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

Claim No. CO/3041/2021

B E T W E E N:

LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

(1) MINISTER OF STATE FOR HOUSING

(2) WESTMINSTER CITY COUNCIL

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

Defendants

SUMMARY GROUNDS OF RESISTANCE

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(1) References:

- in the form [CB/page] are to pages in the claim bundle filed by the Claimant;
- in the form "DL paragraph" are to paragraphs in the First Defendant's decision letter at [CB/45 - 70]; and
- in the form "IR paragraph" are to paragraphs in the Inspector's report at [CB/71 - 452] which was considered by the First Defendant in his decision letter.

(2) Essential pre-reading (time estimate 2 hours):

- the decision letter under challenge at [CB/45 - 70]; and
- the Inspector's report at IR 15.3, 15.8 – 15.69, 15.74 – 15.94, 15.117, 15.164 – 172 and 15.186 - 15.189 only.

I. INTRODUCTION

1. The Claimant applies for permission to proceed with its claim for statutory review pursuant to s. 288 of the Town and Country Planning Act 1990 ("**TCPA 1990**") of the decision by the First Defendant ("**the Minister**") to grant planning permission for the installation of the United Kingdom Holocaust Memorial and Learning Centre

("**UKHMLC**") (as more fully described in DL1) at Victoria Tower Gardens, Millbank, London SW1P 3YB ("**VTG**"). The Minister resists this claim and submits that permission to proceed with this claim should be refused for the following summary reasons:

(a) **Ground 1** - Neither the NPPF nor the Planning Practice Guidance ("**PPG**") prescribe a fixed approach to the assessment of whether the harm to a designated heritage asset is "substantial" or "less than substantial"; rather this is a matter of planning judgment which is sensitive to the facts of the case. Both the Minister and the Inspector had regard to the PPG and ***Bedford Borough Council v Secretary of State for Communities and Local Government*** [2012] EWHC 4344 (Admin), focusing on whether there was a serious degree of harm to the asset's significance. This was a lawful approach in accordance with the policy framework.

(b) **Ground 2** – This is a straightforward rationality challenge. The Claimant fails to adopt the correct approach to the interpretation of decision letters and fails to clear the high hurdle for a rationality challenge.

(c) **Ground 3** – Section 8(8) of the London County Council (Improvements) Act 1900 ("**the 1900 Act**") does not prevent the alteration or development of VTG as contended. Accordingly, the UKHMLC would not give rise to a breach of the 1900 Act as alleged and there was no failure to take into account a material consideration.

(d) **Ground 4** – The Inspector's reasoning in respect of alternatives was in accordance with case law, including that which he expressly cited. There was no error of law.

(e) **Ground 5** – The Claimant seeks reasons for an outcome that the Inspector concluded was uncertain. There was no duty to provide reasons for such a scenario. The Inspector's reasons (which were accepted and adopted by the Minister) were sufficient to explain his conclusions. The Claimant's submissions ignore the well established approach to the requirement for reasons in planning decisions.

2. The Minister responded to the Claimant's pre-action correspondence [CB/9797 – 985]. It is apparent from the Claimant's Statement of Facts and Grounds ("**SFG**") that the Claimant has ignored the Minister's response. The Court need have no hesitation in concluding that the proposed claim is unarguable.

II. FACTUAL BACKGROUND

3. On 19 December 2018, the Third Defendant ("**the Secretary of State**") applied to the Second Defendant ("**the Council**") for planning permission for the UKHMLC at VTG ("**the Application**"): see DL1. The Council is the local planning authority for the area in which VTG is situated. On 5 November 2019, the Minister directed pursuant to s. 77 TCPA 1990 that the Application be referred to him instead of being determined by the Council.

4. A public inquiry was held into the Application by an Inspector appointed by the Minister between 6 – 23 October 2020 and 3 – 13 November 2020: see DL 1. The Inspector prepared a report for the Minister ("**the IR**") following the inquiry. By a decision letter dated 29 July 2021 ("**the DL**") and following consideration of the IR (see DL 1), the Minister granted planning permission: see DL 4.

5. Both the DL and the IR must be read as a whole and in accordance with established principles: see below at [7]. Accordingly, the Minister refers to the relevant parts of the DL and IR below in respect of each ground and does not recite those parts here.

6. 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 responding to this claim.

III. LEGAL FRAMEWORK

7. 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]. The Minister relies on the following principles in particular:

> *"(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[…]*
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> *(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 […]*
>
> *(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 […]"*

8. Despite these principles being drawn to the Claimant's attention in the Minister's pre-application response, the Claimant's SFG neither recognises nor adopts these principles in the grounds of challenge.

