\] UKSC 7](#), [\[2019\] HRLR 7](#), Lord Kerr said at [62], [63]:

"62. From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed upon it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.

63. In this case, it was argued for the respondent that it was incumbent on Mrs Finucane to show that she had suffered a detriment. That argument simply does not avail in this instance, since the question of detriment can only arise, if it arises at all, in the context of a substantive legitimate expectation. Here the promise made did not partake of a substantive benefit to a limited class of individuals (as for instance, in *Ex p. Coughlan*); it was a policy statement about procedure, made not just to Mrs Finucane, but to the world at large."

Lord Carnwath agreed with Lord Kerr, at [156] – [160].

127. In *Paponette v AG of Trinidad and Tobago* [\[2010\] UKPC 32](#), [\[2012\] 1 AC 1](#), Lord Dyson said:

"36. The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the

applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68:

"The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

It is for the authority to prove that its failure or refusal to honour its promises *was* justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was *not* justified.

...

45. In *Bibi*, Schiemann LJ said that an authority is under a duty to consider a legitimate expectation in its decision making process. He said:

"49. Whereas in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 it was common ground that the authority had given consideration to the promises it had made, in the present cases, that is not so. The authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations.

...

51. The law requires that any legitimate expectation be properly taken into account in the decision making process. It

has not been in the present case and therefore the authority has acted unlawfully."

46. The Board agrees. Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account."

128. A legitimate expectation may be procedural or substantive. In *R v North and East Devon HA ex parte Coughlan* [2001] QB 213, at [57], [58], Lord Woolf distinguished between (a) a procedural promise to consult, which the Court will enforce as a matter of procedural fairness, unless there is an overriding reason to resile from it, and (b) a promise of a substantive benefit, where the Court has to "decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power ... the court will have the task of weighing the requirement of fairness against any overriding interest relied upon for the change of policy".

129. In *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, Laws LJ applied the principle of proportionality to the assessment, saying, at [68]:

"68. The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement — to describe what may count as good reason to depart from it — as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have

expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

Evidence

130. The SCI is directed at those who live, work or undertake other activities in the Borough. It also refers to stakeholders, and those who may be consulted about planning matters in the Borough.

131. In its Conclusion at section 8, it states:

"The Statement of Community Involvement is intended to provide certainty to the community about how and when they can participate in the planning process. Given the diverse nature of planning, it is not possible to determine every possibility and to this extent the Statement of Community Involvement is intended to be flexible enough to accommodate various circumstances. The Statement of Community Involvement should ensure continual engagement with the community in a timely and productive manner."

132. In an earlier information section, paragraph 4.13 poses the question "What is meant when the Council says it will do something where/as appropriate?" The answer given is:

"Planning is very diverse in the issues it deals with and the people it impacts on. It is not possible to determine every possibility and, to this extent, the Statement of Community Involvement is intended to be flexible enough to accommodate various circumstances as they arise. In situations where there will be a need for the Council to exercise discretion in deciding how something should be dealt with, the terms 'where appropriate' or 'as appropriate' are used to reflect the reality that something will only happen if, having regard to the specific circumstances of the matter being considered, the Council considers it is a suitable and/or reasonable approach to take....."

133. Paragraph 3.13 provides:

"The Design Panel and the Amenity Societies Panel have been established to provide design advice to the Council on certain planning applications (see Section 6 for the types of planning application that are included in the agendas for these panels)."

134. Members of the Design Panel are independent of the Council and are appointed because of their expertise in design e.g. architects. The IP's Planning Statement explains its role as follows:

"3.2.9 The purpose of the DRP is to provide expert, independent design advice and guidance to developers and their design teams, Planning case officers and the Planning Committees on significant development within the Borough. The DRP's advice is meant to assist and encourage the developers and their design teams to achieve and deliver high quality design in their development proposals."

135. Section 6 is headed "Planning applications". It provides, at paragraph 6.1:

"This section details how the community will be involved with the processing of planning applications (as a minimum)."

136. Paragraphs 6.2 to 6.5 provide for pre-application consultation, which the Council strongly encourages.

137. Paragraph 6.6 sets out in a table "the minimum consultation arrangements" once a planning application has been submitted. Within the table, paragraph 6.9 provides:

"The following planning applications will be referred to the Design Panel:

? planning applications for major new development and significant alterations to existing buildings with scope to impact on the borough's townscape. Major development is defined as commercial buildings proposing 1,000sq.m. or more of new floorspace or 10 or more residential units, and such other developments which the Council's Head of Planning considers would benefit from design advice. ...

? any significant new buildings proposed within conservation areas.

The following planning applications will be referred to the Amenity Societies Panel:

? in conservation areas, planning applications for ... new buildings not referred to the Design Panel,..."

