England and Wales High Court (Administrative Court) Decisions

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

The Royal Courts of Justice
The Strand
London WC2 A2U
25th May 2007

B e f o r e :

MR JUSTICE SULLIVAN

KING'S CROSS RAILWAY LANDS GROUP — **Claimant**

-v-

LONDON BOROUGH OF CAMDEN
INTERESTED PARTIES — **Respondents**

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(Official Shorthand Writers to the Court)

Mr John Hobson QC, Mr Paul Stinchcombe and Mr Alex Goodman appeared on behalf of the Claimant.
Mr Tim Corner QC and Mr Paul Brown appeared on behalf of the London Borough of Camden.
Mr Keith Lindblom QC and Mr David Forsdick appeared on behalf of the Interested Parties

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HTML VERSION OF JUDGMENT

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1. MR JUSTICE SULLIVAN: Introduction. In this rolled-up application for permission to apply for judicial review and for judicial review if permission is granted, the Claimant seeks quashing orders in respect of the grant by the defendant to the interested parties of outline planning permission for the redevelopment of the railway lands at King's Cross and the grant of eight related listed building consents and conservation area consents. One of the listed building consents permits the demolition of Stanley Buildings North, which is listed grade 2. One of the conservation area consents permits the demolition of Culross Building, an unlisted building within the King's Cross conservation area.

2. There is widespread agreement that the railway lands at King's Cross are and have for many years been in need of redevelopment and regeneration. The background is conveniently summarised in the officer's report for the Defendant's Development Control Subcommittee at its meeting on 8th and 9th March 2006:

> "The site and the area has been run down, blighted and depressed for over a generation, during which a number of proposals have been promoted, considered and subsequently abandoned ... the development of the 26.1 hectares of brownfield land of the railway lands represents an opportunity to trigger new jobs, housing and leisure facilities that could be of significant benefit to the lives of those who have lived in the shadow of King's Cross for so long. The strategic importance of this site cannot be understated, situated, as it is, at the rail head for continental Europe. It will be the most important interchange in Britain and one of the most accessible interchanges in Europe. This makes it the most important single site in Central London and its development will be a significant factor in ensuring that London's position as a world city is maintained. The key issue that has faced the council in framing its planning policies and development briefs for this area has been how these important commercial developments can be balanced with the pressing needs of the immediate area and produce a development of sustainable quality. The surrounding wards to King's Cross are characterised by some of the highest levels of unemployment, housing stress, health imbalances and inequality of opportunity to be found in London and the south-east. During the very extensive consultation that has taken place there has emerged a very broad consensus around seeking a mixed used development with a substantial commercial content, the provision of significant housing of all types of size and tenure, jobs for local people, leisure and social facilities, and the preservation of the site's unique historical issues. The issues, as always, are balance and impact on the wider area, retaining quality and sustainability. This will be a very complex scheme due to its scale, over 700,000 square metres, and development period of probably between 15 and 20 years ..."

3. Following the passing of the Channel Tunnel Rail Link Act which established St Pancras as the terminus for the CTRL, the defendant published and consulted on a series of reports and policy statements beginning in 2001 with King's Cross Camden's vision. That was followed with the adoption in May 2003 of a new Unitary Development Plan chapter on King's Cross, and the King's Cross Planning and Development Brief was published jointly with the adjoining local planning authority, Islington, in January 2004.

4. It was against this policy background that the interested parties made their application for outline planning permission for the redevelopment of the 26.1 hectare site within the railway lands in May 2004. Following extensive discussions with the defendant and with other bodies, including the Greater London Authority and English Heritage, the interested parties submitted a "revised development specification" in September 2005.

5. The Defendant's Development Control Sub-Committee considered the application for outlined planning permission as revised on 8th and 9th March 2007. The report presented by the Defendant's officers to the Committee was over 670 pages long and together with various additions and appendices the papers before the Subcommittee ran to nearly 900 pages. The report was described by its authors as "the most complex to be put before a Development Control Subcommittee in Camden". The Subcommittee heard deputations from the interested parties and from numerous objectors, including several groups falling under the umbrella of the Claimant. The Claimant is an umbrella group comprising individuals and groups who are active in campaigning for the regeneration of the railway lands.

