IN THE HIGH COURT OF JUSTICE **Claim No. CO/3041/2021**

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

MINISTER OF STATE FOR HOUSING

First Defendant

and

WESTMINSTER CITY COUNCIL

Second Defendant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Interested Party

DETAILED GROUNDS OF DEFENCE ON BEHALF OF THE SECRETARY OF STATE

Decision challenged:

1. The Claimant challenges the decision of the Defendant dated 29th July 2021 to grant planning permission for the UK Holocaust Memorial and Learning Centre at Victoria Tower Gardens next to the Houses of Parliament ("the Site").

Background:

2. The background is set out in pp6-16 of the Inspector report's **[77-87]** to which the court is respectfully referred. At section 2 the Inspector sets out the context of the Victoria Tower Gardens site including the many heritage assets, and at section 3 the applicable planning policy framework.

3. At paragraphs 4.6- 4.16 the Inspector sets out the progress and development of the proposals, starting with the creation of the Holocaust Commission and its findings. He records at para 4.8 the Commission's recommendation that there be a striking and prominent new National Memorial, co-located with a learning centre.

4. The Inspector deals at this point with the search for a suitable site, noting (para 4.10) that the Imperial War Museum (IWM) had been one such option, but as it came to pass, this site could not fulfil the fundamental requirement that the memorial be *prominent and striking*, involving as it did being attached to a back wall of the museum.

5. Pausing here, the court may consider that the core of the challenge is really a complaint that the memorial is not going to be at the Imperial War Museum instead of at Victoria Tower Gardens. The Claimant has included the plans **[533** and **875-939]** for that failed bid despite it having been made very clear why that proposal would not accord with the aims of the memorial and learning centre.

6. Core Document 6.49 before the inquiry, Vol 2 of the Environmental Statement, Revised Chapter 4, Alternatives ("the Alternatives Document") **[739-750]** states in relation to the IWM in table 4.2 'Visibility and profile' **[744]**:

> "The proposition offered was a memorial attached to a back wall with no prominence and a below-ground learning centre adjacent to it. The site lacks significance and the activities would be subsidiary to the far larger remit of the IWM, whose aims in remembering Britain at war [] are not consistent with the aims of the HMLC."

7. Indeed, the aim of the UKHMLC is amongst other things to show the full story of Britain's response to the Holocaust in all its ambiguity, and in its focus is not confined wholly to the Holocaust but also to other genocides such as that which took place in Rwanda[1].

8. The space available at the IWM was "insufficient for the scale and nature of the Scheme" (para 4.5.3 of the Alternatives Document).

9. As at January 2016, although 24 sites had been identified by the consultants CBRE and considered by the Foundation, none were considered suitable. The Site then emerged as the outstanding candidate (para 4.14, and see the conclusion at section 4.5 of the Alternatives Document **[747]**).

10. As the applicant Secretary of State submitted in closing submissions **[839]**, a proposal of such obviously profound national and international importance warrants being located, as chosen, at the heart of Westminster, beside Parliament, a place of national significance next to a World Heritage Site. It is the location which would give "this momentous memorial the gravitas it needs" (Sir David Adjaye). Many of the interested parties who spoke to the inquiry endorsed this, including for example Dr. Toby Simpson, Director of the Wiener Library, and Holocaust survivor Mala Tribich MBE, who respectively said:

> "…The Holocaust is widely recognised as the defining event of twentieth century European history, and as the worst and most extreme atrocity perpetrated in the history of human civilisation. In my view, it is fitting for the memorial to be located in a position of the greatest possible prominence to reflect that fact." **[840]**

> "I really believe that a memorial next to Parliament, where vital decisions are made, will help us to learn the vital lessons of the past. What better symbol to remind our Parliamentarians and the wider public of where apathy as well as prejudice and hate can ultimately lead?" **[842]**

[1] The inquiry heard from Mr. Eric Murangwa Eugene MBE, a survivor of the Rwandan genocide, in support of the scheme.

11. The Minister (DL33) **[51]** agreed with the Inspector that locating the memorial next to the Palace of Westminster would offer "a powerful associative message".

12. The proposals themselves are described pithily at section 5 of the Inspector's report. The winning design of Adjaye Associates is described in the Alternatives Document at section 4.6 'Design alternatives' as having reflected extensive research into both the Site and the objectives of the UK Holocaust Memorial Foundation in developing the HMLC.

