IN THE HIGH COURT OF JUSTICE CO/3041/2021
QUEEN'S BENCH DIVISION
PLANNING COURT
ADMINISTRATIVE COURT

BETWEEN:

LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

(1) MINISTER OF STATE FOR HOUSING

(2) WESTMINSTER CITY COUNCIL

Defendants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) LEARNING FROM THE RIGHTEOUS

Interested Parties

PROPOSED 2ND INTERESTED PARTY'S SUMMARY GROUNDS OF DEFENCE

- **[CB:x]** = page *x* of the claim bundle.
- [**IR:x**] references are to paragraph *x* in the Inspector's report ("**the IR**") at [**CB:71-452**].
- [**DL:x**] references are to paragraph *x* in the Minister's decision letter ("**the DL**") at [**CB:45-70**].

Introduction

1. Learning from the Righteous ("**LFtR**") was a formally represented "Rule 6 Party"[1] which appeared in support of the UK Holocaust Memorial and Learning Centre Scheme ("**the Scheme**") at the planning inquiry before Inspector David Morgan in October and November 2020. LFtR was the only Rule 6 party which appeared in support of the Scheme (others, including the Claimant in these proceedings, objected to the scheme).

2. LFtR's founder and CEO is Mr Antony Lishak. The Court is referred to Mr Lishak's 1st witness statement for a summary of the importance of the Scheme to LFtR and its educational mission, an explanation of why LFtR chose to become formally represented at the inquiry as a Rule 6 party, and why it now seeks permission to respond to this claim as an interested party. Exhibited to Mr Lishak's witness statement is a copy of LFtR's closing submissions to the inquiry, which are also summarised at section 7 of Inspector Morgan's 29.4.21 report ("**the IR**") at [**CB:111-124**].

3. These summary grounds respond only to Ground 4 of the Claimant's case – the ground on putative alternative sites. As Mr Lishak explains, this issue was at the heart of LFtR's evidence and submissions to the Inspector and the Minister of State.

4. The Claimant has not served LFtR with its claim form. So these summary grounds also explain the basis for LFtR seeking to respond to the claim as an interested party under CPR r.19.2(2).

[1] i.e. LFTR submitted a formal Statement of Case to the inquiry under Rule 6 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, called written and oral evidence, was represented by counsel and made opening and closing submissions to the inquiry.

5. These summary grounds:

(i) Outline LFtR's summary response to the Claimant's Ground 4; and then

(ii) Explain the basis for LFtR's application to respond to this claim as an interested party.

LFtR's Response to C's Ground 4

(i) LFtR's submissions to the inquiry on the Scheme's location

6. As above, LFtR's closing submissions are exhibited to Mr Lishak's witness statement and are also summarised at section 7 of the IR [**CB:111-124**].

7. So far as relevant to the Claimant's Ground 4 (with § references to the closings submissions at Mr Lishak's appendix 1), LFtR's evidence to the inquiry was that:

(i) The resonance between the Scheme's content and its location next to the Palace of Westminster will be profound. That resonance will make the Scheme (literally) unique: §8 - §15.

(ii) The proposed location accords with the key recommendations of the Holocaust Commission's 2015 report to the Prime Minister. Indeed, the site is *more* "prominent" and "iconic" within the meaning of those recommendations than the putative alternative sites frequently cited by the Claimant and other objectors (in particular, the Imperial War Museum): §17-§24.

(iii) That prominence is a profound benefit of the Scheme. It would not be secured, as one of the objecting witnesses had argued, "*in any number of locations*". In particular, as LfTR's witness explained to the inquiry in words which were echoed by the Inspector in the DL:

> "[…] in the 1930s and 40s, Jews were stripped of citizenship. When most vulnerable, they were left isolated – with no country to fight for their protection, to say "*you are our people and we won't let you be treated this way*". As Mr Maws [for LFtR] put it, siting a memorial in VTG is a powerful symbol that says: British Jews are British; your history is our history; your security is a British concern, "you belong here"."
>
> §28 of LFtR's closing submissions

(iv) The Scheme's location will enhance its power as an educational tool exponentially. The scheme will galvanise, focus and coordinate teaching and learning about the Holocaust in the UK for future generations: §37-§41.

