Neutral Citation Number: [2020] EWHC 526 (Admin)

Case No: CO/3356/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2020

Before :

MRS JUSTICE LANG DBE

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Between :

STARBONES LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) LONDON BOROUGH OF HOUNSLOW	
(3) TRUSTEES OF THE ROYAL BOTANIC GARDENS, KEW	**Defendants**

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Richard Turney (instructed by **Town Legal LLP**) for the **Claimant**
Gwion Lewis (instructed by the **Government Legal Department**) for the **First Defendant**
Richard Ground QC and Edward Grant (instructed by **HB Public Law**) for the **Second Defendant**
James Maurici QC (instructed by **Burges Salmon LLP**) for the **Third Defendant**

Hearing dates: 11 & 12 February 2020

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant ("the Secretary of State"), dated 19 July 2019, in which he dismissed appeals by the Claimant, under section 78 TCPA 1990, against the decision of the Second Defendant ("the Council") to refuse planning permission and advertisement consent for a mixed use tower at the Chiswick Roundabout, London W4 ("the Site").

2. Permission was granted by Lieven J. on 29 October 2019. She also joined the Trustees of the Royal Botanic Gardens Kew as Third Defendant. Exceptionally, the Royal Botanic Gardens Kew sought rule 6 status at the Inquiry and appeared through leading Counsel, Mr Maurici QC. The Royal Botanic Gardens Kew is a statutory incorporation established under section 23 of the National Heritage Act 1983. It is a non-departmental public body, and an exempt charity under the provisions of the Charities Act. Kew Gardens was inscribed as a World Heritage Site by UNESCO in 2003, having already been identified as a Grade I Registered Park and Garden in 1987, and a conservation area in 1969. The Inscription places a significant obligation on the UK Government, under the terms of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972.

Planning history

3. The Site is 0.28 ha in size, and it is located by the Chiswick roundabout at the junction of Gunnersbury Avenue and the Great West Road. For planning purposes, the Site falls within what is described as the "Great West Corridor" in the Council's Local Plan.

4. The Claimant is the owner of the Site. The Site already has planning permission, granted in 2002, for a 13 storey office building, 59 metres high, called the Citadel. This development was commenced, but not completed, as it was not considered to be sufficiently viable.

5. In December 2015, the Claimant applied for planning permission for the current proposal. It is a mixed-use building, one part 32 storeys, and one part 25 storeys, comprising up to 327 residential units, office, retail/restaurant uses, basement car and bicycle parking, residential amenities, hard and soft landscaping and advertisement consent. The maximum height is 120 metres. The proposal is known as the "Chiswick Curve".

6. The Council refused planning permission and advertisement consent on 9 February 2017. The Claimant appealed, and the appeals were recovered by the Secretary of State for his own determination.

The Inspector's report

7. Mr Paul Griffiths BSc (Hons) BArch IHBC was appointed as an Inspector, and he held an Inquiry which opened on 12 June 2018 and sat for 15 days. Historic England, the Royal Botanic Gardens Kew, and the Kew Society were represented at the Inquiry.

8. In a report dated 10 December 2018 ("the IR"), the Inspector recommended that planning permission and advertisement consent be granted.

9. The Inspector identified the main issues at IR 12.9, as follows:

> "(1) whether the proposal would provide reasonable living conditions for prospective occupiers in terms of air quality, amenity space, and accessibility, in particular; highway safety; and the effect of the proposal on the living conditions of nearby residents; (2) the building in its immediate context, in other words, its effect on the character and appearance of the local area; and (3) the building in its wider context, in other words, the effect of the proposal on the setting and thereby the significance of a range of designated heritage assets. That analysis needs to take place in the light of (4) any benefits the proposal might bring forward, including affordable housing, and whether any other impacts can be successfully mitigated. It is the balancing exercise that flows from (4) that allows a conclusion to be made about the overall quality of the design. Appeal B, and the impact of the proposed advertisements on amenity and public safety can be considered as part of (1), (2), (3) and (4) above."

10. Under the heading "Background", the Inspector set out what he described as the context for the analysis of the effect of the building on the local and wider areas, at IR 12.31 to 12.37:

> "12.31 Before dealing with the second issue, namely the effect of the building proposed on the local, and wider, areas, it is imperative that the context for that analysis is properly set out.
>
> 12.32 The appeal site is at the end of the Great West Corridor, or Golden Mile, and the Council has identified it as an entry point to the area, that ought to be marked with a landmark building, of high-quality, around 60m in height. The principle of a tall building on the site is therefore well established. A building of that height on the appeal site would be widely visible.
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> 12.33 Alongside that, in line with the DRLP, and the HLP, the Council has wider ambitions for the Great West Corridor, and the adjoining area. Manifestations of those ambitions are already coming forward, notably the Brentford FC development. The Mayor's positive attitude to the proposals for the Citroen site, which at around 70m AOD, as I understand the situation, are significantly taller than what the Council thinks is appropriate for the 'landmark' on the appeal site, is also reflective of what might well be coming forward.
>
> 12.34 On top of that, there is an implementable planning permission for a 60m tall building on the appeal site: the Citadel. Ms Weiss of the Skyline Campaign described it in evidence as terrible, in architectural terms, and it was criticised by others too. In my view, it fails to attain the level of architectural sophistication one ought to expect of a tall building, and it would be extremely unfortunate if it was progressed, especially when one takes into account the Council's current ambitions for the appeal site.

> 12.35 It was suggested that the Citadel can be discounted as a fall-back because it is not viable. It may well not be viable in a conventional sense but there are ways that it could be made viable through the addition of advertisements, for example. Moreover, in a London context, it is not unknown for buildings that are not viable at the onset of construction to be implemented in any event. It is clear that there has already been significant investment in the project, and there are strong reasons why it might come forward despite the economics - the Citadel would not require any payments under local, or Mayoral CIL, for example. It cannot be ruled out completely and the possibility of it coming forward is something that needs to be borne in mind.
>
> 12.36 In any event, whether the Citadel does or does not come forward is not the central point. There is a clear mandate in policy for a tall building on the site and it is reasonable to assume that one will manifest itself, in time. That building, alongside others in the Great West Corridor, under construction, or likely to come forward, will be visible from most of the areas the Council, and others, have expressed concern about.
>
> 12.37 The proposal at issue cannot reasonably be considered in isolation, therefore. Conclusions about impacts can be made, but they must be tempered in the light of what might come forward in the light of the Council's plans for the site itself, the possibility, and I put it no higher than that, of the Citadel being implemented, and what is and will be coming forward in the wider area as part of the Council's ambitions for the Great West Corridor."