6. In March 2006 the Claimant had argued in its representations to the defendant that the balance of the interested parties' redevelopment proposals was wrong. There should, for example, have been a greater range of employment opportunities. There should have been more affordable housing and more of the historically significant buildings, including Stanley Buildings North and Culross Buildings should have been retained.

7. Having considered all of the arguments the subcommittee resolved that conditional outline planning permission should be granted, subject to referral of the application to the Secretary of State and the Mayor of London, and the completion of a section 106 agreement. The Secretary of State and the Mayor of London confirmed that there would be no call-in/direction.

8. When negotiations on the necessarily very complex section 106 agreement were concluded, the matter was brought back to the Committee (the Development Control Subcommittee had become the Development Control Committee) on 16th November 2006. There had been elections in May 2006 and the membership of the new Committee in November was different to that of the Subcommittee in March 2006.

9. I will deal with the representations made by the Claimants' then solicitors, EarthRights, to the Defendant prior to the meeting on 16th November 2006 and with the officers' report to that Committee meeting below. The Committee on 16th November passed four resolutions by a majority of 12 in favour, 2 against and two abstentions in each case. The first three resolutions approved the section 106 agreement and (subject to minor drafting amendments) the conditions and informatives on the planning permission which had been approved by the Subcommittee on 9th March 2006.

10. The fourth resolution was "that planning permission, conservation area consents and listed building consents as approved by the Subcommittee on 9th March 2006 be granted."

11. The summary reasons for granting planning permission as approved in March 2006 were:

    "Reason for granting planning permission.

    > "The proposed development is in accordance with the policy requirements of the adopted London Borough of Camden Unitary Development Plan, UDP 2006. For more detailed understanding of the reasons for the granting of this planning permission, please refer to the report to the development control Subcommittee agenda for 8th and 9th March 2006."

12. The decision notices were not issued until 22nd November 2006. The outline planning permission was subject to no less than 68 conditions. There were also a number of informatives in the decision notice. Prior to the issuing of the decision notice the Government published "Planning Policy Statement 3: Housing" (PPS3) on 29th November 2006. PPS3 replaced previous Government policy guidance in "Planning Policy Guidance 3: Housing) (PPG3) and contained in annexe B a definition of affordable housing. PPG3 had contained no such definition.

    The law:

13. The Claimant's detailed grounds of claim contended that the claim raised "two short but important points of legal and democratic principle as to:

> "1. Whether a newly elected council has a discretion to reconsider, as a matter of its own planning judgment, an outline planning application which the previous council resolved to grant, subject to various contingencies being fulfilled, including the entering into a 106 agreements, when those agreements have not yet been entered into and no decision notice has been issued.
>
> "2. The extent of any obligation upon a council officer to return a planning application to the relevant council Committee when a material change in planning circumstances has occurred after that Committee has resolved to grand planning permission but before the decision notice has been issued and the circumstances in which such obligation might arise."

14. Copious citation from authority is unnecessary, because it became apparent once the parties had filed their skeleton arguments that there was, in fact, no dispute as to the two relevant legal principles viz:

> 1. The Committee had a discretion on 16th November 2006 to review afresh the decision which the Subcommittee had taken on 9th March 2006 and was entitled as a matter of law to "change its mind" and revoke the earlier resolution to grant outline planning permission (see R (Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593; [2002] UK HL 23, per Lord Steyn at para. 39).
>
> 2. If publication of the definition of "affordable housing" in PPS3 on 29th November 2006 was a new factor which might rationally have been regarded as a material consideration, the officers had a duty to refer the application back to the Committee unless they were satisfied that, even taking account of that new material consideration, the Committee would, not might, reach the same decision, namely to grant outline planning permission (see R (Irene Kides) v South Cambridgeshire District Council [2002] 4 Planning Law Reports 66;[2002] EWCA 1370 per Lord Justice Parker at paras. 125-126).

15. In respect of principle 1 above, although there was a difference between the parties as to the significance of the March 2006 resolution, the difference was one of emphasis rather than substance. It was common ground that the March 2006 resolution was a material consideration to which the Committee in November 2006 was bound to have regard (see North Wiltshire District Council v Secretary of State for the Environment [1992] 3 planning law reports 113 per Lord Justice Mann at 122F-H).

