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

-and-

LEARNING FROM THE RIGHTEOUS

Interested Party

DETAILED GROUNDS OF RESISTANCE

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.

I. INTRODUCTION

1. This is a 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**").

2. By an Order dated 28 October 2021, Lieven J granted permission to proceed with Grounds 1 and 4 only. By a notice of renewal served on 4 November 2021, the Claimant applied to renew its application for permission to proceed with Ground 3. The parties agreed that the Claimant's application should be considered on a rolled-up basis at the substantive hearing of the claim.

3. The Minister resists this claim and submits that the claim should be dismissed on Grounds 1 and 4, and permission to proceed with Ground 3 should be refused.

II. FACTUAL BACKGROUND

4. 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 her for determination.

5. 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 64.

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 Department for Levelling Up, Housing and Communities.[1] These 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.

7. The DL and the IR must be read together and each must be read fairly and as a whole, in accordance with well-established principles (see below). However, the Minister highlights the following parts of the DL and the IR which are of particular importance.

[1] At the time of the challenged decision, the name of the department was Ministry of Housing, Communities and Local Government.

(a) Consideration of heritage impact in the DL and the IR

The Inspector's report

8. At IR 15.11 – 15.13, the Inspector considered the meaning of the policy concept in the National Planning Policy Framework ("**NPPF**") of substantial harm to a designated heritage asset:

> *'15.11 In addition to disagreements on the magnitude of harm to DHAs between the parties, there is also divergence in the methodology to be applied to its calibration. The Applicant relies on the definition of substantial harm (and the calibration of lesser harms that flow from it) set out in the Bedford case, broadly defined as a high test. WCC on the other hand (though not making express reference to it in written evidence) prefer to rely on the example of substantial harm set out in paragraph 018 of the PPG, a definition, as I understand it from their oral evidence, which sets the test at a lesser height. Although also reliant on the PPG definition (but again with no reference in written evidence) TIS.SVTG & LGT apply a further, different approach, based on consultancy-developed methodologies for characterising the magnitude of harm. Lastly, other parties present a similar Bedford-based approach to harm calibration, though conclude that the magnitude of harm, specifically with regard to VTG as an RPG, should be judged as substantial.*
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> *15.12 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'.*
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> *15.13 It is a high test indeed and I address these matters in detail below, calibrating the degree of harm identified to each DHA and the weight to be apportioned accordingly. The sum of such harms is then duly considered against any public benefits in the heritage balance anticipated in paragraphs 195 or 196 of the NPPF and, where appropriate, development plan policy.'*

9. At IR 15.65 – 15.69, the Inspector considered the effect of the UKHMLC on the setting of the Buxton Memorial (it being common ground that there would be no direct effect to the Buxton Memorial, i.e. to its fabric). The Inspector identified some harm to the

significance of the Buxton Memorial arising from the harm to its setting, but noted that the Buxton Memorial would remain physically unaffected by the proposal and that the level of harm to its significance '*remains well below the threshold of substantial, [but] I nevertheless afford this a measure of considerable weight in the heritage balance'*.

10. At IR 15.117 the Inspector recorded his overall conclusion on the 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.'*

11. At IR 15.186 – 15.189 the Inspector considered the heritage balance for the purposes of para. 202 of the NPPF. In particular at IR 15.187 – 15. 188 the Inspector said:

> *'15.187 Let us remember, for comparison, that substantial harm requires, in the case of Bedford, that the harm be assessed as 'serious' with significance needing to be very much, if not all, 'drained away'. Alternatively, paragraph 018 of the PPG indicates that an important consideration is whether the adverse impact would 'seriously' affect a key element of special interest. My reasoned judgement is that this bar has not been reached here and, contrary to the views of objecting parties, the harm, calibrated cumulatively at no greater than a medium degree above moderate, (still accounting for the great importance apportioned to the harm to the setting of the BM) would not come close to substantial for any asset, by either measure.*
>
> *15.188 I must emphasise, in the light of the extensive debate on the calibration of heritage harm heard at the Inquiry, that less than substantial harm does not necessarily amount to a less than substantial planning objection. This is particularly the case where the statutory and national policy tests have not been met. Accounting for the considerable importance and weight to be given to the desirability of preserving the setting of listed buildings anticipated by the Act510, and the expectation that great weight be afforded to their conservation in the NPPF, I have found the measure of the harm to the setting of the BM should be assessed as being of great importance, and the weight to that harm characterised as considerable. […]'*

The Minister's decision letter

12. At DL 13 and DL 14 the Minister reminded himself of ss. 66(1) and 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990.