11. At IR 12.40 to 12.46, the Inspector was enthusiastic about the design of the building, with its "highly sophisticated glazing module, articulated by fins of different colour" which he considered would give the building "a dynamism that would make the approach by road along the M4 a very exciting experience". The Inspector acknowledged that the height of the building would be well above what the Council saw as appropriate, but disagreed, saying that he did not find the height inappropriate. He concluded that it was a "quite brilliant response to the difficult problems presented by the immediate context of the Site".

12. In considering the third main issue – the building in its wider context – the Inspector assessed its impact on the setting and significance of the heritage assets and found as follows:

    i) It would cause some harm to the setting and significance of the Strand-on-the-Green Conservation Area and the listed buildings on the river frontage (IR 12.58).

    ii) It would cause some harm to the setting and significance of the Kew Green Conservation Area and the listed buildings within it (IR 12.65).

    iii) It would cause harm to the setting and significance of the Large Mansion, Orangery, and Registered Park and Garden, as parts of the Gunnersbury Park Conservation Area (IR 12.87).

iv) It would cause a degree of harm to the setting, and significance of Kew Palace, and as a consequence, the Outstanding Universal Value ("OUV") of Kew Gardens, designated as a World Heritage Site, and its significance, and the significance of the Registered Park and Garden and the conservation areas (IR 12.118).

v) It would cause a degree of harm to the setting and significance of Kew Palace (a Grade I listed building and Scheduled Ancient Monument); the Orangery (a Grade I listed building); Cambridge Cottage (a Grade II listed building) and the Palm House (a Grade I listed building). These buildings were an integral part of the iconic architectural legacy of the gardens and fundamental parts of the designed landscape. The harm caused to their settings and significance would feed into harm to the OUV of the World Heritage Site, and its significance, together with the significance of the Registered Park and Garden, and the conservation area. To a degree, it would compromise a viewer's ability to appreciate its OUV, integrity, authenticity and significance (IR 12.132).

13. The Inspector acknowledged, at IR 12.135, that many of these heritage assets were of the highest order of significance.

14. Applying the National Planning Policy Framework ("the Framework"), the Inspector found that the harm was "less than substantial", and in accordance with paragraph 196, he weighed the harm against the public benefits of the proposal. He assessed the benefits as follows:

> "12.151 The appellant points to a wide range of benefits that the proposal would bring forward. The first notable benefit of the scheme is the provision of 327 new homes, 116 of which would be affordable, which is in excess of the maximum viable level of affordable housing.
>
> 12.152 The Council sought to downplay this by pointing to the fact that they have well in excess of a five year supply of deliverable housing sites. They may well have in relation to their current OAN, as enshrined in the HLP, but that OAN is going to rise significantly as a result of the DRLP. Moreover, it is not correct to look at the Council area alone, given that London is one Housing Market Area, and a Housing Market Area with extreme pressures, especially in terms of affordability. In that context, the housing the scheme would bring forward, and the affordable housing especially, is a benefit that must attract significant weight in the planning balance.
>
> 12.153 The proposal would bring forward a significant amount of high-quality workspace too. The Council, through their emerging policy, favour an office solution for the site and indeed, suggest that the Citadel would be a better prospect on the basis of the jobs it would bring to the area. However, they make the point that there is no guarantee that the new workspace in the proposal would bring new jobs; it might just feed the relocation of existing jobs. To my mind, the same argument could well be made about the Council's favoured use for the site. There are doubts too about whether this kind of solution would be viable,

> given the negative points made in relation to the viability of the Citadel.
>
> 12.154 In my view, the mix of high-quality new housing and workspace the scheme would bring forward is a much better solution for the site. I reach that conclusion in the light of Section 11 of the revised Framework and the encouragement therein to make effective use of land, and especially brownfield land. The mix of uses in the proposal certainly does that.
>
> 12.155 Of course, that does not come without environmental impacts, but the proposal, by reason of its sophisticated design, would bring a massive uplift to the local area, on a key gateway site deemed suitable for a 'marker', providing an active frontage, accessible ground and first floor uses, and environmental improvements to the area immediately surrounding the building.
>
> 12.156 It would act as a beacon, setting very high standards for other buildings coming forward in the Great West Corridor Opportunity Area. Viewed from further afield, it would cause some harm to the setting and thereby the significance of a range of designated heritage assets. However, the same would be true of the Citadel, or the 60m tall building the Council favours for the site. As I have set out, in these more distant views, the Chiswick Curve would create a legible hierarchy for the new stratum of development that will come forward in the Opportunity Area. I accept that others have a less favourable view about the qualities of the proposal but in my view, the provision of a work of architecture, of the quality proposed, represents a significant benefit.
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> …
>
> 12.158 There are other benefits in the proposal too. Like its predecessor, the revised Framework sets great store on building a strong, competitive economy. Paragraph 80 says that significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs, and wider opportunities for development. There can be no doubt that a project of the scale of the Chiswick Curve would create significant economic activity, and employment, in the construction phase, and beyond.
>
> 12.159 In my view, these benefits are of great magnitude and must carry a good deal of weight in the planning balance."

15. Under the heading "Final Conclusion", the Inspector summarised the harm to heritage assets (at IR 12.160) and reminded himself that, by virtue of paragraph 193 of the Framework and section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990, the findings of harm must attract great weight or considerable importance and weight in the balancing exercise IR 12.161.

16. The Inspector found that the proposal was contrary to London Plan ("LP") Policies 7.8 and 7.10 (IR 12.161). He then went on to conclude:

"12.162 That cannot be the end of the matter though. If it was, then it is difficult to conceive of the Council and the Mayor's ambitions for the Great West Corridor coming to fruition because the proposal coming forward would have similar impacts on designated heritage assets. It is fair to observe too that these LP policies do not contain the facility to balance benefits against harm, in the way the revised Framework does.

12.163 Notwithstanding that great weight, or considerable importance and weight, must be attached to findings of harm to the significance of designated heritage assets, and especially those of the highest order, and the setting of listed buildings, and the strong presumption against any grant of planning permission in such circumstances, it is possible for other considerations to be even more weighty.

12.164 In London especially, decision-makers need to strike a balance between the protection of significance of designated heritage assets, and the OUV of WHSs, and the need to allow the surrounding land to change and evolve as it has for centuries. In this case, while I recognise that others, including the SoS may disagree, it is my view that the extensive public benefits the proposal would bring forward are more than sufficient to outweigh the less than substantial harm that would be caused to the significance of the various designated heritage assets. As a consequence, the proposal accords with HLP Policy CC4.