16. The need generally for "certainty and predictability" in public administration, including the planning system, is recognised not merely in the authorities but also in PPS 1 (see paragraphs 7 and 8).

17. I accept the submission of Mr Hobson, QC, on behalf of the Claimant, that the weight to be attached in any particular case to the desirability of consistency and decision-making, and hence the weight to be attached to the March 2006 resolution, was a matter for the Committee to decide in November 2006. However, given the desirability in principle (to put it no higher) of consistency in decision-making by local planning authorities, Mr Hobson rightly accepted that in practice the Committee in November 2006 would have to have a "good planning reason" for changing its mind. That is simply a reflection of the practical realities. If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.

18. Mr Hobson submits, correctly, that while a material change of circumstances since an earlier decision is capable of being a good reason for a change of mind, it is not the only ground on which a local planning authority may change its mind. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission.

19. An example canvassed during the course of submissions was that of a local planning authority which resolved to grant planning permission for an inappropriate development in the green belt, subject to a section 106 agreement, on the basis that the very special circumstances prayed in aid by the applicant outweighed the harm to the green belt and other harm. On revisiting the matter when the section 106 agreement was finalised, that local planning authority could properly reverse its earlier decision if, on reflection, it considered the harm was not outweighed by the special circumstances. Thus, it was not necessary for the Committee in November 2006 to be satisfied that there had been any material change of circumstances since March 2006. It was entitled to conclude that, having regard to all the circumstances considered in March 2006, a different balance should be struck.

20. Neither the defendant nor the interested party dissented from the proposition that, as a matter of law, there did not need to have been a material change of circumstances in order to justify a different decision in November 2006. A change in circumstances was one of the more obvious reasons which might justify a change of mind by a local planning authority, but it was not the only possible reason.

21. The issues. In the event, therefore, the dispute between the parties boiled down not to any question of law but to two, essentially factual, questions.

    1. Was the city's discretion (to change its mind) fettered, as a consequence of advice given by officers and advisers, in writing and orally, to members before and during the meeting on 16th November 2006 that in order for there to be a good reason for a change of mind some change of circumstances would have to be demonstrated.

    2. Whether publication of the definition of affording housing in PPS3 after the Committee's decision on 16th November 2006 was a new factor which might rationally have been regarded as a material consideration, so that officers were required to put the application back to the Committee unless they were satisfied that the Committee would reach the same decision in any event.

22. It is convenient to deal with these two issues in reverse order.

23. Issue 2. The definition of affordable housing in PPS3 is in these terms, so far as relevant for present purposes:

> "Affordable housing includes social, rented and intermediate housing provided to specified eligible households whose needs are not met by the market. Affordable housing should meet the needs of eligible households, including availability at a cost low enough for them to afford determined with regard to local incomes and local house prices, include provision for the home to remain at an affordable price for future eligible households, or, if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision."
>
> "Intermediate affordable housing is housing at prices and rents above those of social rent but below market price or rents and which meet the criteria set out above. These can include shared equity products, eg home buy, other low cost homes for sale and intermediate rent. These definitions replace guidance given in Planning Policy Guidance Note 3: Housing (PPG3) and DETR Circular 6 of 98: Planning and Affordable Housing. The definition does not exclude homes provided by private sector bodies or provided without grant funding. Where such homes meet the definition above, they may be considered for planning purposes as affordable housing whereas those homes that do not meet the definition -- for example, low cost market housing -- may not be considered for planning purposes as affordable housing."

24. The same definition was contained in the draft PPS3 which was referred to in the following terms in the March 2006 officers' report:

> "In December 2005 the ODPM published a draft PPS3 for consultation. Once adopted, this would replace PPG3 and circular 0698. Draft PPS3 reiterates

> many of the themes in PPG3, focusing on providing for a mix of housing, including affordable, to create sustainable communities and deliver mixed communities."