IV. RESPONSE TO GROUNDS OF CHALLENGE

(a) Ground 1 - Alleged unlawful assessment of harm to the Buxton Memorial

9. The Minister did not misapply the policy test for the evaluation of the significance of and assessment of harm to the Buxton Memorial ("**BM**"). Nor did the Minister fail to give adequate reasons for the conclusion that the harm to the BM would be less than substantial.

10. What amounts to "*substantial harm*" or "*less than substantial harm*" is a planning judgment which depends on the circumstances of the case and in respect of which the NPPF does not direct a specific approach. See ***City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government*** [2021] EWCA Civ 320 *per* Sir Keith Lindblom at [74]:

> *"What amounts to "substantial harm" and "less than substantial harm" to a "designated heritage asset" 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 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."*[1]

11. Consistently with the absence of a mandated approach to the exercise of assessment in the NPPF, the relevant guidance in the PPG does not mandate an approach to the assessment of harm either. Rather, in accordance with ***Bramshill***, the PPG states that: '*Whether a proposal causes substantial harm will be a judgment for the decision-maker, having regard to the circumstances of the case and the policy of the National Planning Policy Framework*'. Following this, the PPG expresses itself '*in general terms*', provides an example concerning works to a listed building and notes the varied circumstances in which substantial harm may or may not arise. Importantly, nowhere does the PPG seek to lay down a "test" for determining what amounts to substantial harm. In these

[1] Notably, despite the Minister drawing ***Bramshill*** to the Claimant's attention in pre-action correspondence, the Claimant has failed to address in its SFG. This is telling and ultimately illustrates the lack of merit in this ground.

circumstances and having regard to the fact that guidance does not have the status of policy and is rarely amenable to the type of legal analysis that is applied to development plan policy, it is erroneous to subject the general guidance in the PPG to forensic scrutiny in order to produce a "test" in the manner attempted by the Claimant.[2] Such an approach is also contrary to the fourth principle in ***St Modwen***, above.

12. Further, the Claimant's reliance on ***Majorstake Ltd v Curtis*** [2008] UKHL 10, [2008] 1 AC 787 is misplaced. ***Majorstake*** is not a planning case and did not consider the NPPF; rather it is a case concerning the statutory language '*the whole or a substantial part of any premises in which the flat is contained*' in s. 47(2)(b)(ii) of the Leasehold Reform, Housing and Urban Development Act 1993, in the context of leasehold enfranchisement (see ***Majorstake*** *per* Lord Hope at [2]). Accordingly, the discussion of what '*substantial'* may mean in that specific statutory context, even in relatively general terms, is of no assistance in the present case. Further, this is another example of the Claimant's erroneous attempt to define a "test" for substantial harm.

13. The Inspector and the Minister had regard to both the guidance in the PPG and ***Bedford*** in assessing the harm to the BM.

14. At IR 15.11 the Inspector notes the different approaches of the main parties at the inquiry, including the fact that the Claimant employed a '*different approach, based on consultancy-developed methodologies for characterising the magnitude of harm*'.

15. At IR 15.12 the Inspector has regard to both ***Bedford*** and the PPG and states:

> *'My interpretation of this point, also bearing in mind paragraph 018 of the PPG has been formulated in light of the Bedford judgement, is that there is in fact little to call between both interpretations. Bedford turns on the requirement for the harm to be assessed as 'serious' (with significance needing to be very much, if not all, 'drained away') in order that it be deemed substantial. Alternatively, paragraph 018 indicates that an important consideration would be whether the adverse impact 'seriously' affects a key element of special interest. In both interpretations, it is the serious degree of harm to the asset's significance which is the key test. Moreover, in accordance with the logic of the Bedford argument, paragraph 018 explicitly acknowledges that substantial harm is a 'high test'.*

[2] See for example, ***Solo Retail Ltd v Torridge DC*** [2019] EWHC 489 (Admin) *per* Lieven J at [33]: "*[the PPG] will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in* ***Tesco v Dundee*** *applied to the Development Policy there in issue*".