12.165 On top of that, it is my view that notwithstanding the harmful impact it would have on the significance of designated heritage assets, viewed in the round, the design of the proposal is of the highest architectural quality. I do not subscribe to the view that a proposal that causes harm to the setting and thereby the significance of a designated heritage asset cannot represent good design. The proposal would bring a massive uplift to the area immediately around it, in accordance with LP Policies 7.1 and 7.4, and HLP Policies CC1 and CC2 and notwithstanding some harmful impacts that I regard as tolerable, it would make very efficient use of a brownfield site, in accordance with DRLP Policy D6. For the same reasons, there would be compliance with HLP Policies SC1, SC2, SC3, and SC4. There would be no harm caused to MOL as required by HLP Policy GB1 and the proposed advertisements would raise no significant issues in terms of amenity, or public safety, as required by HLP Policy CC5. On that overall basis, the proposal would accord with all the criteria set out in paragraph 127 of the revised Framework.

12.166 In terms of its wider impacts, by reason of its height, and more particularly its design, the proposal would bring a legible hierarchy to the new layer of urban development that will be coming forward in the Great West Corridor. In that respect, it would perform much better than the Citadel, or the Council's favoured approach to the site.

> 12.167 Put simply, the way this new layer of urban development will be perceived from, and in association with designated heritage assets, demands an approach that, like the proposal, has verve. I am afraid the Council's more compromising approach, enshrined in emerging policy, would result in a layer of development with little sense of differentiation. I note what is said about the ability of using design to set a 'marker' in the supporting text to Policy CC3, but this would be difficult to achieve when all tall buildings are expected to exhibit the highest standards of architectural design."

17. At IR 12.170, the Inspector concluded that the proposal complied with the development plan, read as a whole, and that the scheme was in compliance with the Framework. He recommended that the appeals be allowed.

The Secretary of State's decision

18. The Secretary of State received advice from his Architectural Advisor who concluded that the Inspector had made "a reasonable balance of argument in favour, all factors considered". The Planning Casework Unit agreed with the Inspector's recommendation in its ministerial submission. However, both the Minister for Housing and the Secretary of State disagreed with the Inspector's recommendations.

19. The Secretary of State's decision letter ("DL") was issued on 19 July 2019. He decided to dismiss the appeals and refuse planning permission and advertising consent.

20. At the beginning of the DL, the Secretary of State set out the policies in the development plan. He then considered, at DL 15 and 16, the emerging London Plan - the Draft Replacement London Plan ("the DRLP"). Applying the guidance in paragraph 48 of the Framework, he concluded that DRLP policies carried limited weight, as it was still at a relatively early stage, objections were not yet fully resolved, and policies may still be subject to change.

21. At DL 23, the Secretary of State disagreed with the Inspector's conclusion that the proposal was in accordance with the development plan. Like the Inspector, he found that the proposal was contrary to LP Policies 7.8 and 7.10 on heritage assets. However, unlike the Inspector, he found that the proposal was contrary to LP Policy 7.7 on the location and design of tall buildings (DL 20).

22. The Secretary of State also found that there was a minor departure from Hounslow Local Plan 2015 ("HLP") Policy SC5 because of insufficient private and communal amenity space (DL 18; DL 28).

23. The Secretary of State considered that the proposal was contrary to HLP policy CC4 on heritage assets, which provides that where a proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm will be weighed against the public benefits of the proposal. After considering the benefits at DL 35 - 36, the Secretary of State disagreed with the Inspector's finding that the public benefits of the proposal were sufficient to outweigh the harm to the heritage assets (DL 19; DL 34-39).

24. The Secretary of State agreed with the Inspector, at DL 35, that the provision of housing and affordable housing was a benefit in favour of the proposal. He took account of the fact that the Council could demonstrate a five year supply of housing. Whilst he noted the prospect of the housing requirement increasing significantly in the DRLP, the policies in the emerging plan only carried limited weight, and so he attributed moderate weight to this benefit, in contrast to the Inspector's finding of significant benefit.

25. At DL 36, the Secretary of State considered that there were benefits to be provided through the creation of workspace, which would support economic growth. However, an alternative scheme with lesser impacts on heritage assets, such as the Citadel, could also provide benefits of this type. He attributed moderate weight to this benefit.

26. The Secretary of State considered the design of the proposal at DL 27 and DL 28. He did not agree with the Inspector's assessment that the design was of such high quality as to be "a brilliant response" to its context. The Secretary of State found that the scale and massing of the proposal meant that the proposal did not relate to its immediate surroundings and would dominate the surrounding area. Due to its scale, he did not consider that it was a benefit of the scheme, and did not attribute any weight to it in the planning balance (DL 36).

27. The Secretary of State found, at DL 40, that the moderate weight to be attached to the benefits of the appeal scheme, in terms of housing provision, workplace provision and economic benefits, were not collectively sufficient to outweigh the great weight to be attached to the harm to the significance of the heritage assets. The balancing exercise under paragraph 196 of the Framework was not favourable to the proposal.

28. The Secretary of State concluded that the proposal was not in accordance with the development plan overall, and there were no material considerations which indicated that it should be determined other than in accordance with the development plan.

Statutory and policy framework

29. The Claimant relied upon the principles set out by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, at [6].

(i) Applications under section 288 TCPA 1990

30. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

31. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

32. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

33. In *Hopkins Homes v Secretary of State Communities* [2017] 1 WLR 1865, Lord Carnwath said, at [26], that claimants should "distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not … elide the two".

34. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

35. The First Defendant was under a statutory duty to give reasons for his decision, pursuant to rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

36. In *South Buckinghamshire District Council v Porter* (No 2) [2004] 1 WLR 1953, Lord Brown reviewed the authorities and gave the following guidance on the nature and extent of the inspector's duty to give reasons:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

37. Lord Brown's classic statement was held to be applicable in all planning decision-making in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, per Lord Carnwath, at [35] – [37].