13. The Inspector sets out the parties' cases and proceeds to his conclusions at p146 **[217]** before giving his recommendation at p212 **[283]**. He stated at IR 15.280 and IR 15.283, respectively **[282]**:

> "In essence, the balance is a simple one between the harms, principally those that would be caused to the setting, special interest and character and appearance of a number of heritage assets and harm to open space and to trees, set against the public benefits, primarily the delivery of a national Memorial and LC of exceptional design quality in a location befitting the national and international importance of its purpose. As there is, amongst other harms, more than one instance of heritage harm, these have been combined in the planning balance."

> "When the measures of harms and benefits are respectively accounted, it is clear to me, as set out in the comprehensive reasoning above, that the significant range of truly civic, educative, social and even moral, public benefits the proposals offer would demonstrably outweigh the identified harms the proposals have been found to cause. The outcome of this balance therefore amounts to a material consideration of manifestly sufficient weight to indicate in this case that determination other than in accordance with the development plan is justified."

Submissions:

14. First, the description of the development as representing an *exceptionally serious* intrusion into a green public open space *of the highest heritage significance* is overblown hyperbole which, while encapsulating the Claimant's views, was not

accepted by the Inspector, who came to very different conclusions in his independent, thorough, thoughtful and careful analysis.

15. Turning to the individual grounds of claim, which are put in terms of alleged errors of approach to what is termed the 'layers' of protection.

16. Permission was granted by Lieven J on 28th October 2021 for grounds 1 and 4 of the claim only, but the Claimant has indicated its desire to renew the claim on ground 3 at the substantive hearing. These detailed grounds of defence therefore focus on grounds 1, 3 and 4 of the claim as filed.

Ground 1:

17. The Claimant contends that the Inspector and Minister applied the wrong legal test to the issue of whether there was *substantial harm* to the heritage assets within the Gardens, because they applied the ***Bedford*** test which the Claimant asserts "has no justification within the test set out in the NPPF".

18. This submission is wholly wrong. The correct test was applied and the approach of both the Inspector and Secretary of State is not out of alignment with the comments of the Court of Appeal in ***City and Country Bramshill Ltd v SSCLG*** **[2021] EWCA Civ 320**. In any case the Inspector has not expressly adopted any of the descriptive language employed in ***Bedford*** used to illustrate what substantial harm might look like (significance being "drained away": para 24 of Jay J's judgment).

19. The point of contention between the parties at the inquiry was whether what is said about 'substantial harm' in paragraph 018 of the PPG should be preferred over the explanation of substantial harm to a heritage asset given by Jay J in ***Bedford Borough Council v SSCLG and Nuon UK Ltd*** **[2012] EWHC 4344 (Admin)**. The Inspector correctly characterised the difference between the parties as whether the PPG encouraged a test of 'lesser height' (IR 15.11 **[219]**).

20. The Inspector in any event found (IR 15.12) that "there is in fact little to call between both interpretations":

> "…*Bedford* turns on the requirement for 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'."

21. That the test for finding substantial harm is a high one is not in any way inconsistent with what the Court of Appeal observed in ***Bramshill***. The point remains that other parties to the inquiry who set the bar for substantial harm *lower*, therefore *necessarily overstated* the degree of harm to be found.

22. The passage in the PPG does not in any event set out (either explicitly or implicitly) to reformulate the legal definition of 'substantial harm' as established by the High Court. The approach in ***Bedford*** is founded on the way in which the NPPF refers to substantial harm to or total loss of significance of a designated heritage asset.

23. Further, the Claimant's position in relation to 'substantial harm' is muddled in paragraphs 32-42 of the grounds, taking elements of the PPG and elements of Jay J's judgment in ***Bedford*** and appearing to marry the different parts together. However, the test is entirely clear; it is explained in ***Bedford*** and what has been subsequently said in the PPG does not purport to undermine that.

24. Further and in any event, there is no justification whatsoever for the Claimant's assertion that the "correct" application of the test would have led "inevitably" to the conclusion that the harm to the significance of the Buxton memorial was substantial. Whilst there were differing views before the Inspector, it simply cannot credibly be asserted that there was any *inevitability* about the Inspector's, and in turn the Minister's, eventual conclusion. The Inspector in fact declined a wholesale

acceptance of the views of those appearing for the Secretary of State and tended more towards agreeing with the opponents of the scheme, the point remaining that the harm that he did find (IR 15.69 **[231]**) was strongly outweighed in the planning balance.