25. Mr Hobson points out that the definition was not set out in the March, or for that matter the November, officers' report. While that is true, no-one suggested that the definition of affordable housing which had been adopted by the defendant in the adopted UDP and the then emerging replacement UDP (the RUDP) in accordance with the policy guidance in PPG3, which left local planning authorities free to adopt their own definitions of affordable housing, was materially different from the definition of affording housing in the draft PPS3. The suggestion that the definition of affordable housing which had been carried forward from the draft PPS3 into the final version of PPS3 was materially different from that which was being applied by the defendant emerged only after PPS3 was published on 29th November 2006.

26. With respect to the Claimant, it is not surprising that the point was not made at an earlier stage, because there is, in practical terms, no difference whatsoever between the definition of affordable housing in PPS3 and the definition of affordable housing in the section 106 agreement (which was foreshadowed by the Heads of Terms which were agreed in March 2006).

27. Section NN of the section 106 agreement defines affordable housing in these terms:

> "Low cost housing provided to those households who cannot afford to occupy homes available in the open market comprising social rented housing and intermediate housing."

28. Intermediate housing is defined as follows:

> "Affordable housing which is not social rented housing and which is made available at a discount from market housing to households who would not otherwise have been able to afford adequate housing on the open market."

29. For completeness I should read the definition of market housing, which is:

> "Residential units within the development (excluding student accommodation) which are not affordable housing units."

30. Despite Mr Hobson's best assistance, I am unable to discern any, let alone any significant, practical difference between intermediate affordable housing, which is made available to those whose needs are not met by the market, at a price or rent below the market price or rent, and intermediate affordable housing which is made available at a discount from market housing to those who would not otherwise have been able to afford housing on the open market, once it is appreciated that market housing is housing which will be sold or rented on the open market.

31. As a matter of common sense a discount from the (open market price or rent of) market housing will result in "a price or rent below the open market price or rent".

32. In these circumstances not merely were the officers entitled not to bring the definition in PPS3 to members' attention. No reasonable planning officer could have concluded that the definition was a new factor (it had been in existence since prior to the March 2006 meeting) or that if it was a new factor, it might possibly have caused the Committee to reach a different conclusion, given the lack of any real difference between the PPS3 definition and that which was being applied in the section 106 agreement.

Issue 1:

33. I turn, therefore, to issue 1. In a nutshell the Claimant contends that if the Committee had been properly advised as to the extent of its discretion, members might have concluded that even though there was no material change of circumstances, they should reach a different planning judgment, because they gave greater weight to the Claimants' objections that:

(a) insufficient affordable housing had been offered to meet the requirements of the RUDP, and:

(b) the demolition of Stanley Buildings North and Culross Buildings was not justified by the wider planning benefits which were said on balance by the interested party and the defendant to justify demolition of those buildings.

34. When deciding whether the advice given to members fettered their discretion or unduly "boxed them in", to use the words of Mr Justice Richards, as he then was, in R v Vale of Glamorgan District Council ex parte Adams, [2001] Journal of Planning Law 93 at 101 to 102, it is common ground between the parties that the court is entitled to consider the whole of the advice given to the Committee by the Defendants' officers and its legal advisers both in writing in the report to the Committee and in oral advice given during the Committee meeting: See Oxton Farms v Selby District Council (unreported, 18th April 1997) in which Lord Justice Judge said this:

> "The report by a planning officer to his Committee is not and is not intended to provide a learned disposition of relevant legal principles which repeat each and every detail of the relevant facts to members of the Committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of the statute or the directions provided by a judge when summing the case up to a jury. From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment, an application for judicial review based on criticisms of the planning officers' report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the Committee about material matters which thereafter are left uncorrected at the meeting of the planning Committee before the relevant decision is taken."

35. The material parts of the November officers' report are in these terms: Part 3.4 of the report dealt with the nature of the March resolution.

> "3.4 .1. Membership of the Development Control Committee has changed since the March decision was taken. A change in the membership of the Committee is not in itself a material planning consideration. Further, the change in status of the Committee from a Subcommittee to a full Committee is also not a material planning consideration.
>
> > "3.4 .2. As a matter of law the Council can review the applications afresh and if so minded reach a different conclusion either in principle or in relation to the conditions and planning obligations that are proposed.
> >
> > "3.4. 3. However, save to the extent outlined below, the relevant planning policies and other material considerations to which the Committee must have regard when coming to a decision have not changed significantly since March 2006.
> >
> > "3.4 .4. It is the planning officers' and leading counsel's view that the changes in planning circumstances do not justify decisions that are inconsistent with those made on 9th March 2006.
> >
> > "3.4 .5. A change in approach without clear justification would be open to appeal. If a local planning authority acts without good reason and reverses a previous decision and the application is appealed, then it is likely that the underlying proposals will be granted planning permission. If the council's behaviour in refusing the application is held to be unreasonable, costs are likely to be awarded against the council.