38. Mr Maurici QC drew my attention to a long line of case-law going back to *R. v Secretary of State for the Environment Ex p. Gosport BC* [1992] JPL 476 that the standard of reasons expected on issues such as visual impact, design etc. is generally lower. This was a case where the Secretary of State departed from his Inspector's view on the visual impact by reason of the height of a proposed antennae. Popplewell J. said:

> "I turn next to the question of whether he has given proper intelligible and adequate reasons to explain why he has arrived at a different conclusion. When one looks at paragraph 6 he has arrived at a different conclusion because looking at the documents and the photographs it is his opinion that they do not have the prominence or the serious visual impact that the inspector found or considered. That is his conclusion, and indeed the reason for it is no more than saying, "I have looked at the documents, I have looked at the photographs, and I do not think that these masts are going to have the serious visual impact which you do." He cannot say any more. Two people look at something and one says, "I think that will have a serious visual impact", and the other says, "I do not." It is not possible, in my judgment, for any more reason to be given than that. I have come to the conclusion that the reasons which have been given are proper, intelligible and adequate."

39. *Gosport* was followed in *Coal Contractors Limited v Secretary of State for the Environment and Northumberland County Council* (1994) 68 P & CR 285, where the Secretary of State disagreed with his Inspector on the visual impact of a proposed development on the Hadrian's Wall Military Zone World Heritage Site. At p. 293 David Keene QC, sitting as a Deputy High Court Judge, said:

> "It is true that he spells out this reasoning in a relatively brief passage, but I bear in mind that when a judgment is being expressed about the acceptability or unacceptability of the visual impact of a proposal, it will often be the case that that judgment can be adequately expressed briefly and that little would be gained by lengthier repetition. On this aspect I agree with what was said by Popplewell J. in *R v. Secretary of State for the Environment, ex p. Gosport Borough Council.*"

40. Where the Secretary of State disagrees with his Inspector's report, there is no heightened standard of reasons, but he must explain the reasons for the disagreement. As Lindblom LJ said in *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767 at [19]:

> "Where the Secretary of State disagrees with an inspector, as he did in this case, it will of course be necessary for him to explain why he disagrees, and to do so in sufficiently clear terms. He must explain why he rejects the inspector's view. He must do so fully, and clearly. But there is no heightened standard for "proper, adequate and intelligible" reasons in such a case. Whether the reasons given are "proper, adequate and intelligible" will always depend on the circumstances of the case, and in a case where the Secretary of State differs from his inspector this will depend on the particular circumstances in

> which he does so (see, for example, the decision of this court in *Horada and others v Secretary of State for Communities and Local Government [2016] EWCA Civ 169*, in particular the judgment of Lord Thomas of Cwmgiedd C.J., at paragraphs 57 to 59, and the judgment of Lewison L.J. at paragraphs 34 to 40). It is a truism that the Secretary of State does not have to give reasons for his reasons. What he has to do is to make sure that his decision letter shows why the outcome of the appeal was as it was, bearing in mind that the parties to the appeal know well what the issues were. In this case he did that."

(ii) Decision-making

41. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

42. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted….
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give

effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175* , 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

43. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].

(iii) The Planning (Listed Buildings and Conservation Areas) Act 1990 ("the PLBCAA 1990")

44. Section 66(1) PLBCAA 1990 provides:

> "66. General duty as respects listed buildings in exercise of planning functions
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> (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

45. Section 72(1) PLBCAA 1990 provides:

> "72. General duty as respects conservation areas in exercise of planning functions
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any [functions under or by virtue of] any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

46. In *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, [2015] 1 WLR 45, Sullivan LJ gave guidance on the application of section 66(1) PLBCAA 1990, holding that there was an overarching statutory duty to treat a finding of harm to a listed building as a consideration to which the decision-maker must give "considerable importance and weight" when exercising his powers under section 70(2) TCPA 1990 in dealing with an application for planning permission.

(iv) National Planning Policy Framework

47. The Framework (February 2019 edition) is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making. It is policy, not statute, but a decision-maker who decides to depart from it must give cogent reasons for doing so.

48. Paragraph 48 gives guidance on the approach to be taken to emerging plans. It states:

> "48. Local planning authorities may give weight to relevant policies in emerging plans according to:
>
> a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);
>
> b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and

> c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given) [FN22 During the transitional period for emerging plans submitted for examination (set out in paragraph 214), consistency should be tested against the previous Framework published in March 2012.]."

49. National policy on "Conserving and enhancing the historic environment" in section 16 of the Framework is to be interpreted and applied consistently with the statutory duties under the PLBCAA 1990.

50. The relevant polices are set out below:

> "**Considering potential impacts**
>
> 193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:
>
> a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
>
> b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply….
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.
>
> 197. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that

> directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

(v) Development plan policies

51. The Development Plan consisted of the London Plan consolidated with alterations between 2011 and March 2016, and the Hounslow Local Plan.

52. The policies which are of particular relevance to this claim are set out in the Appendix to this judgment.

Grounds of challenge

53. The Claimant submitted that the Secretary of State's decision was unlawful and should be quashed on the following grounds:

    i) The Secretary of State failed to have regard to the relative impact on heritage assets of either the implementation of an existing planning permission, or development of the Site in accordance with the Second Defendant's emerging policy for the area. That was a central issue in the Inspector's finding that permission should be granted. The Secretary of State did not grapple with the issue, and did not give adequate reasons for departing from the Inspector on that issue;

    ii) The Secretary of State failed to understand and apply paragraph 48 of the Framework on emerging policies when determining the weight to be given to the DRLP, and failed to have regard to a material consideration (namely the absence of objection to the relevant emerging policies in the DRLP). Those failures went to the heart of a principal issue, namely the weight to be given to the provision of housing and affordable housing. There was a failure to give any adequate reasons on this issue.

Ground 1

54. The Claimant submitted that the Secretary of State failed to have regard to a material consideration, namely, that it was a central theme of the Inspector's analysis that the Citadel, or some other similar development which accorded with the Council's plan for a tall building (about 60 metres) for this location, would have similar or worse adverse effects on the heritage assets, and unlike those alternatives, the Chiswick Curve would provide a legible hierarchy.

55. I agree with Mr Lewis that this summary of the Inspector's analysis was inaccurate as the Inspector's assessment was more nuanced. In relation to many heritage assets and views, the Inspector found that the proposal would be more harmful than other potential developments on the Site. For example, in relation to the Grade I Listed Kew Palace, the Inspector found that the proposal would detract to a degree from the setting of the Palace and its significance, whereas the Citadel or any other 60 metre tall building on the Site would not appear in those views (IR 12.111). The Inspector reached similar conclusions in relation to the Order Beds, the Rockery, the Grass Gardens (IR 12.122-123) and the Grade I Listed Palm House (IR 12.125).