25. Whilst it is contended in paragraph 32 of the grounds of claim that the Inspector gave inadequate reasons for finding that the harm to the Buxton memorial remained well below the threshold of 'substantial', the grounds actually go on at paragraph 33 to set out exactly why the Inspector so found. The Inspector's judgment was an exceptionally fair and well-balanced one, albeit that the Claimant may be frustrated that the harm that the Inspector *did* find was not elevated still further.

26. The words from the Inspector's report (which, as is trite, must be read as a whole and without undue rigour or laborious dissection in an effort to find fault: ***Felicity Norman v SSCLG* [2018] EWHC 2910**) referenced in paragraph 34 of the grounds reflect this highly experienced Inspector's acknowledgment of the broader test he was bound to apply: how the harm that he found to the setting of the Buxton memorial was to weigh in the overall balance. In saying that the harm remained well below the threshold of 'substantial', he was clearly expressing his planning judgment, *having taken into account* the harm he considered there may be. In short, despite the harm found, it went as far as he found it to go, but not further. No conceivable prejudice to the Claimant arises by way of a lack of reasoning.

27. In short the many heritage assets within the Site and the vicinity were all examined in tremendous detail in the written evidence before the inquiry and in the oral evidence testing those professional opinions. They were considered equally carefully by Inspector Morgan in his report. He clearly gave due weight to the significance of the Buxton Memorial and did consider that harm, but ultimately he concluded that it was outweighed. That was a matter well within the bounds of his planning judgment.

28. However it is dressed up this ground is in reality a disagreement with the inspector's and decision-maker's judgment-calls.

Ground 3:

29. *This ground does not have permission to proceed; it was refused permission by Lieven J.*

30. The contention is that the London County Council (Improvements) Act 1900 prevents the use of the Gardens for a memorial "in the manner proposed". However, there are multiple other memorials on the Site, and indeed their very presence is a major plank of the case the Claimant seeks to mount in other parts of its challenge.

31. Whilst there are some references to the 1900 Act in the third parties' written evidence, the 1900 Act was not an issue which was canvassed in the oral evidence. There is *no mention* of the 1900 Act in *any* of either the (written) opening or closing submissions made on behalf of the parties. Whilst there are some small references to the Act in the VTG Conservation and Significance Statement January 2019, prepared by the Claimant (sections 4.7 and 4.9 and Appendix 6) and the Claimant's letter of 4th February 2019, and a small factual reference in the Claimant's statement of case, the only reference in the Claimant's proofs of evidence was at point 4.9 on p15 of Sally Prothero's proof, which is again a short factual reference. The only party who asserted that alterations to the Site would be contrary to the 1900 Act was Baroness Deech (see point 14, p5). None of the Thorney Island Society's nor Save Victoria Tower Gardens' seven proofs of evidence made any reference to the Act at all. Thus the Claimant's submission that the requirements of the Act were a material consideration *to this planning decision* which needed to be dealt with in the inspector's report / decision letter is to put it mildly, problematic.

32. Even if the Claimant has a point (which it is emphasised the Secretary of State does not accept it has) this would mean that Parliament would need to repeal or amend the relevant provisions of the 1900 Act in respect of the Site. This is 'all very

interesting' but is hardly a point for a planning inspector making recommendations concerning a planning matter and the minister making a planning decision.

33. The Secretary of State disagrees with the submission that the 1900 Act prevents the proposed alterations to the Site. Neither does the Secretary of State consider that it falls to this court to adjudicate on this point in this litigation. With that important caveat entered what follows is set out should the court consider otherwise.

34. The Site will remain a garden open to the public within s8(a) of the Act and an integral part of Victoria Tower Gardens.

35. In so far as this ground has been developed, the Claimant's submission is essentially contained in paragraph 69 of the grounds. It rests on the Claimant's *opinion* that the "area proposed to be taken up by the UKHMLC" would "clearly take up and dominate the greater part of the southern section of what is now Victoria Tower Gardens as extended by the New Garden Land", such that s8 would be contravened.

36. Not only are such issues of 'domination' quintessentially matters of judgment, but it is not inconsistent with the concept of a garden to have a structure or other enclosure within it. Indeed, the Buxton Memorial resides within the Gardens but it has not been suggested that that was incompatible with the garden nature of the overall Site. It is unlikely that in enacting the 1900 Act Parliament was thinking about a space in which there could be *no* enclosed parts or buildings. The concept of a 'garden' at that time was in any case likely to have been much closer to a park, with all the flexibility inherent in the use of such as a concept, as opposed to just fruit, vegetables and flowers. Kew Gardens is a good example: whilst it is mainly greenery, it also contains recreational facilities such as cafes, art galleries, tennis courts and its greenhouses.

