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Your ref:
APP/XF990/V/19/3240661
Our ref:
Z2110827/TCO/JD3

6 September 2021

Dear Sir/Madam,

Proposed Holocaust Memorial in Victoria Tower Gardens
Minister of State's decision to grant permission dated 29 July 2021

We write in response to your letter of 6 July 2021 ("**the PAP Letter**").

The Judicial Review Pre-Action Protocol ("**the Protocol**") does not apply to statutory reviews, but this response follows the form of the response letter at Annex B to the Protocol.

1. The claimant

1.1. The proposed claimant is the London Historic Parks and Gardens Trust.

2. From

2.1. You have addressed your letter to the '*Ministry of Housing, Communities and Local Government'* and then refer to '*MHCLG'* as the defendant in paragraph 3 of the PAP Letter.

2.2. The Minister of State for Housing ("**the Minister**") made the decision which is the subject of the proposed challenge. Accordingly, this response is sent on behalf of the Minister.

2.3. The application for planning permission which is the subject of the Minster's decision was made by the Secretary of State for Housing, Communities and Local Government ("**the Secretary of State**"). The Secretary of State did not make the decision which is the subject of the proposed challenge, and this response is not sent on behalf of the Secretary of State. Given the involvement of both the Secretary of State and the Minister in this matter in different roles, handling arrangements have been put in place at the Government Legal Department and the Ministry of Housing, Communities and Local Government which include information barriers between the lawyers and policy advisors for the Secretary of State and the Minister to ensure that there is a functional separation between the persons bringing forward this

proposal for development and the persons responsible for determining that proposal. These handling arrangements remain in place and are being adhered to when providing this response.

3. Reference details

3.1. The Government Legal Department are acting for the Minister in this matter. Christina Crossman (christina.crossman@governmentlegal.gov.uk) at the Government Legal Department has conduct of this matter for the Minister and all correspondence should be marked for her attention. Please quote the GLD reference number of Z2110827/TCO/JD3 on all future correspondence.

4. The details of the matter being challenged

4.1. The decision of the Minister by a decision letter dated 29 July 2021 ("**the DL**") to grant planning permission for the installation of the United Kingdom Holocaust Memorial and Learning Centre ("**UKHMLC**"), as more fully described in DL 1, at Victoria Tower Gardens, Millbank, London SW1P 3YB ("**VTG**").[1]

5. Response to the proposed claim

5.1. The Minister resists the proposed claim in its entirety. For the reasons below, the proposed claim discloses no error of law in the DL.

<u>The correct approach to the proposed claim</u>

5.2. The correct approach to statutory reviews pursuant to s. 288 of the Town and Country Planning Act 1990 was explained by Lindblom LJ in ***St Modwen Developments Limited v Secretary of State for Communities and Local Government*** [2011] EWCA Civ 1643, [2018] PTSR 746 at [6]. We draw your attention to the following principles set out in ***St Modwen*** which have not been adopted in the PAP Letter:

> *"(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph […]*
>
> *(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration[…]*
>
> *(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, provided that it does not lapse into Wednesbury irrationality […] to give material considerations whatever weight [it] thinks fit or no weight at all […]. And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision […]*

[1] References in the form "DL paragraph" are to paragraphs in the DL; and references in the form "IR paragraph" are to paragraphs in the Inspector's Report dated 29 April 2021 which was considered in the DL.

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration […]"

Ground 1 – alleged unlawful assessment of harm to the Buxton Memorial

5.3. The Minister did not apply '*the wrong legal test'* when determining the degree of harm to the Buxton Memorial. Further, there was no failure to give adequate reasons for the conclusions at DL23 and IR 15.69.

5.4. The distinction between less than substantial harm and substantial harm is a matter of planning judgment and is a policy based analysis which is rooted in the National Planning Policy Framework. In this regard, see ***City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government*** [2021] EWCA Civ 320 *per* the Senior President of Tribunals at [74]:

"The same can be said of the policies in paragraphs 195 and 196 of the NPPF, which refer to the concepts of "substantial harm" and "less than substantial harm" to a "designated heritage asset". What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. Whether there will be such "harm", and, if so, whether it will be "substantial", are matters of fact and planning judgment. The NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. It distinguishes the approach required in cases of "substantial harm … (or total loss of significance …)" (paragraph 195) from that required in cases of "less than substantial harm" (paragraph 196). But the decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting."