56. In my judgment, the Secretary of State clearly did take into account the Inspector's view that the Citadel or some other similar development would also have adverse effects on the heritage assets.

57. The Inspector set out what he described as the context for his analysis of the effect of the building on the local and wider areas at IR 12.31- 12.37. He described the Council's plan for a tall building, around 60 metres in height, at this location, which in his view would be widely visible, including from areas about which the Council was expressing concern. He considered the existing planning permission for the Citadel, which he thought was a very poorly designed building, but might nonetheless come forward. He concluded:

> "12.37 The proposal at issue cannot reasonably be considered in isolation, therefore. Conclusions about impacts can be made, but they must be tempered in the light of what might come forward in the light of the Council's plans for the site itself, the possibility, and I put it no higher than that, of the Citadel being implemented, and what is and will be coming forward in the wider area as part of the Council's ambitions for the Great West Corridor."

58. At DL 27, the Secretary of State expressly agreed with these observations, even adopting the same language used by the Inspector in 12.37:

> "….The Secretary of State agrees with the Inspector for the reasons given at IR12.31 – 12.37, that conclusions about impacts must be tempered in the light of the Council's plans for the site, the possibility of the Citadel being implemented, and what is and will be coming forward in the wider area as part of the Council's ambitions for the Great West Corridor."

59. At DL 24, the Secretary of State said that he had "carefully considered the Inspector's assessment of the impact of the proposals on the setting and significance of designated heritage assets (IR12.47-12.150)". These paragraphs in the IR, which the Secretary of State said he had carefully considered, included the Inspector's consideration of how the completion of the Citadel or some other similar development on the site would impact differently on the heritage settings, in comparison with the proposal.

60. Then, at DL 25, the Secretary of State then went on to explain that he had reached a different conclusion to the Inspector when he weighed the harm to the heritage assets against the benefits of the proposal.

61. Finally, at DL 36, the Secretary of State considered the impacts of the Citadel and any alternative scheme at the Site, stating that he:

> "…..considers that it could be possible for an alternative scheme with lesser impacts on designated heritage assets to also provide benefits of this type. For example, the Citadel scheme, should it proceed, would offer benefits in terms of job provision, and would comply with the Council's emerging policy for this area."

62. In the light of these paragraphs, I consider it is unarguable that the Secretary of State failed to take into account the Inspector's view that the Citadel, or some other similar

development which accorded with the Council's proposal for a tall building (about 60 metres), would also have adverse effects on the heritage assets.

63. Mr Turney also submitted that the Secretary of State failed to take into account the Inspector's finding that the Chiswick Curve would be superior to the Citadel and other similar developments because it would create a "legible hierarchy" for tall buildings in the area.

64. After considering the references to legibility in the IR, at IR 12.54, 12.74, 12.112, 12.117, 12.123, 12.156 and 12.166, I accepted Mr Lewis's submission that, in this appeal, the Inspector used the term "legibility" to refer to both design and height. Indeed, at IR 12.166, the Inspector suggested that design was the more important element of the two, when he stated:

> "… by reason of its height, and more particularly its design … would bring a legible hierarchy to the new layer of urban development ….. In that respect, it would perform much better than the Citadel, or the Council's favoured approach to the site."

65. The Secretary of State did not use the term "legibility" in his decision, but he clearly considered the design and height of the Chiswick Curve at DL 28, when he referred to the "scale" of the proposal which would "dominate" the surrounding area. He said:

> "The Secretary of State considers that the site has a strategic location, and he recognises the constraints and challenges associated with it. While he agrees with the Inspector at IR12/40 that the proposed design seeks to respond to those challenges in a positive way, he does not find the proposal to be of such high quality as to be a brilliant response to its immediate context. He finds the scale and massing of the proposal to be such that the proposal does not relate to its immediate surrounding. While he recognises that attempts to minimise this impact have been taken with regard to glazing and fins, the building would still dominate the surrounding area. He considers the design to be a thoughtful attempt to respond to the challenges and opportunities of the site, but due to its scale, he disagrees with the Inspector at IR 12.156 that it is a significant benefit of the scheme."

66. When assessing the planning balance, the Secretary of State concluded at DL 36:

> "In respect of design, the Secretary of State disagrees with the Inspector that the design would be a significant benefit of the scheme, given his findings on scale and massing set out in paragraph 28 of this letter. Setting aside heritage impacts, the Secretary of State finds the design of the proposal to be broadly neutral in the planning balance, and does not consider that it carries weight as a benefit of the scheme."

67. In response to a further point raised by Mr Turney, in my view, there was no contradiction between the Secretary of State's findings in DL 28 and his conclusion that, in terms of design, the proposal met the policy standard of "highest architectural quality" in LP Policy 7.5. As he explained at DL 20, despite its architectural quality, the proposal conflicted with LP Policy 7.7 which opposes tall and large buildings in sensitive locations which have an unacceptably harmful impact on their surroundings:

> "The Secretary of State further agrees with the Inspector that in terms of design, the proposal does not conflict with LP Policy 7.6 and HLP Policy CC3. However, given his findings in terms of the harm to heritage assets, he disagrees with the Inspector that there is no conflict with LP Policy 7.7 concerning the impact of tall buildings proposed in sensitive locations such as conservation areas, listed buildings and their settings, World Heritage Sites."

Reasons

68. The Claimant submitted that the reasons given by the Secretary of State were inadequate because he did not address the relative harm of the Citadel as compared to the Chiswick Curve and he did not refer to the "legible hierarchy" that the Chiswick Curve would bring to the new stratum of development, which the Inspector found to be a benefit of the proposal. Therefore "it is impossible for the Claimant to know whether there is any prospect of obtaining permission for a building on the Site that is taller than 60m regardless of design quality…" (Claimant's skeleton argument, paragraph 59).

69. The Secretary of State's DL was drafted in the customary terse departmental style, identifying areas of agreement and disagreement with the IR, and briefly setting out the conclusions reached. It is 8 pages long, whereas the IR is 149 pages long. The difference in length reflects the different functions of the Secretary of State and the Inspector in the appeal. The DL does not purport to address every point made in the IR, and in my view, it is not required to. As Lord Brown explained in *South Bucks*, adequate reasons must "enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues'," but the "reasons need refer only to the main issues in the dispute not to every material consideration". Moreover, the reasons can be "briefly stated". This is particularly the case where the Secretary of State disagrees with a judgment made by the Inspector, which is based upon the appearance and visual impact of a building, where little more can be said: see the cases of *Gosport* and *Coal Contractors* cited above.