(v) In the end, LFtR argued that it was this "locational imperative" – delivering this Scheme **in this place** – which was the point of overwhelming importance for the inquiry: §42-§49.

(ii) The Inspector's report

8. Inspector Morgan summarised LFtR's case at Section 7 of the IR [**CB:111-124**]. His conclusions were set out in Section 15 [**CB:217-283**].

9. The Inspector addressed the scheme's location from [**IR:15.148-163**]. He found that:

(i) The Scheme's proposed location meets the core expectations the recommendations of the Holocaust Commission's report. The site's location would help the Scheme to make a "clear and unequivocal statement about the degree of importance we as a nation place on preserving the memory of the Holocaust" which would "readily serve as a focal point for its national commemoration": [**IR:15.155**].

(ii) The Inspector accepted the core of LFtR's case, i.e. that there is an explicit and direct relationship between the significance and prominence of any given site and the value and status that individuals assign to the events commemorated: [**15.157**].

(iii) Which is why the Scheme's location next to Parliament in a place of "national and indeed international importance" was found to be justified: [**15.158**]. The Inspector continued in that paragraph (with **emphasis** added):

> "It should also be recalled that the HMC also concluded that the [Imperial War Museum] was also very highly regarded, being within easy reach of Westminster. However, if one accepts the primacy of location in recognising the importance of the Holocaust, **it follows that the selection of a less significant location connotes a lesser degree of significance to the purpose of that commemoration**."

(iv) The Inspector added at [**IR:15.159**] that the Scheme's location next to Parliament would amplify its commemorative and cognitive purpose. He ended that paragraph by citing LFtR's case (with **emphasis** added):

> "Lastly, the idea of the Memorial offering a sense of commemorative citizenship (to those form which it was robbed), a symbol that says "*British Jews (and others of minority ethnicity and sexuality) are British; your history is our history; your security is a British concern, you belong here*", has a very powerful resonance, and **on that should indeed be heard in the context of the Palace of Westminster**".

10. On alternative sites, the Inspector found that:

(i) Albeit considering alternative sites may be relevant and necessary, to garner significant weight, their merits must logically be underpinned by a good measure of evidence demonstrating their viability and credibility: [**IR:15.165**]. That comment is the central target of the Claimant's Ground 4.

(ii) However, the Inspector had "**serious concerns**" over whether the principal alternative site under consideration – the Imperial War Museum – would meet the criteria of housing a "bold and striking" memorial in a "prominent location": [**IR:15.167**].

(iii) Further, the alternatives before the inquiry – including the Imperial War Museum site – were constrained, and there was no detailed scheme before the inquiry which would meet the core requirements of the Holocaust Commission's report: [**IR:15.168-169**]. Which meant that the weight the Inspector gave to alternative sites in the planning balance was very limited (for the Imperial War Museum site) and lesser still (for the others).

(iii) The Minister of State's findings

11. The Minister endorsed the Inspector's recommendations. He concluded at [**CB:51**] that:

> "*Location*
>
> 33.The Minister of State notes that the Victoria Tower Gardens as a site for the UKHMLC was not anticipated by the HMC Report, nor identified in subsequent site selection processes (IR15.148). The Minister of State has carefully considered the analysis set out at IR15.148-15.163 and for the reasons given there, he agrees with the Inspector that the location next to the Palace of Westminster would offer a powerful associative message in itself, which is consistent with that of the memorial of its immediate and wider context (IR15.161). The Minister of State further agrees with the Inspector's conclusion that the location of the UKHMLC adjacent to the Palace of Westminster can rightly be considered a public benefit of great importance, meriting considerable weight in the heritage and planning balance (IR15.161).
>
> *Alternative Locations*
>
> 34.The Minister of State notes the Inspector's assessment of alternative sites and, for the reasons given at IR15.164-15.169, agrees that the Imperial War Museum [IWM] lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery (IR15.169). The Minister of State agrees with the Inspector's conclusion that the weight to be afforded the IWM alternative in the planning balance is very limited (IR15.169). Furthermore, the Minister of State agrees that the two other sites [Potter's Field, south bank of the Thames adjacent to Tower Bridge and Millbank Site next to Millbank Tower], even more lacking in detail and feasibility, merit still lesser weight (IR15.169). The Minister of State has carefully considered the matter of timing at IR 170-172 and considers that the desirability of delivering the UKHMLC within the living memory of survivors as a fulfilment of the nation's obligation to honour the living as well as the dead reinforces the conclusions drawn in IR15.169 as to the limited weight to be given to alternative proposals."