5.5. It is not clear from the Letter what '*legal test'* you contend should have been applied but was not applied.

5.6. Nevertheless, it is clear from *inter alia* DL 22 – 23 and 28, and IR 15.3, 15.8 – 15.17, 15.65 – 15.69, 15.117 – 15.119 and 15.186 – 15.189, that the Minister and the Inspector were alive to, and properly applied, the relevant policy in the National Planning Policy Framework. In particular, both the Minister and the Inspector considered the degree of adverse effect to the significance of the Buxton Memorial, were alive to the distinction between less than substantial harm and substantial harm, did not treat less than substantial harm as a less than important impact, acknowledged the multiple aspects of harm and undertook an orthodox heritage balancing exercise. Further and notably, both the Minister and the Inspector referred to the ***Bedford*** case and the Planning Practice Guidance ("**PPG**"), being alive to both: see, for example, DL 28 and IR 15.12. The application of the ***Bedford*** case and the PPG in both instances was lawful.

5.7. It follows that there is no error of law as alleged.

Ground 2 – alleged unlawful assessment of harm to the VTG

5.8. This proposed ground fails to read the DL and IR fairly or as a whole, is an attempt to re-argue the planning merits of the UKHMLC and, in the absence of any alleged irrationality, is an impermissible attack on the planning judgment of the Minister and the Inspector.

5.9. The harm to the VTG as a Grade II Registered Park and Garden ("**RPG**") is considered in detail at IR 15.74 – 15.94 (adopted at DL 25) in a manner which is multifaceted and comprehensive. Applying the appropriate standard – see the second principle from ***St Modwen,*** above – there can be no doubt that the reasons in the DL and IR were adequate. In particular, contrary to the allegations in the PAP Letter, there is express consideration of both the significance of the VTG as a RPG and the effect of the UKHMLC on that significance: see, inter alia, IR 15.76 – 15.78 (as a prominent part of the consideration of significance) and IR 15.94 (a clear conclusion on the effects on significance).

5.10. The arguments in the PAP Letter as to IR 15.74 – 15.94 both fail to read the DL and IR fairly – rather sentences or parts of sentences are cherry picked out of context. This in any event adopts the sort of impermissibly forensic and legalistic approach which has been consistently deprecated by the courts: see, for example, the first principle from ***St Modwen***, above.

5.11. It follows that there is no error of law as alleged.

Ground 3 – alleged failure to address the London County Council (Improvements) Act 1900

5.12. We note that the argument raised in the PAP Letter as to the effect of the London County Council (Improvements) Act 1900 ("**the 1900 Act**") is not one which was advanced in your client's closing submissions to the Inspector (as recorded at IR 9.1 – 9.79, which you do not contend is inaccurate). In these circumstances, your contention that there was an unlawful failure to address the 1900 Act is unsustainable: see the principles from ***St Modwen***, above, and, by analogy, ***Gathercole v Suffolk County Council*** [2020] EWCA Civ 1179 *per* Coulson LJ at [56] – [57].

5.13. In any event, s. 8(8) of the 1900 Act, which is concerned with the maintenance of the VTG laid out in accordance with the other parts of s. 8, does not give rise to either an express or implied statutory restriction on future development in the manner alleged in the PAP Letter.

5.14. For these reasons there is no error of law.

Ground 4 – alleged unlawful approach to the issue of alternatives

5.15. This proposed ground is narrowly focussed on IR 15.164, which provides in full:

> *'It is reasonable to suggest that if there are alternative locations for a proposal which would avoid an environmental cost, then these should be taken into account when determining the acceptability or otherwise of the proposal at hand. This is a particularly attractive prospect if it is held that there are viable alternatives [sic.] sites that could accommodate the proposal without attendant harm. Whilst (as the Courts have determined) the desirability of having alternative proposals before the Inquiry may be "relevant and indeed necessary", (though not always essential), in order that it may garner significant weight, the merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.'*

5.16. In a footnote to this paragraph (fn. 501), the Inspector refers to the case of '*CD 16.2A Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 57 P. & C.R. 293 at p299 – 300'.*

5.17. In ***Trusthouse Forte***, Simon Brown J states at 300:

> *"(2) Although generally speaking it is desirable and preferable that a planning authority (including, of course, the Secretary of State on appeal) should identify and consider that possibility by reference to specifically identifiable alternative sites, it will not always be essential or indeed necessarily appropriate to do so. […]*
>
> *(5) Clearly, it is more difficult to make a sensible comparison in the absence of an identified alternative site and it is likely that a planning authority would be more hesitant in concluding that an accepted need could be met elsewhere if no specific alternative sites have been identified, a fortiori if they have been carefully searched for, identified and rejected." (emphasis added)*

5.18. Further, in ***R. (Mount Cook Land Ltd) v Westminster City Council*** [2003] EWCA Civ 136, [2017] PTSR 1166 Auld LJ states at 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, they were, should be given little or no weight."*

5.19. IR 15.164 is consistent with the authorities set out above and it is clear that there was no error of law by the Inspector as alleged.