13. At DL 16, the Minister recorded his agreement with the Inspector's approach to considering effects on designated heritage assets:

> *'The Minister of State notes the Inspector's analysis set out at IR15.8-15.17 detailing views of parties on the harms to heritage assets, and agrees with his approach to considering effects on Designated Heritage Assets.'*

14. AT DL 22 – 23, the Minister considered the impact of the UKHMLC on the Buxton Memorial:

> *'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.'*

15. At DL 28, the Minister recorded his conclusion on the effect of the UKHMLC on 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).'

16. At DL 37 – 38, the Minister undertook the heritage balance for the purposes of para. 202 NPPF and concluded that when the '*very important public benefits*' which he had identified were weighed against the less than substantial harm to the significance of the designated heritage assets, '*in each case the balance clearly and demonstrably weighs in favour of the proposals*'.

(b) Consideration of alternatives in the DL and the IR

The Inspector's report

17. The Inspector considered alternative locations for the UKHMLC principally at IR 15.164 – 15.169. This consideration included discussion of the Imperial War Museum ("**IWM**") as an alternative location.

18. At IR 15.164 - 165 the Inspector said:

> *'15.164 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.*
>
> *15.165 A range of alternative sites appear in the evidence before the Inquiry, all of which, for different reasons, were subsequently rejected in the selection process. Primary amongst these are the three provisionally identified in the HMC Report, Potter's Field on the south bank of the Thames adjacent to Tower Bridge, the aforementioned Millbank site next to Millbank Tower, and the IWM again south of the river. It is on the latter that the hopes of those opposing the VTG proposal are focused as a credible alternative worthy of weight in the planning balance.'*

19. Notably, at the end of IR 15.164, the Inspector:

(a) inserted a footnote to ***Trusthouse Forte Hotels Ltd v Secretary of State for Environment*** (1987) 57 P. & C.R. 293 at pp. 299 - 300;

(b) cross-referred to IR 8.62 where the Council advanced the submission that '*the absence of detailed and worked up alternatives before the inquiry is not a reason for discounting [alternative sites]'* (by reference to ***Trusthouse Forte***); and

(c) cross-referred to IR 9.65 where the Claimant advanced the submission that *'[i]t is not accepted that the existence of an alternative proposal or site is only a material consideration if there is a specific scheme in existence (such as occurs in a conjoined planning appeal or otherwise)*' (again, by reference to ***Trusthouse Forte***).

20. At IR 15.169 the Inspector concluded:

> *'So, 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 still lesser weight.'*

The Minister's decision letter

21. The Minister considered alternative locations principally at DL 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.'*

III. LEGAL FRAMEWORK

(a) Approach to claims for statutory review

22. The correct approach to statutory reviews pursuant to s. 288 TCPA 1990 was summarised 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 […]"*

(b) The interpretation of planning policy

23. The fourth principle in ***St Modwen*** is derived from ***Tesco Stores Ltd v Dundee City Council*** [2012] UKSC 13, [2012] PTSR 983 where Lord Reed explained the objective approach to the interpretation of development plan policy at [18] – [19]:

> *"18. […] The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in* ***R (Raissi) v Secretary of State for the Home Department*** *[2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.*
>
> *19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (****Tesco Stores Ltd v Secretary of State for the Environment*** *[1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."*

24. This approach to the interpretation of development plan policies also applies to the interpretation of the NPPF: see ***Hopkins Homes Ltd v Secretary of State for Communities and Local Government*** [2017] UKSC 37, [2017] 1 WLR 1865 *per* Lord Carnwath at [23]. In ***Hopkins Homes*** Lord Carnwath added the following guidance at [25] – [26] in response to the concern "*about the over-legalisation of the planning process*":

> *"25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory*

*texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (**Wychavon District Council v Secretary of State for Communities and Local Government** [2008] EWCA Civ 692; [2009] PTSR 19 , para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see **Secretary of State for the Home Department v AH (Sudan)** [2007] UKHL 49; [2008] 1 AC 678 , para 30 per Lady Hale.)*