16. At IR 15.13 the Inspector affirms that substantial harm '*is a high test*'.

17. At IR 15.65 – IR 15.68 the Inspector considers the effects on the setting of the BM before concluding at IR 15.69 that:

> *'Notwithstanding these effects, the BM would remain physically unaffected by the proposal, and in this respect, its special architectural and historic interest would be preserved. That said, this outcome would fail to preserve the setting of the BM, a Grade II* listed building, in accordance with the expectations of the Act, such a consideration the Courts anticipate being given considerable importance and weight. It would also be contrary to those of paragraphs 193 and 194 of the NPPF, which anticipates great weight being given to the conservation of DHAs and their settings. Accounting for these considerations, I characterise this harm to the setting of the Grade II* memorial as being of great importance. Although this measure remains well below the threshold of substantial, I nevertheless afford this a measure of considerable weight in the heritage balance.'*

18. At IR 15.117 the Inspector reaches his conclusion on the overall effect of the UKHMLC on designated heritage assets:

> *'Taken together then, these are the sum of the heritage harms, including harm to trees. In respect of each key DHA, the BM, the RPG and the WAPSCA, the modest degree of harm to trees has been added to the final sum of harm in each. To be clear however, the degree of harm to trees has been found to be very considerably less that that characterised by those opposing the proposals. The sum of harm to each DHA has been individually assessed and these vary. However, in no case, does this aggregated degree of harm to each asset individually approach anything near the substantial threshold established by either Bedford or the PPG. Furthermore, even when the individual harms to DHAs are considered cumulatively, as required, they again still fall well below the substantial threshold established by Bedford and the PPG. Having fully considered such harms, I now turn to the public benefits.'*

19. At DL 15 the Minister agrees with the Inspector's analysis at IR 15.8 – 15.17, including the matters set out above at [14] – [17].

20. At DL 22 – 23 the Minister reaches the following conclusion on the impact of the UKHMLC on the BM:

> *'22. The Minister of State has carefully considered the Inspector's assessment of the effect on the setting of the Buxton Memorial (Grade II* listed building) set out at IR15.65-15.69 and for the reasons given there, he agrees that when viewing the older monument from within the UKHMLC courtyard, or from other points in close proximity to it, the visual dominance of the proposal would unsettle and crowd the Buxton Memorial (IR15.67). Furthermore, he notes the Inspector's assessment that the*

plane trees to the east and west of the memorial do contribute to its setting but for the reason given at IR15.68 agrees that there would be no additional material harm arising to the setting of the Buxton Memorial as a result of impact to trees.

23. The Minister of State agrees with the Inspector's assessment that the Buxton Memorial would remain physically unaffected by the proposal, and in this respect, its special architectural and historic interest would be preserved (IR15.69), but further agrees with the Inspector that this outcome would fail to preserve the setting of the Buxton Memorial, a Grade II listed building (IR15.69). For these reasons, the Minister of State agrees with the Inspector's characterisation of the harm to the setting of the Grade II* memorial as being of great importance (IR15.69), and that while well below the threshold of substantial, this less than substantial harm should be afforded considerable weight in the heritage balance.'*

21. At DL 28 the Minister reaches his conclusion on the overall effect of the UKHMLC on the designated heritage assets:

> *'For the reasons given at IR15.117, the Minister of State agrees with the Inspector's conclusion that the sum of harm to each designated heritage asset has been individually assessed and these vary (IR15.117). He also agrees that in the case of each key designated heritage asset, the degree of harm to its significance is less than substantial. In no case does this aggregated degree of harm to each asset individually approach anything near the substantial threshold established by either the Bedford case or the Planning Practice Guidance. He further agrees that even when the individual less than substantial harms to designated heritage assets are considered cumulatively, they again still fall well below the same substantial threshold (IR15.117).'*

22. In light of the passages quoted above, it is clear that the approach of both the Inspector and the Minister to the assessment of harm was in accordance with ***Bramshill***: namely a fact sensitive exercise of planning judgment which recognised the differing effects of the UKHMLC on the BM and which was calibrated by reference to the policy framework in the NPPF, in particular the fact that substantial harm was a "high test", as explained in both ***Bedford*** and the PPG. The Inspector's identification of '*the key test*' as '*the serious degree of harm to the asset's significance*' is aligned with the approach in ***Bramshill***. At [40] – [41] of the SFG, the Claimant attempts to impugn this approach by quoting unfairly from the IR, taking the Inspector's sentences in IR 15.12 out of order and omitting important parts. This approach is directly contrary to the first principle in ***St Modwen***, above. When IR 15.12 is read fairly and as a whole, there is no error for the reasons above.