70. In my judgment, the Secretary of State's reasoning in respect of the Citadel and alternative development was sufficiently clear from the passages in the DL which I have set out above. At DL 27, the Secretary of State expressly agreed with the Inspector that "conclusions about impacts must be tempered in the light of the Council's plans for the site, the possibility of the Citadel being implemented, and what is and will be coming forward in the wider area as part of the Council's ambitions for the Great West Corridor". At DL 24, he gave careful consideration to the Inspector's assessment of the impact on heritage assets, at IR 12.47 – IR 12.150, which included both the impact of the Chiswick Curve and the impact of the Citadel and other development. He did not agree with the Inspector that the public benefits of the proposal outweighed the harm to the heritage assets (DL 25, DL 38, DL 39).

71. The Secretary of State was not required to assess whether the public benefits of the Citadel or other development would outweigh the harm to the heritage assets, as they were not the subject of the appeal, nor were they "principal important controversial issues". Furthermore, future applications for planning permission have to be considered on their individual merits, and it is not the Secretary of State's role to prescribe criteria to be met for a future application to succeed. But I consider it is obvious from the

Secretary of State's decision that a smaller building, which complied with LP Policies 7.7 and 7.10, would be more acceptable than the Chiswick Curve, in the light of his findings that the "scale and massing of the proposal" meant that it dominated the surrounding area (DL 28). The Chiswick Curve was unacceptable because of the harm it would cause to the setting and significance of the heritage assets. The Secretary of State indicated that "it could be possible for an alternative scheme with lesser impacts on designated heritage assets to also offer benefits of this type ….[f]or example, the Citadel scheme, should it proceed, would offer benefits in terms of job provision…" (DL 36).

72. As to "legibility" and a "legible hierarchy", the Secretary of State did not use these terms in his DL, but as I have explained above, the two elements of legibility identified by the Inspector were design and height, and the Secretary of State made clear findings on both these aspects, at DL 28 and DL 36, criticising the "scale and massing" (i.e. height and bulk) of the proposal, which did not relate to its immediate surroundings and dominated the surrounding areas. On my reading of paragraph 28, it can reasonably be inferred that, as the Secretary of State considered the proposal was too high and dominating for its location, he therefore did not agree with the Inspector's view that it was a planning benefit for the Chiswick Curve to be significantly higher than the other buildings in the Great West Corridor, so as to head the hierarchy of high rise buildings (IR 12.44).

73. But even if I am wrong about that, I accept Mr Lewis' submission that the Inspector's concept of the "legibility hierarchy" was not a "principal important controversial issue", applying the guidance in *South Bucks*. The main issues in the appeal were identified at IR 12.9. An observation or judgment made by an inspector when dealing with those issues cannot be elevated into a principal issue in its own right simply by taking a highly granular approach to the identification of the "issues". Once the Secretary of State had rejected the Inspector's enthusiastic assessment of the proposal as "a brilliant response" to its context (DL 28), and made his assessment of its flaws, he was not required to go on to spell out laboriously his rejection of the Inspector's judgment on the legible hierarchy.

74. In *South Bucks*, Lord Brown re-stated the well-established principle that "a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

75. In *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108, Lord Carnwath, at [36], cited with approval the observation of Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271, where he said:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

76. In my judgment, this is a case where the Claimant cannot be in any genuine as opposed to forensic doubt, as to what the Secretary of State decided on the two issues of the

alternative developments and legibility. Thus, the Claimant has failed to establish that it has genuinely been substantially prejudiced by any inadequacy in the reasons given.

Secretary of State's decision-making

77. In its written case, the Claimant attacked the quality of the Secretary of State's decision-making, suggesting that it was questionable because his conclusions were contrary to the advice of his officials and the Inspector's recommendations. I consider that this attack was ill-judged. Where an appeal is recovered for determination by the Secretary of State, the statutory function of planning decision-maker is conferred on the Secretary of State, not his advisers or his Inspector. The Secretary of State is the primary decision-maker. He is not reviewing or conducting an appeal against his Inspector's decision. Whilst he should give due consideration to the Inspector's planning judgments, because of the Inspector's knowledge of the issues raised during the Inquiry, and his planning expertise, the Secretary of State is not required to follow them, especially when, as in this appeal, the Inspector has expressed subjective opinions about a proposal's design and appearance which he himself recognised others may disagree with (see IR 12.43 – 12.46, IR 12.156).

78. As the Court of Appeal confirmed in *Ecotricity (Next Generation) Limited v Secretary of State for Communities and Local Government* [2015] EWCA Civ 657, per Sullivan LJ at [32] – [41], there is no requirement that the Secretary of State must have visited the site before departing from the opinion of the Inspector who has conducted a site visit, provided that there was sufficient material before him on which he was reasonably able to make a judgment on visual impact. In this case, the Secretary of State was well able to assess the design, scale and visual impact of the proposal from the photomontages, photographs, plans and drawings, as well as the descriptions in the evidence.

79. Ultimately, the matters on which the Secretary of State differed from his advisers and the Inspector were quintessentially questions of planning judgment for the Secretary of State which could only be challenged on *Wednesbury* grounds.

80. For these reasons, Ground 1 does not succeed.

Ground 2

81. The Claimant submitted that the Secretary of State failed to understand and apply paragraph 48 of the Framework on emerging policies when determining the weight to be given to the DRLP.

82. The Secretary of State addressed the DRLP at DL 15 – 16, and DL 35:

> "15. The Draft Replacement London Plan (DRLP) is currently undergoing its Examination in Public. Hearings have now been concluded and the Panel will shortly be considering suggested changes and evidence submitted, with a view to submitting a report to the Mayor of London in September 2019. The Secretary of State considers that the emerging policies of most relevance to this case include DRLP policy SD1, seeking to fully realise the growth and regeneration potential of Opportunity Areas and Figure 2.10 which identifies the possible provision of 7,500 new

> homes and 14,000 new jobs in the Great West Corridor Opportunity Area. The DRLP retains the principle that London is a single housing market and increased the Borough of Hounslow's housing target from 822 dwellings per annum to 2,182. DRLP Policy D6 seeks to optimise density and states that residential development that does not make the best use of the site should be refused.
>
> 16. Paragraph 48 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework. As the Draft Replacement London Plan is still at a relatively early stage, any objections are not yet fully resolved and its policies may still be subject to change, the Secretary of State considers that the DRLP policies carry limited weight.
>
> …..
>
> 35. The Secretary of State considers that the provision of housing and affordable housing is a benefit in favour of the proposal. He also takes account of the fact that it is common ground between the parties that the Council can demonstrate a five year supply of housing land. While he notes the prospect of the housing requirement increasing significantly as a result of the emerging Draft Replacement London Plan, given that objections are not yet fully resolved and its policies are still subject to change, the Secretary of State considers that the DRLP policies carry limited weight at present. Accordingly, the Secretary of State attributes moderate weight to this benefit, in contrast to the Inspector's finding of significant benefit."