*26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the **Tesco** case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two."*

(c) Legal challenges and heritage assets

25. The degree of harm (if any) to the significance of a designated heritage asset is a matter of judgment for the decision maker: see ***R. (Palmer) v Herefordshire Council*** [2016] EWCA Civ 1061, [2017] 1 WLR 411 *per* Lewison LJ at [5]. This was expanded on in ***Catesby Estates Ltd v Steer*** [2018] EWCA Civ 1697, [2019] 1 P. & C.R. 5 *per* Lindblom LJ at [30]:

*'[…] the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in **East Northamptonshire District Council v Secretary of State for Communities and Local Government** [2015] 1 W.L.R. 45 (at paragraphs 26 to 29), **Jones v Mordue** [2016] 1 W.L.R. 2682 (at paragraphs 21 to 23), and **Palmer** (at paragraph 5), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene (see **Williams**, at paragraph 72). For decisions on planning*

> *appeals, this kind of case is a good test of the principle stated by Lord Carnwath in* ***Hopkins Homes Ltd. v Secretary of State for Communities and Local Government*** *[2017] 1 W.L.R. 1865 (at paragraph 25) – that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".'*

(d) Alternatives in planning decision making

26. There is a wealth of case law on when an alternative development should or should not be taken into account in planning decision making. For a recent summary of that case law, see ***R. (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport*** [2021] EWHC 2161 (Admin) *per* Holgate J at [268] – [276]. Unlike in that case, the proposed alternative (the IWM) was taken into account and a judgment was made in the light of consideration of its credentials as an alternative location for the proposed development.

27. Where, as in the present case, a potential alternative site is in fact considered by the planning decision maker, the weight to be afforded to that alternative site as the location for the proposed development is a matter of planning judgment for the decision maker, with which the court should not interfere unless it can be shown to be ***Wednesbury*** unreasonable: see, for example, ***Kilmartin Properties v Tunbridge Wells Borough Council*** [2003] EWHC 3137 (Admin), [2004] Env LR 36 at [50].

28. In ***Rhodes v Minister of Housing and Local Government*** [1963] 1 WLR 208, Paull J considered the Minister's judgment that planning permission could not be refused '*because other sites have not been fully investigated'* and said at 213:

> *"Those words seem to me to mean that the Minister is taking the attitude that while he ought to take into consideration any definite evidence as to the availability or suitability of alternative sites, it is not for him to do more than consider what evidence was brought forward at the hearing before the inspector as to any alternative site being suitable and the effect of such evidence upon his mind. With that attitude I agree. I do not think it is incumbent upon the Minister to do more on this aspect of the matter than to consider whether at the hearing it has been shown that there is an alternative suitable site and to consider the effect of that fact upon his mind in relation to the totality of facts. He must take into consideration all he knows, but it is not for the Minister to "rout round" to see if he can find another site, although, if he chooses, he can (as the inspector recommended) refuse the application unless the applicants for planning permission do so. He has given the objectors the opportunity of proving any facts they desire him to take into consideration. If they do not adduce the necessary evidence and leave the*

matter vague the Minister is entitled to say that the balance of the facts actually proved or otherwise known to him is in favour of the applicants who ask for the permission."

29. In ***Trusthouse Forte Hotels Ltd v Secretary of State for Environment*** (1987) 53 P. & C.R. 293, at 301 Simon Brown J accepted the submission that '*there can be no objection in principle to a planning authority concluding in certain cases at least that a particular need can be satisfied elsewhere than upon the appeal site even though no other specific sites are identified and established as preferable alternatives*' on the basis of the following reasoning:

> *"(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.*
>
> *(3) The clearer it is that the planning objections relate essentially to the development of the application site itself rather than to some intrinsically offensive aspect of the proposed development wherever it might be sited, the less likely it is to be essential to identify specific alternative sites.*
>
> *(4) Equally, the less specific and exacting are the requirements to be satisfied in order to meet the accepted need, the more likely is it that a planning authority could reasonably conclude that such need can be met elsewhere without reference to some identifiable preferable alternative site.*
>
> *(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.*
>
> *(6) The extent to which it will be for the developer to establish the need for his proposed development on the application or appeal site rather than for an objector to establish that such need can and should be met elsewhere will vary. […]"*