> "3.4 .6. If the Committee requests materially different planning applications from those set out in the heads of terms, then depending on the nature of the changes, that may result in a change to the overall scheme that the 9th March 2006 subcommittee resolved to approve and there would need to be a reasoned justification for such a change. Very considerable thought would need to be given as to whether there are changes of circumstance or weight that justify a different approach. Officers' view is that it would be difficult to justify significant changes to the planning obligations, given that the Committee has already resolved to grant consent on the basis of the proposed detailed heads of terms.
>
> "3.4 .7. Officers' recommendations is that, having taken account of the issues raised below, having considered the material provided and made available, and having reviewed the decision of the 9th March Committee, the decision of the 9th March Committee to grant the various provisions should be ratified.
>
> "3.4 .8. The principal issue for consideration by this Committee should therefore be whether the final drafting of the section 106 agreement adequately reflects the heads of terms that the council resolved to approve in March 2006."

36. Pausing there, Mr Hobson accepted that the advice in paragraph 3.4 .2 was correct, but he submitted that the remainder of paragraph 3.4 constrained members' discretion. I do not accept that submission. As Lord Justice Judge said in Oxton Farms, the officers and the Defendant's legal advisers were not writing a legal treatise. They were giving advice to members which had to be of practical assistance to them in the real world. In that world, outside the pages of legal text books, a discretion that is as a matter of law unfettered may in reality be much constrained by practical considerations. In the context of the present case the need to give a good planning reason, or a "clear justification", for a change of mind was such a practical consideration and a very important one. Those advising the members would have been justifiably open to criticise if they had failed to address not merely the legalities but also the practicalities of reaching a different decision.

37. Read fairly as a whole, paragraph 3.4 does not advise members that as a matter of law, unless there has been a change in circumstances, there cannot be a good reason for a change of mind. The advice in paragraphs 3.4 .2 and 3.4 .5 is general and is not so constrained. Paragraphs 3.4.3 and 3.4.4 record the officers' and legal advisers' advice that members must have regard to relevant policies and other material considerations, that those policies and considerations have not changed significantly and that the changes would not justify a change of mind. If the Committee members considered that a change of mind could be justified on other grounds, they were left free so to conclude. If there was any doubt, it would have been laid to rest by paragraph 3.4 .6. Paragraph 3.4 .6 is concerned with the section 106 agreement, but it makes it clear that:

> "Changes of circumstance or <u>weight</u> (my underlining) are capable of justifying a different approach." There could be no quarrel with the very sensible advice that "very considerable thought would need to be given" to whether they did, in fact, justify a different approach.

38. In summary, I accept the Defendant's submissions which were adopted by the interested party, that the advice given to members in paragraph 3.4 was both clear and correct. It was reinforced in respect of one of the two matters about which the Claimant has expressed particular concern, namely the proportion of affordable housing to be provided in the redevelopment.

39. In summary, the Claimant had contended in correspondence prior to the meeting on 16th November 2006 that RUDP policy K4 set a target of 50% affordable housing but that what was being offered in the redevelopment was only 44% (or 42% if the replacement affordable housing was excluded). It was contended that this shortfall meant there was a departure from the development plan which in November 2006 was the RUDP, which had been adopted on June 20th 2006.

38. The advice in the report dealing specifically with this issue was as follows:

"3.5.28: Weight has been given to the relevant policies throughout assessment of the proposals and negotiations of the applicants. Although the weight to be attached to policies is an issue for Committee and must be considered in the context of the change of the statutory status of the RUDP, officers do not believe that the adoption of the RUDP since the March Committee meeting should lead to a different conclusion. This is because officers afforded appropriate weight to the RUDP policies in the March Committee report and in the overall analysis in anticipation of its imminent adoption. Therefore had the RUDP in the form that it now takes been adopted before 9th March, officers' recommendation would have been the same."