83. In my judgment, the Secretary of State's approach does not disclose any error of law. At DL 16, he correctly directed himself in accordance with paragraph 48 of the Framework. There is nothing in the DL to support the submission that he failed to understand it. At DL 15, he correctly identified the policies in the DRLP which were potentially relevant, namely, housing and Opportunity Areas.

84. At DL 15, the Secretary of State then correctly summarised the status of the DRLP, as at the date of his decision. At the time of the Secretary of State's decision, the formal examination of the DRLP was ongoing. The examination hearings had been concluded with the examining panel expected to provide its report on the draft DRLP, including recent suggested changes, to the Mayor of London in September 2019.

85. At DL 16, the Secretary of State applied paragraph 48 of the Framework to these facts, and decided that, as the DRLP was still at a relatively early stage, any objections were not yet fully resolved and its policies might still be subject to change, the DRLP policies carried limited weight. This was an exercise of judgment on the part of the Secretary of State, not a misinterpretation of the Framework. As Lord Carnwath made clear in *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, at [26], claimants should "distinguish clearly between issues of

interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not … elide the two". It is well-established that the assessment of the weight to be given to material considerations, such as an emerging plan, can only be challenged on grounds of perversity (e.g. *City of Edinburgh* cited at paragraph 42 above). The Claimant did not allege perversity; such a challenge would have been hopeless. The Secretary of State's judgment that only limited weight should be given to an emerging plan on which the examiner had not yet reported was entirely orthodox.

86. Indeed, the Claimant's own planning expert, Mr Goddard, stated that the DRLP should be given limited weight as an emerging plan in his proof of evidence at the Inquiry. Paragraph 8.67 said as follows.

> "8.67 The adopted local plan is out of date in as far as the annual housing target of 822 units is expected to be replaced by a materially higher target. The Draft London Plan carries limited weight at this stage, but clearly reinforces the importance of meeting housing targets, increasing densities, and optimising development on brownfield sites, and proposes to designate the Site as part of a new Opportunity Area."

87. Ms Kiri Shuttleworth for the Council confirmed in her witness statement that the Claimant did not change its position about the weight to be accorded to the DRLP in oral evidence or in closing submissions.

88. The Claimant also submitted that the Secretary of State failed to have regard to a material consideration, namely the absence of objections to the relevant emerging policies in the DRLP. It submitted that those failures went to the heart of a principal issue, namely the weight to be given to the provision of housing and affordable housing.

89. The Secretary of State and the Council understandably object to the Claimant's reliance on this point when it was not raised as an issue at the Inquiry either by Mr Goddard or counsel. As Holgate J. said in *Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1083, at [49], a new point of law should not be raised for the first time on a statutory review where "the point would have required further fact-finding or investigation by the Inspector".

90. In any event, I have carefully considered the evidence produced by the Council in support of its contention that there were unresolved objections to the housing and Opportunity Areas policies as at the date of the decision. I accept that the witness statements of Mr Barry-Purssell, and the documents which he refers to, show that there were indeed unresolved objections. These resulted in the Panel recommending a reduction in the housing requirement and changes to the Opportunity Areas policy. Therefore the Secretary of State was entitled to conclude, at DL 16, that the DRLP should be given limited weight on the grounds, *inter alia*, that "any objections are not yet fully resolved and its policies may still be subject to change".

91. The Claimant also challenged the adequacy of the reasons given in respect of the emerging plan. In my judgment, the reasons given in DL 15, DL 16 and DL 25 were both adequate and intelligible and met the standard set out by Lord Brown in the *South Bucks* case. As I have already found, the Secretary of State was entitled to proceed on the basis that objections had not yet been fully resolved. In any event, the weight to be given to the DRLP was a material consideration but not a "principal important

controversial issue" at the Inquiry, as it was not disputed that it should be given limited weight.

92. Finally, the Claimant has failed to establish any substantial prejudice arising from the alleged inadequacy of reasons.

93. For these reasons, Ground 2 does not succeed.

Conclusion

94. For the reasons set out above, the claim is dismissed.

APPENDIX

London Plan

POLICY 7.6 ARCHITECTURE

Strategic

A Architecture should make a positive contribution to a coherent public realm, streetscape and wider cityscape. It should incorporate the highest quality materials and design appropriate to its context.

Planning decisions

B Buildings and structures should:

a be of the highest architectural quality
b be of a proportion, composition, scale and orientation that enhances, activates and appropriately defines the public realm
c comprise details and materials that complement, not necessarily replicate, the local architectural character
d not cause unacceptable harm to the amenity of surrounding land and buildings, particularly residential buildings, in relation to privacy, overshadowing, wind and microclimate. This is particularly important for tall buildings

….

POLICY 7.7 LOCATION AND DESIGN OF TALL AND LARGE BUILDINGS

Strategic

A Tall and large buildings should be part of a plan-led approach to changing or developing an area by the identification of appropriate, sensitive and inappropriate locations. Tall and large buildings should not have an unacceptably harmful impact on their surroundings.

Planning decisions

B Applications for tall or large buildings should include an urban design analysis that demonstrates the proposal is part of a strategy that will meet the criteria below. This is particularly important if the site is not identified as a location for tall or large buildings in the borough's LDF.

C Tall and large buildings should:

a generally be limited to sites in the Central Activity Zone, opportunity areas, areas of intensification or town centres that have good access to public transport
b only be considered in areas whose character would not be affected adversely by the scale, mass or bulk of a tall or large building
c relate well to the form, proportion, composition, scale and character of surrounding buildings, urban grain and public realm (including landscape features), particularly at street level;
d individually or as a group, improve the legibility of an area, by emphasising a point of civic or visual significance where appropriate, and enhance the skyline and image of London

e incorporate the highest standards of architecture and materials, including sustainable design and construction practices
f have ground floor activities that provide a positive relationship to the surrounding streets
g contribute to improving the permeability of the site and wider area, where possible
h incorporate publicly accessible areas on the upper floors, where appropriate
i make a significant contribution to local regeneration.