23. Further, the Inspector and the Minister showed awareness of both ***Bedford*** and the PPG, and expressed their respective conclusions on a basis which acknowledged both

sources of guidance. For example, at IR 15.117 the Inspector concludes that the heritage harm was '*below the substantial threshold established by Bedford and the PPG*' and at DL 28 the Minister concludes that in '*no case does this aggregated degree of harm to each asset individually approach anything near the substantial threshold established by either the Bedford case or the Planning Practice Guidance*'. In light of this conclusion, the Claimant's argument is ultimately a sterile one because either on the basis of ***Bedford*** or the PPG (if there is a substantial difference, which there is not), both the Inspector and the Minister reached the same conclusion.

24. Finally, the Claimant makes the bare assertion at [32] of its SFG that the Minister failed to give adequate reasons but does not elaborate further. There was no such failure, having regard to the totality of the Minister and Inspector's reasoning, especially at IR 15.65 – 69 and applying the correct approach (see the second principle in ***St Modwen***). The conclusion that the harm to the BM was less than substantial is readily understood. The Inspector concluded that the BM would be physically unaffected by the proposal (IR 15.69), there would be a degree of harm to the setting of the BM (IR 15.64 – 15.67), there would be no additional harm arising from the impact to trees in VTG (IR 15.68) and having regard to all these matters, the harm did not reach the high test of substantial (IR 15.69). The Minister agreed with this analysis at DL 22 and explained at DL 23 that whilst in some respects the special architectural and historic interest of the BM would be preserved, the UKHMLC failed to preserve the setting of the BM and thus overall there was less than substantial harm.

25. It follows that this ground is unarguable and permission to proceed should be refused.

(b) Ground 2 – Alleged unlawful assessment of harm to VTG

26. This ground is a straightforward rationality challenge to the Inspector's assessment of harm to VTG as a Registered Park and Garden ("**RPG**").[3] Such challenges face a high hurdle and in the context of a multifactorial planning judgment: see ***Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions*** [2001] EWHC 74 (Admin), [2017] PTSR 1126 *per* Sullivan J (as he then was) at [6]. The Claimant fails to surmount that hurdle.

[3] See, for example, the allegation that the harm to VTG '*was not lawfully considered*' in the SFG at [43]; and the assertion at [63] of the SFG that '*the Inspector erred in failing to find that the proposed development would cause harm to the significance of Victoria Tower Gardens*'.

27. As with Ground 1, the Claimant fails to read the IR fairly or in accordance with the correct approach: see the first principle in ***St Modwen***. Rather, the Claimant seeks to cherry pick sentences – or parts of sentences – from different parts of the IR (including from parts which were not addressing the issue of heritage harm) and juxtaposes them unfairly. This confuses the clear reasoning of the IR. In any event, this ground is unarguable for the following reasons.

28. First, neither the Inspector nor the Minister fail to address the effect of the UKHMLC on VTG. At IR 15.74 the Inspector identifies the '*key attributes*' that justify its designation as a RPG. The history and development of the RPG is then discussed over the subsequent paragraphs: see IR 15.74 – 15.77. For example, at IR 15.77 the Inspector also identifies the '*more intangible qualities*' which '*are important elements of its character and interest as an RPG*'. Subsequently, the Inspector, considers the effect of the UKHMLC on the VTG at IR 15.78 – IR15.94, reaching the clear conclusion at IR 15.94 that there would be a moderate degree of harm arising from the adverse effect of the UKHMLC on the BM and the effect of the UKHMLC on trees within VTG. The Minister agreed with this analysis at DL 25. Insofar as a reasons challenge is advanced by the Claimant at [45] of its SFG, such a challenge is also unarguable given the clear reasoning in these paragraphs.

29. Secondly, there is no error in the Inspector's conclusion that whilst there would be changes to the VTG, those changes do not cause additional harm to the VTG from the UKHMLC.[4] It is trite, but overlooked by the Claimant, that there may be changes to a designated heritage asset (or its setting) without there being harm. Accordingly, contrary to [50] – [59] of the SFG, there is no irrationality on this basis.

30. Thirdly, contrary to the submission at [60] – [62] of the SFG, the Inspector's consideration of the benefits to VTG arising from UKHMLC at IR 15.89 does not amount to an error of law. The suggestion at [61] – [62] of the SFG that the Inspector undertook a balancing of harm and benefit to reach his conclusion of '*neutral*' effect at IR 15.89 is not a fair reading of that paragraph. However, even if there was such a balancing, that is a permissible approach: see ***Bramshill*** at [78].[5]

[4] The harm to the VTG was found only in respect of the adverse effect of the UKHMLC on the BM and the very limited degree of potential harm to a limited number of trees within the VTG. See IR 15.94. The other changes which the Claimant complains about did not add to this harm.