138. Paragraph 6.10 provides that:

"All representations must be considered by the Council in making a decision."

139. The Panel was consulted at the pre-application stage, on three occasions, and made critical comments. It was not consulted on the application which was submitted. The OR described the history of consultation to Committee Members as follows:

"5.5 LEWISHAM DESIGN REVIEW PANEL (LDRP)

108. The proposed development was presented to LBL's Design Review Panel (DRP) on three occasions across 2018 and 2019

109. Following comments made in relation to the DRP's comments from the first two meetings, the design team met with the Planning Service and amended the scheme to address the issues raised by the DRP, as well as those raised by the Planning Service.

110. The Panel's comments following the third meeting in July 2019 in relation to a 120 unit iteration of the proposed development are summarised as follows:

- The presentation was very good and clear and the evolution of the scheme is generally developing in a positive direction.
- The Panel noted the reduction in the overall heights of some of the proposed blocks which it regarded as a positive trend. However, the buildings still appear to be of a scale and mass which seem excessive when considered in context. The case for a substantial development of the heights proposed has not really been developed much beyond the consequence of the quantum of development. Whilst the architects have applied considerable energy and intelligence to talking the issue, the fundamental problem of the scale of development remains taking into account the context of the sub-urban treed environment with generally low-rise buildings surrounding, and important heritage assets on both neighbouring land plots on Sydenham Hill.
- The Panel strongly recommended that the scale is re-evaluated and a more persuasive supporting architectural and townscape narrative developed to help underpin the case for the final outcome. This is missing at present and makes the development therefore harder to substantiate.
- The central building within the body of the site also appears too tall/large.
- The Sydenham Hill frontage is the most important and is not yet working entirely successfully.

- The approach to polychromatic brickwork on the elevations was rich and characterful but the buildings in general did not engage with the ground very successfully and the language of the architecture needs to be further developed, modelled and refined in intent. The detailing should be contemporary and should avoid pastiche, some Panel members commenting that the architecture exhibited a clear 1950s feel which was suspected to be unintentional.
- The landscape design strategy is evolving positively, and the integration of building footprints and landscape is starting to appear much more convincing. However there are concerns about the separation between public and private spaces which seems unclear at present, and the general integration of internal plans at ground level and the landscape spaces. The opportunities that ground level living can offer in terms of relationship with terraces, gardens and the like and the effect architecturally on the base of the building have yet to be fully developed.

111. The applicant subsequently amended the application in response to the comments from the panel's third view, constituting in a further reduction of scale and loss of 10 residential units. The responses are discussed in detail in the applicant's Design and Access Statement and Planning Statement as well as in the planning assessment below. The scheme has not been further reviewed by the Panel, the scheme has support from the councils urban design team, and officers consider that the comments from the Design Review Panel have been taken into account and addressed within the submission scheme."

140. Mr Robinson elaborated upon the reasoning in OR 111 in his witness statement filed in the proceedings.

141. Mr Murtagh listed at paragraph 26 of his witness statement the amendments which the IP made from the inception of the proposals in response to feedback from local residents, the Council, the GLA, Amenity Societies and all others.

142. The IP's Design and Access Statement identified amendments to the scheme between the Panel's third response in July 2019 (as set out in the OR) and the submitted planning application. The total number of units was reduced from 120 to 110. There was a reduction in the number of storeys in some blocks, reducing overall massing. Blocks A, B and C were between 4 and 7 storeys. Otto Close terrace massing had been reduced in height in one section. All parking was at ground level. The play space was retained and to be refurbished. The garages were to be replaced with terraced houses.

Vehicle access to the blocks was rearranged so that relocation of the bus stop on Sydenham Hill was no longer required.

Conclusions

143. The table to paragraph 6.6. of the SCI outlined "the minimum consultation arrangements for planning consultations". It included a clear representation that a planning application for a major development (as defined) "will" be referred to the Panel. It was expressed in mandatory terms, and it was a "minimum" requirement. It did not confer a discretion on the Council as to whether or not to refer to the Panel. The circumstances in which the Panel would be consulted were clearly identifiable in advance, and so this was not one of the "situations" or circumstances in which the Council enjoyed a degree of flexibility (see paragraphs 4.13 and 8 of the SCI).
144. Section 6 of the SCI clearly distinguished between consultation on a planning application, and pre-application consultation, which was addressed earlier, at paragraphs 6.2, 6.3 and 6.3A.
145. In my judgment, the Council made a representation or promise that was "clear, unambiguous and devoid of relevant qualification" (see paragraph 125 above). It was directed to a class of persons, namely, those who lived, worked or undertook other activities in the Borough, which included the Claimant. Therefore I am satisfied that the Claimant had a legitimate expectation that the Council would refer the IP's planning application to the Panel.
146. The representation was a "policy statement about procedure" (*Re Finucane*, at [63]), namely consultation. It did not confer any substantive benefit on the Claimant. So it was a procedural, not a substantive, legitimate expectation.
147. The planning officer's reasons for not referring the planning application to the Panel were set out in his witness statement as follows:
- i) the Panel had already considered and commented upon three iterations of the proposed scheme at pre-application stage, in accordance with the Planning Performance Agreement between the Council and the IP, and the desirability of reviewing design as early as possible (Framework paragraph 129);
 - ii) the IP had made several amendments as a direct response to the comments made by the Panel in its third review;