D Tall buildings:

a should not affect their surroundings adversely in terms of microclimate, wind turbulence, overshadowing, noise, reflected glare, aviation, navigation and telecommunication interference
b should not impact on local or strategic views adversely

E The impact of tall buildings proposed in sensitive locations should be given particular consideration. Such areas might include conservation areas, listed buildings and their settings, registered historic parks and gardens, scheduled monuments, battlefields, the edge of the Green Belt or Metropolitan Open Land, World Heritage Sites or other areas designated by boroughs as being sensitive or inappropriate for tall buildings.

…

POLICY 7.8 HERITAGE ASSETS AND ARCHAEOLOGY

Strategic

A London's heritage assets and historic environment, including listed buildings, registered historic parks and gardens and other natural and historic landscapes, conservation areas, World Heritage Sites, registered battlefields, scheduled monuments, archaeological remains and memorials should be identified, so that the desirability of sustaining and enhancing their significance and of utilising their positive role in place shaping can be taken into account.

B Development should incorporate measures that identify, record, interpret, protect and, where appropriate, present the site's archaeology.

Planning decisions

C Development should identify, value, conserve, restore, re-use and incorporate heritage assets, where appropriate.

D Development affecting heritage assets and their settings should conserve their significance, by being sympathetic to their form, scale, materials and architectural detail.

…

POLICY 7.10 WORLD HERITAGE SITES

Strategic

A Development in World Heritage Sites and their settings, including any buffer zones, should conserve, promote, make sustainable use of and enhance their authenticity, integrity and significance and Outstanding Universal Value. The Mayor has published Supplementary Planning Guidance on London's World Heritage Sites – Guidance on Settings to help relevant stakeholders define the setting of World Heritage Sites.

Planning decisions

B Development should not cause adverse impacts on World Heritage Sites or their settings (including any buffer zone). In particular, it should not compromise a viewer's ability to appreciate its Outstanding Universal Value, integrity, authenticity or significance. In considering planning applications, appropriate weight should be given to implementing the provisions of the World Heritage Site Management Plans.

…

Hounslow Local Plan 2015

POLICY CC3 TALL BUILDINGS

Our approach:
To contribute to regeneration and growth, we will support tall buildings of high quality in identified locations which accord with the principles of sustainable development.

We will achieve this by:
(a) Supporting tall buildings in Hounslow town centre;
(b) Supporting a limited number of tall buildings in Feltham town centre;
(c) Supporting a limited number of tall buildings in Brentford town centre. These should be carefully designed and sensitively placed so as not to have a significant adverse impact on the setting of, views from and between heritage assets including Royal Botanic Gardens Kew World Heritage Site, Syon Park and the Thames foreshore landscape. They should also respect and respond to the area's special townscape and heritage value;
(d) Supporting tall buildings along sections of the A4 Golden Mile frontage. Specific sites will be identified in the Great West Corridor Plan subject to the delivery of strategic public transport improvements. These should be carefully placed so as not to create a wall of tall buildings, ensuring they relate sensitively to surrounding residential areas and do not have a significant adverse impact on the setting of, or views from heritage assets including Gunnersbury Park, Royal Botanic Gardens Kew World Heritage Site, Syon Park and Osterley Park;
(e) Preserving the predominantly 2 to 3 storey (less than 10m) building heights across the rest of the borough with some limited scope for 4 to 6 storey (up to 20m) buildings/ elements along main streets (for example London Road), to assist with way-finding and where the opportunity exists for higher density development;
(f) Not seeking to replace existing tall buildings which are in inappropriate locations (assessed against the criteria of this policy) and not allowing them to be a justification for the provision of new ones;
(g) Undertaking more detailed design analysis including a study to identify spatial sensitivities; and
(h) Working with our partners, particularly Historic England and Royal Botanic Gardens Kew World Heritage Site.

We will expect tall building development proposal to

(i) Be sensitively located and be of a height and scale that is in proportion to its location and setting, and carefully relate and respond to the character of the surrounding area;
(j) Be of the highest architectural design and standards; be attractive, robust and sustainable;
(k) Be of a scale that reflects their relevance and hierarchical importance when located within a grouping/cluster of tall buildings;
(l) Be designed to give full consideration to its form, massing and silhouette, including any cumulative impacts, and the potential impact of this on the immediate and wider context;
(m) Relate heights to widths of spaces to achieve comfortable proportions, and provide a positive edge to the public realm and a human scale through the careful treatment of ground floors and lower levels;
(n) Provide for a comfortable and pleasant microclimate which minimises wind vortices and over-shadowing
(o) Provide for biodiversity within the building form and be sensitive to surrounding open spaces including waterways to ensure minimal impact;
(p) Take opportunities to enhance the setting of surrounding heritage assets, the overall skyline and views;
(q) Carefully consider the façade and overall detailing to ensure visual interest, vertical and horizontal rhythms, an indication of how the building is inhabited, internal thermal comfort and the visual break-up of the building visually at varying scales;
(r) Use materials and finishes that are robust, durable and of the highest quality, with facades providing innate interest, variety and function;
(s) Incorporate innovative approaches to provide high quality, usable, private and communal amenity space where residential uses are proposed; and
(t) Comply with the requirements of the Public Safety Zone.

POLICY CC4 HERITAGE

Our approach:
We will identify, conserve and take opportunities to enhance the significance of the borough's heritage assets as a positive means of supporting an area's distinctive character and sense of history.

We will achieve this by:
….
(d) Working with Royal Botanic Gardens Kew World Heritage Site, London Borough of Richmond and Historic England to conserve and enhance the outstanding universal values of The Royal Botanical Gardens Kew World Heritage Site, its buffer zone and its setting, including views to and from this asset. This includes assisting in the implementation of the World Heritage Site Management Plan;
….

We will expect tall building development proposal to
(i) Conserve and take opportunities to enhance any heritage asset and its setting in a manner appropriate to its significance;

….

(l) Demonstrate that where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset (see Glossary), this harm will be outweighed by the public benefits of the proposal, including securing its optimum viable use; or

….

Conservation areas
(o) Any development within or affecting a Conservation Area must conserve and take opportunities to enhance the character of the area, and respect the grain, scale, form, proportions and materials of the surrounding area and existing architecture; and

….

World Heritage Site
(q) Conserve and enhance the internationally recognised Outstanding Universal Value of the Royal Botanic Gardens Kew World Heritage Site, its buffer zone and its setting, including views to and from the site.