30. In ***South Cambridgeshire District Council v Secretary of State for Communities and Local Government*** [2008] EWCA Civ 1010, [2009] PTSR 37, Scott Baker LJ referred to the sixth point in the above quotation from ***Trusthouse Forte*** and said at [47]: "*In my judgment all that* ***Trusthouse Forte Hotels Ltd*** *establishes is that whether the developer is required to justify why he should be allowed to develop the site depends upon the circumstances."*

31. In ***R. (Langley Park School for Girls Governing Body) v Bromley London Borough Council*** [2009] EWCA Civ 734, [2010] 1 P. & C.R. 10, Sullivan LJ referred to ***Trusthouse***

Forte when considering when it may be necessary to identify a specific alternative site and said at [52] – [53]:

> *"52. […] There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.*
>
> *53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. […]"*

32. Finally, in in ***R. (Mount Cook Land Ltd) v Westminster City Council*** [2003] EWCA Civ 136, [2017] PTSR 1166 Auld LJ stated 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."*

IV. RESPONSE TO GROUNDS OF CHALLENGE

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

33. Neither the Inspector nor the Minister misinterpreted or misapplied the policy concept of substantial harm in their assessment of the degree of harm resulting from the proposed development to the significance of the Buxton Memorial ("**BM**"). Nor did the Inspector or the Minister fail to give adequate reasons for their conclusion that the harm caused to the BM as a designated heritage asset would be less than substantial.

The approach adopted by the Inspector and the Minister

34. At the outset, it is necessary to have in mind that the NPPF does not itself provide a definition of the concept of "*substantial harm*". Paragraph 201 of the NPPF refers to substantial harm to (or total loss of significance of) a designated heritage asset.

35. In ***City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government*** [2021] EWCA Civ 320 at [74], the Senior President of Tribunals said:

> *"[…] 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."*

36. In the present case the Inspector's approach, accepted by the Minister, was to judge whether there would be substantial harm by assessing whether the proposed development would result in a serious degree of harm to the significance of the designated heritage asset: see IR 15.12 and DL16. That is in accordance with the approach stated by the Senior President of Tribunals in [74] of ***Bramshill*** (an approach to interpretation of the policy concept of "*substantial harm*" which in turn accords with the analysis of Lord Reed in [19] of ***Tesco Stores Ltd v Dundee City Council*** [2012] UKSC 13, [2012] PTSR 983).

37. In light of the debate at the inquiry which the Inspector records at IR 15.11, in reaching his judgment in IR15.12 as to how he should approach the question of substantial harm, the Inspector considered both the PPG and ***Bedford Borough Council v Secretary of State for Communities and Local Government*** [2013] EWHC 2847 (Admin). It is that part of the Inspector's reasoning upon which the Claimant focuses its attack under Ground 1: see paragraphs 15-20 of the Reply.

38. It is important to emphasise that in IR 15.12 the Inspector formed his own judgment as to how he should approach the question of substantial harm. In so doing he

considered both the reasoning of Jay J in ***Bedford*** and the guidance given in paragraph 018 of the PPG. Nevertheless, it was the question whether the proposed development would result in a serious degree of harm to the affected designated heritage assets that was the foundation for his assessment. Moreover, neither he nor the Minister saw any material distinction between the approach of Jay J to the concept of substantial harm and the guidance on that concept found in paragraph 018 of the PPG: see IR 15.117, IR 15.187 and DL 28.

Bedford

39. In ***Bedford***, the question of whether an inspector had misconstrued or misapplied the policy concept of substantial harm was in issue before the Court: see Jay J at [11]. Jay J saw the epithets "substantial" and "serious" as essentially synonymous in this policy context: see [21] and [26]. In [25], Jay J observed that the decision maker was looking for –

> *"… an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced".*

40. In the final sentence of [24] of his judgment in ***Bedford***, Jay J sought to encapsulate the inspector's approach to the concept of substantial harm in the decision letter which was before him (Jay J) to review. It is plain that Jay J saw the inspector's approach as essentially the same as the approach that he (Jay J) endorsed in [25] as a correct basis for addressing the relevant policy question, i.e. whether substantial harm to designated heritage assets would result from the proposed development. In short, the decision maker would properly both interpret and apply the concept of substantial harm in fulfilment of the policy of the NPPF, if he or she assessed whether the impact of the proposed development was sufficiently serious in its effect that the significance of the designated heritage asset, including the ability to appreciate that asset in its setting, was (if not vitiated altogether) at least very much reduced. Jay J plainly considered the reference to that significance being *"very much …drained away"* as no more than an alternative, metaphorical means of expressing the concept of substantial harm.