iii) officers were satisfied that the amended proposals addressed the Panel's concerns and given the IP's "positive and proactive response", officers did not consider it necessary to return the proposals to the Panel for a fourth time;

iv) the scheme was satisfactory.

148. In my judgment, these reasons do not justify the failure to refer the planning application to the Panel. The Panel had considered earlier, larger schemes. They objected to all those schemes, and recommended changes. Moreover, the Panel's comments on the third review revealed fundamental concerns which were not fully addressed by the amendments in the submitted application for planning permission, listed above, at paragraph 142. For example, the Panel stated:

i) despite the reduction in the overall heights of some of the proposed blocks, "the buildings still appear to be of a scale and mass which seems excessive when considered in context";

ii) "...the fundamental problem of the scale of development remains, taking into account the context of the sub-urban treed environment with generally low-rise buildings surrounding, and important heritage assets on both neighbouring land plots ...";

iii) "The Panel strongly recommended that the scale is re-evaluated ...";

iv) "The Sydenham Hill frontage is the most important and is not yet working entirely successfully";

v) "the buildings ... did not engage with the ground very successfully and the language of the architecture needs to be further developed, modelled and refined in intent".

149. At the Committee meeting, Mr Ager who is a member of the Residents' Steering Group, said:

"The Lewisham Design Review Panel did not support the design at the last meeting in July 2019. The design was not returned to the panel for further review and residents strongly disagree with the planning report conclusion that the final design reflects their recommendations. The density was reduced by less than 10% from the design presented to the panel....."

150. Therefore the statement in OR 111 that the Panel's concerns had been addressed in the submitted application was, in my view, misleading, as it implied that there were no outstanding concerns.
151. If the application had been considered by the Panel, then Committee Members would have been informed of the Panel's views on the proposed scheme, which they would then have been able to take into account when making their decision. Of course, the Panel's views would only have been advisory. Nonetheless, the Council had promised that they would be sought, and taken into account when the application for planning permission was decided.
152. Contrary to the guidance in *Paponette* and *Bibi* (paragraph 127 above), the Council failed to take into account that there had been a breach of the legitimate expectation arising from the representation in the SCI. When the matter was raised at the meeting of the Committee, the planning officer advised that there was no statutory obligation to refer the application to the Panel. He failed to advise Members of the Council's mandatory policy on Panel consultation in the SCI, and its status as a development plan document which is required by section 18(1) of the PCPA 2004.
153. In my judgment, the Council acted unfairly in failing to comply with the SCI, in breach of the representation made to the Claimant, as a member of the local community. In consequence, Members made their decision on the IP's planning application without the benefit of a review by a body of specialists, whose comments could have influenced their views. There was no overriding reason which objectively justified the decision to resile from the legitimate expectation.
154. For these reasons, Ground 6 succeeds.

Senior Courts Act 1981, section 31

155. The Defendant and the IP submitted that relief ought to be refused pursuant to subsection 31(2A) of the Senior Courts Act 1981 as it "appears to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". They referred to the conclusions, at OR 641 to 644, that the proposed development was in accordance with national and local policy, and would make a significant contribution to the supply of rented social housing. The OR concluded that the benefits and planning merits of the scheme substantially outweighed any harm identified.
156. In my view, the submissions of the IP lost sight of the fact that, in the main, the objectors were not opposed to the redevelopment of the Site in

order to upgrade the existing social housing and increase the number of residential units. The Claimant's objection related to the inappropriate height and scale of the new buildings, which would harm the setting of the Grade II Listed buildings and the Conservation Area.

157. In my judgment, if the legal errors which I have identified above had not occurred, it is possible that the Members would have concluded that the IP ought to re-consider the height and scale of the proposed development, and submit a more acceptable proposal. Therefore I am not satisfied that it was highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

Final conclusion

158. The claim for judicial review is allowed on Grounds 1,2, 4 and 6, as pleaded in the original Statement of Facts and Grounds. Ground 3 was not pursued, and Ground 5 is dismissed. Given the number of significant errors made by the Council, and the possibility that, absent such errors, a different conclusion could have been reached by the Planning Committee, I consider that the decision to grant planning permission ought to be quashed.