"Overall policy conclusion:

"3.5.38. In the March Committee report officers advised at that there was no material departure from the development plan, having taken account of the adoption of the RUDP and considering the development plan as a whole, officers remain of that view.

"3.5.39. Committee will need to decide whether they agree with this conclusion. If not, Committee will need to consider whether that departure warrants a different overall conclusion. Officers' view is that even if there is a departure from the development plan the overall balance is still in favour of the grant of planning permissions and associated consents. The analysis in the March report provides a basis for that balanced conclusion and would not, in officers' view be altered by the decision that in some respects the development does not meet certain criteria or requirements within individual development plan policies." (emphasis added).

39. Section 7 of the report dealt with "other third party representations":

"7.1. The council wrote on 2nd August 2006 to all those who had lodged an objection in respect of the applications in the lead-up to the March Committee requesting representations on any outstanding concerns and objections.

"7.2. Only one response was received in the form of a letter dated 8th September 2006 from Earthrights solicitors on behalf of the King's Cross Railway Lines Group (EarthRights' letter). The Council responded to EarthRights' letter on 29th December 2005. There has been subsequent additional correspondence. Copies of these letters are attached to appendix 10. For the avoidance of doubt a note dealing with the issues raised is at appendix 11."

"8. Conclusion.

"8.1. The correspondence received raises no new matters, mostly repeating points that were addressed in the March report. They have raised some issues that have been addressed in this report in the appendices. Officers do not believe that any of the issues affect their overall recommendation in the March report that the planning permission and the associated consent should be granted.

"8 .2. Committee need to take account of the issues raised in this report and the background information and in that context ratify or otherwise the decision of the 9th March Committee.

"8.3. If ratified, the Committee needs to consider whether the proposed section 106 agreement meets the requirements of the heads of terms and any other proper requirements. The Committee also need to consider whether they endorse the minor amendments to the proposed conditions."

40. Pausing there, this advice makes it clear that it was for the Committee to decide whether there was a departure from the RUDP and, if so, whether that departure warranted a different overall conclusion. This advice was echoed in appendix 11, which was a letter dated 6th November 2006 from Mr Ashworth of Denton Wilde Sapte, the Defendant's legal advisers, to Mr West, the planning officer with direct responsibility for the report to the Committee.

41. The letter was a response to a number of points that had been made in correspondence by EarthRights. The letter identified these points as a number of "concerns" and then gave Mr Ashworth's response to those concerns.

42. One of the concerns was:

> "Broadly, the concerns are that the decision needs to be revisited in the light of the adoption of the RUDP and that the council failed to take account properly of the policies on affordable housing in reaching their decision on 9th March. There are other detailed concerns."

43. Part of Mr Ashworth's response to that concern was as follows:

> "... RUDP policy KC4 is unchanged from UDP policy KC4 (chapter 13, adopted May 2003) and therefore the site specific affordable housing targets/requirements which has guided the assessment and negotiating process since the applications were submitted in May 2004. The adoption of the RUDP, therefore, does not alter the assessment. The development policy framework itself is clear and was fully explained in the 9th March Committee report. KC4 has a requirement for 50% of the first 1000 units to be affordable and seeks 50% over and above 1,000 to be affordable. Paragraph 7.6.16/17 of the March report outlined the interpretation of this policy. KC4 also sets a target of 70% of the affordable housing should be social renting. The report explains that it has not been possible to meet these requirements and targets for a variety of reasons. However, 440 of the first 1,000 units will be affordable. 44% of the proposed units overall will be affordable and 66% of those provided will be social rented. Officers' view was and is that in the context of the overall development this is acceptable. Officers' view was that this does not represent a material departure from the development plan. Officers remain of that view, but if the Committee felt it was a departure, then even so that would not affect the overall balanced conclusion. Committee should know the officers treated the decision of 9th March as a decision that the proposals were not a material departure from the development plan and referrals to the government office were dealt with accordingly. In deciding whether to ratify the March decision, Committee will need to consider whether there is a material departure in the relevant plan and if, so, whether despite that departure the development is acceptable." (emphasis added).