5.20. Moreover, the PAP Letter impermissibly seeks to re-argue the merits of the Imperial War Museum ("**IWM**") as an alternative location for the UKHMLC. This is a matter which was considered in detail at IR 15.166 – 15.169 (notably with the benefit of a site visit to the museum) and the Inspector concluded:

> *'whilst seeming to offer a benign alternative, IWM lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery. Together this suggests that the weight to be afforded the IWM alternative in the planning balance is very limited. The two other sites, even more lacking in detail and feasibility, merit lesser weight.'*

5.21. This is an orthodox and lawful exercise of planning judgment, which does not dismiss the IWM as a material consideration, rather the Inspector simply concludes that it is a consideration to which very limited weight should be afforded.

Ground 5 – inadequate reasoning in conclusions on harm to trees

5.22. This ground ignores the established approach to the assessment of reasons: see ***St Modwen,*** above. The effect of the UKHMLC on trees is covered in detail at IR 15.18 – IR 16.64. In particular, in respect of the potential loss of one or more trees (which is the basis for this proposed ground), the Inspector concluded at OR 15.62 that *'this is not an inevitable outcome and the trees might well survive to achieve their life expectancy'*. It follows that the proposed ground alleges a failure to give reasons in respect of an outcome which the Inspector considered to be uncertain. Plainly there is no requirement for reasons on such an issue and in any event, when IR 15.18 – 16.64 is read fairly in the context of the remainder

of the IR and the DL, it is clear that the Inspector gave reasons in respect of his conclusions on the principal important controversial issues and thus there is no error of law.

Conclusion

5.23. For all the reasons referred to above, the Minister does not agree that his decision was in error of law and he does not agree that either his decision should be quashed or that he should pay your client's costs.

6. Details of any other parties

6.1. The Minister agrees that the parties named at [66] of the PAP Letter should be parties to the claim. However, reflecting the nature of statutory review (as opposed to judicial review), those parties should be defendants not interested parties. We refer you to para. 4.1 of Practice Direction 8C of the Civil Procedure Rules.

7. ADR proposals

7.1. No ADR proposals are made in the PAP Letter. This is not a matter which is amenable to ADR.

8. Response to requests for information and documents

8.1. The PAP Letter makes a number of requests for further information. In accordance with the handling arrangements noted above, the Minister responds to your requests on the basis of the information which he holds.

8.1.1. Requests in the PAP Letter at [61]. This information is not held by the Minister.

8.1.2. Request in the PAP Letter at [63]. The issue of flash flooding from rainfall was considered and was dealt with in evidence at the public inquiry. We refer you to sections 2.7 and 3.4 of Appendix K of the Environmental Statement (Core Document 6.39, Part 1). These statements demonstrate that as well as the issue of surface water flooding being considered, the points you raise regarding climate change, the increase in impermeable surface, and the sequential test (referred to in your para 64) were also addressed. This evidence was not challenged by parties at the time, and we would strongly resist any attempt to raise this as a matter of concern at this stage, given the clear opportunity to address these matters during the course of the inquiry.

8.1.3. Request in the PAP Letter at [64]. As with the Environmental Statement, the position of the Environment Agency was clearly set out at the inquiry. We refer you to the Environment Agency's letter of 2 December 2019 (Core Document 5.16), in which, having reviewed Appendix K of the Environmental Statement, they withdrew their previously stated objections to the proposal, subject to the imposition of certain conditions (and noting that those previously expressed objections did not relate to issues of surface water flooding), As noted in 8.1.2 above, the issue of the sequential test was also addressed in Appendix K of the Environmental Statement.

9. Address for further correspondence and service of court documents

9.1 The address for further correspondence and service of court documents is: Government Legal Department, 102 Petty France, Westminster, London, SW1H 9GL, reference Z2110827/TCO/JD3.

9.2 Due to the present Coronavirus pandemic, the Government Legal Department accepts service of originating process by email. Please send any claim, should it be brought, to the principal email address: newproceedings@governmentlegal.gov.uk. At the same time, please send any copies of the claim and all correspondence and court documents by email to christina.crossman@governmentlegal.gov.uk and emel.djevdet@governmentlegal.gov.uk. Please ensure that all such correspondence is marked in accordance with paragraph [3], above.

Yours sincerely

Christina Crossman

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