(iv) Legal framework

12. The cases on the relevance of alternative sites were helpfully summarised by Lindblom LJ in *Lisle-Mainwaring v Carroll* [2017] EWCA Civ 1315 at §16-§17, and in particular:

(i) The judgment of Laws LJ in *R. (J (A Child)) v North Warwickshire BC* [2001] P.L.C.R. 31 at §30:

> "30. If I may say so, with respect, it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

(ii) The judgment of Auld LJ in *R (Mount Cook Land Ltd) v Westminster City Council* [2017] P.T.S.R. 1166 – equally applicable, as Auld LJ said at §34, to alternative sites cases like *North Warkickshire* as to alternative use cases – that:

> "30. […] even, in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight."

(v) Response to C's Ground 4

13. As emerges from the above, the recommendations of the Inspector endorsed by the Minister:

(i) Were based on a correct understanding of and approach to the law on the materiality of alternative sites; and

(ii) Made rational findings – supported by the evidence of several parties to the inquiry, including LFtR – on the relative merits between the putative alternatives.

14. In particular, this is not a case where the decision-maker is said to have erred in law by failing to have regard to alternative sites *at all*. He had regard to them. The challenge is over how much *weight* he gave to those sites in the planning balance, but of course weight is quintessentially a question for the judgment of the decision-maker.

15. Responding to C's Ground 4 at §71-§76 of its grounds of claim:

(i) As to §72: the Inspector's finding at [**IR:15.164**] was not "contrary to the law". As the courts have made clear many times, the weight to be attributed to an alternative scheme is a question of judgment for decision-makers, having regard to – among other things –the degree of detail which supports the alternative scheme and the extent of possibility of that alternative coming about.

(ii) As to §74: the Claimant mischaracterises the Inspector's findings. The Claimant is wrong to characterise the shortcomings on the IWM site as simply a failure to demonstrate its deliverability. The point is more profound. As the excerpts above make clear, the Inspector – by accepting the evidence both of the Secretary of State and LFtR – decided and was rationally entitled to decide that (a) the IWM is in a less significant and prominent location than Victoria Tower Gardens, (b) there are serious concerns over whether or not the IWM site's relative lack of prominence would accord with the recommendations of the Holocaust Commission, and (c) the Scheme's powerful resonance, for all the reasons set above, "should indeed be heard in the context of the Palace of Westminster".

(iii) As to §75: the Inspector did not place a "burden of proof" on the Claimant. He reviewed the evidence on the deliverability as to the IWM site (among other putative alternative sites). He then concluded, and was rationally entitled to conclude, that the evidence was not convincing.

16. In the end, the Inspector's approach – endorsed by the Minister – was a legally impeccable exercise of trite principles on the approach to alternative sites. The Inspector and the Minister accepted the evidence and submissions of the SoS, and of LFtR, that siting the Scheme in VTG was a benefit of profound significance. The weight they gave to alternative sites mooted by the Claimant was a matter exclusively for their planning judgment. Their approach to striking that judgment reveals no error of law.

LFtR's application to respond to the claim as an IP

17. For the reasons above and in the witness statement of Mr Antony Lishak, LFtR is directly affected by this claim. As Mr Lishak explains, the delivery of the Scheme is essential to the future work of LfTR to allow it to achieve its educational mission. LFtR was a key participant in the inquiry. It is, in the language of CPR r.54.1(f), an "interested party".

18. Under CPR r.19.2(2)(a), it is desirable to add LFtR so that the Court can resolve all the matters in dispute in the proceedings because, as above, LFtR's evidence and submissions on the application site and putative alternative sites were highly material to the way both the Inspector and the Minister made the findings under challenge in C's Ground 4.

Conclusion

19. For those reasons, LFtR asks for the Court's permission to respond to this claim as an interested party. It will, for the reasons above, submit that C's ground 4 is unarguable and that permission to bring the challenge on that ground should be refused.

20. LFtR's legal representatives are acting *pro bono*, so there is no application in relation to recovering any of LFtR's costs.

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