37. There is no evidence that Parliament can be taken to have *precluded* use of the Gardens for memorials (and of course they already contain many).

38. Further, the land sat, and sits, right next to Parliament and in the heart of the geography of Government. Parliament's contemplation therefore seems likely to have included the possibility of use of parts of the space for the sorts of purposes that have in fact and over the years underpinned some of the installations (e.g. statutes and indeed the Parliamentary Education Centre which opened in 2015).

39. In any event, c93% of the Site will remain substantially devoted to greenery (and with greater accessibility).

40. Further, this ground is arguably out of time. There is no explanation as to why any challenge based on this ground was not brought within 3 months of the Government's announcement that it intended to proceed with the project.

Ground 4:

41. This ground alleges an error of approach in the consideration of alternative sites.

42. Paragraph 5 of the grounds of claim acknowledge Recommendation 1 of the Holocaust Commission Report (HCR) **[494]** for a new national memorial that would be:

i) Striking;
ii) Serve as the focal point for national commemoration;
iii) Be prominently located- in Central London;
iv) To attract the *largest possible* number of visitors and
v) Make a bold statement about the importance Britain places on preserving the memory of the Holocaust.

43. It should be immediately obvious that if there was any suitable site in Westminster itself, close to the Houses of Parliament where national decisions are made and national issues grappled with, then those criteria would be fulfilled by the choice of the Site. Hence the comment made by Rt Hon Ed Balls in his evidence to the

inquiry, referring to the meeting when it was collectively realised that the most preferable location was Victoria Tower Gardens, right next to Parliament. He described this as the 'moment of genius', being an acknowledgment that this most obvious of sites had somehow been overlooked up until then in the search. It was (and is) submitted that the Site is indeed a uniquely appropriately located one for the subject matter of the development - a memorial and learning centre part of the point of which is to prompt examination of the response of Britain to the events of the Holocaust, both its commendable actions and its regrettable failures.

44. The Claimant suggests that because the Inspector gave little or no weight to options previously considered and rejected, this puts an impracticable burden on an objector to a scheme. It does not. The Inspector did not place a burden of proof on any objector to show that there was no other possible site; what he did do was explain why the other sites referred to by objectors would not have fulfilled the objectives identified by the Holocaust Commission, either as well - or even at all. The Inspector was not setting up some sort of test, he was simply explaining why he agreed with what the Secretary of State and others explained was wrong with the IWM as a potential site.

45. In the Alternatives Document, it was concluded at para 4.5.5 **[747]** that the IWM was *not suitable* as it would have given the scheme "limited space and prominence" and the memorial would have been "subsumed into the wider aims and purpose of the IWM, which is not compatible with the Memorial". It was concluded however that the [VTG] Site "…performs highly compared to all other sites in terms of visibility and prominence".

46. The Inspector and Minister of State's acceptance of this position was simply a matter of planning judgment.

47. Insofar as the Claimant says that the applicant cannot show the necessary "clear and convincing justification" for harm to a heritage asset *if it cannot show that there is no alternative site on which the proposals could be accommodated without harm*,

this is contrary to the judgment of the High Court in ***Pugh v SSCLG*** **[2015] EWHC 3 (Admin)** in which it was held that *the outcome of weighing the harm* which would be caused by the proposals as against their public benefits if found to be favourable to the proposals itself, *provides the clear and convincing justification* referred to in national policy. The Claimant seeks to create a legal test which simply does not exist.

48. Also relevant is the context of the commitment of the British Government to fulfil the recommendations of the Holocaust Memorial Commission. As the Inspector stated at 15.170 **[258]**:

> "…this would represent not only a commitment to honour the memory of the millions lost to the Holocaust, but also a testament to the courage and resilience of those who survived it. This is a matter of importance and, though unusual in planning terms, it is of material weight that such a monument should be raised within the lifetime of at least some of those survivors so that this commitment is seen to be honoured in their living memory*."

*For example, two of the survivors who spoke to the inquiry (Mr. Rudi Leavor and Ms. Lily Ebert) were 93 and 96 years old, respectively.

Conclusion:

49. It is submitted that it is highly regrettable that this challenge to the Inspector and Minister of State's planning judgment has been brought. The overriding imperative is that the memorial be open in time for that to be within the living memory of the few remaining Holocaust survivors, some of whom, in their mid to late 90s, spoke movingly and compellingly before the inquiry. This laudable objective has now been threatened.

50. In the circumstances and for the reasons set out above, the court is respectfully requested to dismiss the claim.

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1st December 2021