41. ***Bedford*** considered paras. 131 – 134 of the NPPF (2012 version). Those paragraphs are materially the same as paras. 197 and 199 – 202 of the current NPPF. The Claimant has not identified any material difference in the language of the NPPF which indicates that

the meaning of '*substantial harm*' has changed between the 2012 version of the NPPF and the current version. Nor does the current guidance in paragraph 018 of the PPG suggest any such change. There has been no relevant change in policy or guidance to indicate that the policy concept of '*substantial harm*' has changed between the 2012 version of the NPPF (considered in ***Bedford***) and the current version.

42. Paragraph 018 of the PPG itself is expressed in terms that accord substantially with Jay J's approach in ***Bedford***. Thus, the PPG speaks of substantial harm as a *"high test"*; and states that an important consideration in judging whether such harm would result is *"whether the adverse impact seriously affects a key element of its special architectural or historic interest. It is the degree of harm… that is to be assessed [which]… may arise from development within its setting"*. In the present case, the Inspector was properly able to see *"little to call between"* Jay J's approach in ***Bedford*** and the guidance in 018 of the PPG.

43. There is no merit in the Claimant's contention that ***Bedford*** was wrongly decided. Jay J's formulation of the approach to the policy concept of substantial harm and how to assess the impact of proposed development in fulfilment of that concept is both reasonable, properly reflects the language and purpose of the NPPF either by reference to the NPPF (2012) or the current version of the NPPF; and accords with the approach stated by the Senior President of Tribunals at [74] in ***Bramshill***.

The PPG

44. The PPG is guidance, not policy, and should be approached on that basis: see ***Solo Retail Ltd v Torridge District Council*** [2019] EWHC 489 (Admin). The PPG does not define what amounts to substantial harm. The PPG states that '*in general terms*' substantial harm '*is a high test*' but does not provide any more precise threshold. Jay J's approach in ***Bedford*** is consistent with substantial harm being '*a high test*' and the guidance in 018 of the PPG is consistent with the essential reasoning in ***Bedford***.

Majorstake

45. 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. It is a case concerning the true construction of a statute: 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]). 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.

No error in the Inspector's or the Minister's approach

46. For these reasons, the Claimant's contentions are not justified. The Claimant has failed to demonstrate that the Inspector's own formulation in IR 15.12 - '*it is the serious degree of harm to the asset's significance which is the key test*' – was in error or other than a proper interpretation and application of the policy concept of substantial harm in the reasonable exercise of his planning judgment, which was in accordance with the correct legal approach as stated by the Senior President of Tribunals at [74] in ***Bramshill***. The Inspector's approach is consistent with both the PPG and ***Bedford***. In particular, the Inspector recognises that '*substantial harm*' is concerned with the degree of seriousness of the harm to the significance of a designated heritage asset; and that this is a high test. His judgment that there was no material difference between Jay J's analysis of the policy concept and the guidance in 018 of the PPG was both reasonable and justified. The Minister's decision does not, therefore, disclose a '*clear error of law*' (see ***Catesby***, above). There is no merit in Ground 1, adopting the approach of Lord Carnwath in ***Hopkins Homes*** (above).

47. Nor, for the reasons we have given, does the Claimant's bare assertion at [32] of its SFG of inadequate reasons have any merit. Having regard to IR 15.65 – 69, the reasons for the conclusion that the harm to the BM was less than substantial are clear. 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 his overall judgment that the degree of harm was less than substantial.

48. It follows that there was no error of law and this ground should be dismissed.

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

49. Lieven J concluded that this ground was not arguable because "*Section 8 of the LCC (Improvements) Act 1900 does not prevent development within VTG, s. 8(8) is a maintenance obligation*". This conclusion was correct, and the Claimant's notice of renewal discloses no arguable ground for reaching an alternative conclusion. Accordingly, permission to proceed with this ground should be refused.