[5] '*Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196.*'

31. It follows that this ground is unarguable and permission to proceed should be refused.

(c) Ground 3 – Alleged failure to address the London County Council (Improvements) Act 1900.

32. This ground is based on a submission which was not made to the Inspector by the Claimant. Indeed, the Claimant (who was represented by Counsel – see [CB/297]) did not mention the 1900 Act at all in its closing submissions.[6] In these circumstances, it is untenable to now criticise the Inspector for not considering a matter which the Claimant did not raise when it had the opportunity to do so.

33. In any event, this ground is unarguable. Section 8(8) of the 1900 Act does not impose a barrier to the development of VTG. Section 8(8) imposes a simple maintenance obligation: '*shall maintain the garden*'. This is consistent with the foregoing provisions (see s. 8(1) – (7)) which provide for the laying out and payment for the garden (i.e. the construction): s. 8(8) simply allocates responsibility for the maintenance of the garden after its construction. There is no prohibition on development, whether express or implied. Notably, there are no words which prohibit alterations, developments etc. This is a complete answer to this ground.

34. This interpretation can be tested by reference to the history of VTG. There have been a number of changes to VTG which, on the Claimant's asserted approach to s. 8(8) of the 1900 Act, go beyond maintenance of the gardens in their original form since VTG was first laid out, for example: the erection or movement of statues, the creation of a large sandpit in 1923 (as well as associated playground) and the redesign of the paths and landscaping in 1956.[7] The Claimant takes no account of these changes, all of which

[6] Before the inquiry, the Claimant's Solicitors wrote to the Secretary of State on behalf of the Thorney Island Society and the Save Victoria Tower Gardens Campaign (with whom the Claimant presented a joint case to the Inspector) on 31 July 2019 contending that the UKHMLC would breach s. 8(1) of the 1900 Act [CB/953 – 954]. The Secretary of State replied on 31 October stating that the UKHMLC complied with the 1900 Act [CB/955]. The Claimant does not rely on s. 8(1) in these proceedings. Instead, the Claimant now relies on s. 8(8) of the 1900 Act. In May 2020 the Claimant's Solicitors then raised the same point in pre-action correspondence and again the Secretary of State did not concede the point: see [CB/956 – 961] and [CB/962 – 965]. The Claimant did not raise the point in subsequent proceedings. This correspondence and the subsequent failure to raise this matter in the Claimant's closing submissions to the Inspector reinforce the First Defendant's contention that this ground provides no arguable basis for impugning the validity of the decision to grant planning permission: it is a point which the Claimant had apparently raised and abandoned before the public inquiry began.

[7] See further the Claimant's own description of this history of change at [CB/555 – 572]. See also IR 15.74 – 15.77.

demonstrate that the interpretation set out above is supported by both the words of the 1900 Act itself and the history of VTG over more than a century. Further, this issue was not raised by the Royal Parks, the charity with the responsibility of managing VTG (and who opposed the Application) [CB/615 – 617].

35. It follows that this ground is unarguable and permission to proceed should be refused.

(c) Ground 4 – Alleged unlawful approach to the issue of alternative sites

36. This ground focuses on a single paragraph, IR 15.164 which provides:

> *'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 sites that could accommodate the proposal without attendant harm. But such an approach has to be treated with caution. 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.'*

37. In a footnote to this paragraph (fn. 501), the Inspector refers to the case of '*Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 57 P. & C.R. 293 at p299 – 300*' which was a core document at the inquiry. The Inspector also cross referred to IR 8.62 (the Council's submissions on this issue) and IR 9.65 (the Claimant's submissions on this issue). There is no inconsistency between IR 15.164 and those submissions.

38. 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)*

39. 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."*[8]

40. IR 15.164 is consistent with the authorities set out above. It is clear that there was no error of law by the Inspector as alleged. The case law demonstrates that it is for the decision maker to evaluate any proposed alternative sites and their ability to meet the identified need for which the application is brought forward. Factors such as the degree to which the alternative is "*identified*" (see ***Trusthouse Forte***), "*inchoate or vague*" (see ***Mount Cook***) are amongst the many considerations that may, in the given case, be relevant to the weight to be afforded to an alternative. That correct approach is reflected by the Inspector in IR 15.164. In addition, the Inspector did not place the burden of proof on any objector in respect of alternatives. IR 15.164 is entirely neutral as to where evidence of the alternative may arise from and no burden was placed on the Claimant (or any other objector).