50. 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 opening or closing submissions, and there is a single short factual reference in one location in the Claimant's proofs of evidence.[2] 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. Further, the Claimant's reliance at [25] of its Reply on ***R. (Kides) v South Cambridgeshire DC*** [2002] EWCA Civ 1370 is no answer: ***Kides*** concerns the circumstances where a new consideration arises between a resolution to grant planning permission and the issue of the formal decision; it does not concern the failure of a professionally represented party to raise an argument at the inquiry which it later seeks to rely on in a statutory review.

51. In any event, this ground is unarguable. Section 8 of the 1900 Act does not impose a barrier to the development of VTG for the following reasons.

52. **Firstly**, s. 8 of the 1900 Act must be read in context. That context is clear from the general recitals to the 1900 Act [CB/941 – 942] and the specific recitals to s. 8 itself [CB/944 – 945].

[2] 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.

53. In general terms, the 1900 Act conferred powers on the London County Council ("**LCC**") to: (1) make the improvements described in the 1900 Act (principally an extension of the Thames Embankment, as recorded in the long title to the 1900 Act); and (2) to raise money for the purposes of the Act. In addition, provision was made for the contributions to be made towards the improvements by others.

54. Section 8 sits within this general context and its purpose is to prescribe the arrangements between the Commissioners of Works and the LCC, as the recital to that section records ('*it has been agreed between the Commissioners of Works and the Council that the said works shall only be executed subject to and in accordance with the provisions hereinafter set forth*'). This is also consistent with the side note to s. 8: '*For protection of the Commissioners of Works*'.

55. Thus, the provisions of s. 8 must be read in light of the fact that they record the prior agreement between the Commissioners of Works and LCC, for the protection of the Commissioners given that the improvements '*will involve the occupation of certain lands vested in Her Majesty or vested in or under the control of the Commissioners of Works and will necessitate some interference with the garden adjoining the Houses of Parliament known as the Victoria Tower Garden*'.

56. **Secondly**, s. 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. This is also consistent with the wider context explained above: the Commissioners were to maintain the garden after they had laid it out and after the Council had both vested the land in the Commissioners and paid for the works. This is the simple division of responsibility. 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.

57. The error in the Claimant's interpretation is clear from its Reply where it asserts that the obligation in s. 8(8) is '*not a simple obligation to maintain any garden; it has to be the garden "as so laid out"*' (emphasis added). The Claimant misquotes s. 8(8) by inserting "as". This word does not appear in s. 8(8) because, contrary to the Claimant's position, there is no requirement to maintain the garden in the form that it was laid out. There is no prohibition on development, whether express or implied.

58. **Thirdly**, the Minister's 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.[3] The Claimant takes no account of these changes, all of which 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].

59. In its Reply the Claimant seeks to ignore this inconvenient history by contending that '*these changes are completely different as a matter of scale from the now proposed use of the new garden land*'. This is no answer. The Claimant's interpretation has evolved: now it is that some development of an unspecified scale is prohibited by s. 8(8), but other development of a lesser unspecified scale is not prohibited. There is no support for this contention in s. 8 which makes no reference to the scale of development. The evolving nature of the Claimant's interpretation underscores its error. Further and in any event, even if there was some scaled limit on development (which is not accepted), there is no basis for contending that such a limit is breached by the UKHMLC, as the Secretary of State explains in his Summary Grounds of Resistance at [36] – [39].

60. 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

61. This ground should be dismissed. It is incorrect to characterise the Inspector's approach as being to place a burden on objectors to produce a detailed scheme for the alternative location for the proposed development. In the light of the authorities, it was legally permissible for him to evaluate the strength of the case for rejecting the planning application before the Minister by considering (amongst other matters) the level of information before him on proposed alternative schemes, including the extent

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

of the evidence in support of a particular alternative site when determining the weight to be afforded to that alternative in the planning balance.

62. As a preliminary matter, it is important to recognise the nature of this ground. The Claimant does not allege that the Minister (or the Inspector) failed to take into account an alternative site. Any such claim would be unsustainable as both the Minister and the Inspector gave specific consideration to alternatives, in particular the IWM. Accordingly, properly understood, this is an attack on the weight which the Inspector and the Minister afforded to the alternative sites which they did take into account. That is a direct attack on a quintessential exercise of planning judgment.