41. At [73] – [74] of its SFG the Claimant 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.'*

42. This is an orthodox and lawful exercise of planning judgment. It is in accordance with the principles established by Simon Brown J in ***Trusthouse Forte***. The Inspector plainly had regard to the comparative merits of IWM as an alternative location. It is incorrect to say that he dismissed the IWM as a material consideration. The Inspector simply concluded, as he was entitled reasonably to conclude in the exercise of planning judgment for the reasons given, that it was a consideration to which very limited weight should be afforded. The First Defendant reached essentially similar conclusions.

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[8] As with ***Bramshill***, the Minister drew ***Mount Cook*** to the Claimant's attention in his pre-action response. The Claimant has not grappled with ***Mount Cook***, again underlining the unarguability of this ground.

43. Finally, the Claimant's reliance on NPPF para. 200 (another submission not advanced to the Inspector) is in error. The predecessor to the phrase "*clear and convincing justification*" in NPPF para. 200 (in para. 132 of NPPF (2012)), was considered in ***Pugh v Secretary of State for Communities and Local Government*** [2015] EWHC 3 (Admin) *per* Gilbart J at [53]:

> *"[Counsel for the Claimant] points out that paragraph 132 uses the phrase "clear and convincing justification". It might be thought difficult to be convincing without being clear, but it seems to me that the author of the NPPF is saying no more than that if harm would be caused, then the case must be made for permitting the development in question, and that the sequential test in paragraphs 132-4 sets out how that is to be done. So there must be adherence to the approach set out, which is designed to afford importance in the balance to designated heritage assets according to the degree of harm. If that is done with clarity then the test is passed, and approval following paragraph 134 is justified."*

44. In light of the reasoning of Gilbart J, it is clear that NPPF para. 200 did not require the Secretary of State to demonstrate an absence of alternatives in order to comply with that provision. Accordingly, the Claimant's submissions at [76] of its SFG are in error. In addition, the Secretary of State did place material before the Inspector dealing with alternatives, for example in the environmental statement (see [CB/535 – 538]) and this was an issue which the Inspector considered in detail, including on the basis of his own observations following a site visit to the IWM: see IR 15.165 – 15.169. It is relevant to note that the Claimant does not contend that the Minister's conclusion at DL 5 that the ES complied with the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (which includes a requirement in para. 2 of Sch. 4 to describe reasonable alternatives studied by the developer) was in error.

45. In summary, the evidence establishes beyond reasonable argument that the First Defendant's decision to grant planning permission was based upon both assessment and evaluation of the alternative locations proposed by those objecting to the development of the UKHMLC at VTG. The First Defendant gave clear reasons for concluding that none of the proposed alternative locations weighed significantly against the grant of planning permission. It follows that this ground is unarguable and permission to proceed should be refused.

(e) Ground 5 – Alleged inadequate reasoning on conclusions on harm to trees

46. This ground ignores the established approach to the assessment of reasons: see the second principle in ***St Modwen,*** above. The Inspector considered the effect of the UKHMLC on trees in detail at IR 15.18 – IR 15.64. 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 IR 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 further reasons, in respect of (i) an outcome which the Inspector found to be uncertain and (ii) his conclusion as to the existence of a residual risk, both of which findings the Inspector had explained with clear reasons. Plainly there is no legal requirement for further reasons on such an issue. It follows that this ground is unarguable and permission to proceed should be refused.

V. CONCLUSION & RELIEF

47. For the reasons above, the Minister submits that none of the proposed grounds of challenge is arguable and permission to proceed with this claim should be refused. Further, the Claimant should be ordered to pay the Minister's costs of preparing his Acknowledgement of Service and these Summary Grounds of Resistance in the sum set out in the enclosed costs schedule.

48. Finally, the Minister submits that this claim should be designated as a Significant Planning Court Claim pursuant to para. 3.1 of Practice Direction 54E on the basis that this claim has generated, and will generate, significant public interest (see para. 3.2(c)) given *inter alia* the high levels of interest in the UKHMLC. This is demonstrated by the previous litigation in respect of the UKHMLC and the extensive public interest and participation at the inquiry and in the Appeal: for example, there were 3 Rule 6 Parties to the inquiry (in addition to the Secretary of State and the Council) (see [CB/297 0298]), 69 people made oral representations at the inquiry (see [CB/298 – 300], including two former Prime Ministers, the Archbishop of Canterbury and the Chief Rabbi) and there was a substantially greater level of written representations.

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MATTHEW HENDERSON
Landmark Chambers
27 September 2021