63. **First**, the Inspector did not impose an impossible burden on any party in IR 15.164. The first to third sentences of this paragraph are unobjectionable and the Claimant makes no complaint about them. As to the fourth sentence, the Inspector expressly recognises that it is not necessary for a specific alternative site to be placed before the inquiry (see the words '*though not always essential*') before indicating (unremarkably) that the weight to be given to a proposed alternative will be affected by the evidence of its credibility and viability as an alternative vehicle to meet the need for which the proposed development has been brought forward. The Inspector's approach was to identify a legally and factually relevant consideration to the question of the weight to be afforded to a proposed alternative. The Claimant fails to identify any authority for the proposition that the credibility and viability of delivery of a proposed alternative is not relevant to the evaluation of an alternative site; and such a contention is unsustainable.

64. **Secondly**, the Inspector's approach is consistent with the case law.

(a) The Inspector's approach is consistent with the guidance in ***Rhodes*** at p. 213 (see above) that the decision-maker need only have regard to the evidence placed before him by the parties when determining the weight to be afforded to the alternative site. Further, consistently with ***Rhodes***, all parties received the opportunity to place any information before the Inspector which they desired him to take into consideration, including on the issue of alternatives. The fact that the Inspector was not persuaded by the objectors' evidence concerning alternative sites in this case was a permissible response to the evidence placed before him.

(b) The Inspector's approach accords with ***Trusthouse Forte*** and reflects the '*the spectrum*' explained in ***Langley Park*** *per* Sullivan LJ at [52] – [53] (see above). Following ***Langley Park***, "*how far evidence in support of [a] possibility, or the lack of it, should have been worked up by the objectors or the applicant for permission [are] all matters of planning judgment*": the Inspector's approach at IR 15.164 is an example of the application of planning judgment to that question as it arose in the case before him.

(c) The Inspector's approach is also consistent with the observations in ***Mount Cook*** *per* Auld LJ at [30] (see above): "*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*."

65. **Thirdly**, the Minister's consideration of alternatives at DL 34 was also consistent with this line of authorities. The Minister took the IWM (and other alternative sites) into account but afforded it very limited weight on the basis of several relevant factors, including the '*clear potential constraints that may hamper its delivery*' and '*the desirability of delivering the UKHML within the living memory of survivors*'.[4] These were all relevant factors which went to the weight to be afforded to the IWM (and other sites) as alternatives. The Minister's planning judgment is unimpeachable.

66. **Fourthly**, the Claimant's reliance on NPPF para. 200 does not advance its case under this Ground. 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.*"

[4] As to the relevance of delay, see the discussion in ***Sainsbury's Supermarkets v First Secretary of State*** [2007] EWCA Civ 1083 *per* Keene J at [38] discussing the inevitable delay from refusing a scheme because of an alternative scheme.

67. It is clear that NPPF para. 200 did not require the Secretary of State to demonstrate an absence of alternatives in order to fulfil the policy of the NPPF. The Claimant's submissions at [76] of its SFG are in error. In fact, the Secretary of State did place material before the Inspector dealing with the availability of alternative locations, including 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. 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.

68. In its Reply, the Claimant submits that ***Pugh*** is not relevant but does not explain why this is the case. The Claimant's submission at [33] of its Reply that '*a higher standard*' was required when considering alternatives in this case because of the identity of the applicant is unsupported by any authority. The is no evidence to suggest that the identity of the applicant had any bearing on the approach adopted by the Inspector or the Minister (and see ***London and Historic Buildings Trust v Secretary of State*** [2020] EWHC 2580 (Admin)).

69. There was no error of law in IR 15.164 and this ground should be dismissed.

V. CONCLUSION & RELIEF

70. For the reasons above, the Minister submits that the claim should be dismissed on Grounds 1 and 4, permission to proceed with Ground 3 should be refused, and the Claimant should be ordered to pay the Minister's costs of the claim.

TIMOTHY MOULD QC
MATTHEW HENDERSON

Landmark Chambers
180 Fleet Street,
London EC4A 2HG.

3 December 2021