44. Mr Hobson accepted that this advice "put the matter very fairly" and conceded in reply that if matters had been left there in respect of the affordable housing issue, then members would have realised that they were entitled to change their mind and to give greater weight to the shortfall of affordable housing and therefore to conclude that there had been a material departure from the development plan.

45. It follows, in my judgment, that on the basis of the written advice to members there was no question whatsoever of their discretion being fettered either generally, or of more importance for present purposes, specifically in relation to the weight to be given to the fact that 44% (or 42%) rather than 50% of the proposed residential units would be affordable housing.

46. The question is, therefore, whether that position was altered by the advice that was given during the meeting by Mr West and Mr Ashworth. There is a full transcript of the meeting. It occupies 40 pages of the court bundle. I am very conscious of the fact that it is unfair to pluck isolated contributions to the questions and the debate out of context. In the interests of brevity I will have to be sparing in my choice of extracts. Inevitably others would have chosen different extracts and feel that my choice is

unrepresentative. I merely confirm that the debate must be considered as a whole, bearing in mind that this was a discussion between councillors and not a lecture at the Oxford Planning Law Conference, and that I have tried to do.

47. At the beginning of the meeting the Chairman, Councillor Somper, explained why they were all there:

> "I am just going to say a few words about why we are considering this matter tonight. It is because the March Committee specifically asked to approve the King's Cross section 106 agreement. Members will have read the report in the appendices, I hope including the section 106. As the members are aware, the report has been specifically endorsed by them Timothy Corner, Queen's Counsel. As well as tonight's report, members have also been sent background material, including the March Committee papers. We have also had access to the webcast of the meetings and had opportunities to go on many site visits. The focus of the report is the section 106 agreement.
>
> "Section 3 .4 of the report deals with the nature of the March resolution. It says that legally we are not restricted tonight to just looking at the section 106. However, it also sets out potential consequences of amending the March decision without a proper planning justification and leading counsel has advised that in his view, although there have been some changes in planning circumstances, these are not significant and don't justify the decisions that are inconsistent with those made in March."

48. Mr Ashworth referred to appendix 11 and said inter alia:

> "Appendix 11 to the Committee report has been scrutinised by counsel, who says that we weren't robust enough. In the Annex 11 we say there are some targets and requirements in relation in particular to affordable housing policy that may not have been met. Counsel's view and advice is on proper interpretation of that policy there is no departure and the proposals are compliant with the development plan and he wanted to make clear that that was his advice. So I'll just start off to clarify that as a point in relation to the papers in front of you."

49. There was then some concern expressed by members at the fact that this advice was not in writing and had reached them only at a late stage.

50. Councillor Abrahams, the vice-chairman of the Committee, said this:

> "My question is directed to Stephen Ashworth. Just to clarify, appendix 11 does state that the target in KC4 on affordable housing was not met, 44% rather than 50%. I think you just said that leading counsel's view was very strongly at that taken as a whole the application did comply with the UDP and the relevant policies and therefore that's actually at least a difference of emphasis between leading counsel and appendix 11. Now we're taking that on trust from you because we have had a two-page counsel's opinion but it doesn't say that there. So obviously that's a kind of verbal gloss from you, is it?"

51. To which Mr Ashworth replied:

> "It is not very much a gloss. Counsel's opinion was written after having seen the Committee report and after having seen annex 11. He wanted to make it clear that his view was that when that when it was stronger and firmer, as set out in the actual opinion, and that there is compliance with the UDP policies in so far as they relate to affordable housing. The policy which he's concerned with talks about the percentage of houses which need to be built up. That's expressed as a target. Counsel's view where a target is expressed in those sort

> of terms that it is for the Committee to decide as to whether that target is achieved, and if you don't hit 50% you can still be in accordance with the development plan."

52. Mr Hobson submitted that this exchange effectively altered the advice in appendix 11 by "reining in" the Committee's Discretion. I do not agree. Mr Ashworth made it clear what was the view of Mr Corner QC, who was advising the council, but equally he made it clear that it was for the Committee to decide whether the failure to hit the 50% target meant that there was a departure from the development plan:

> "It is for the Committee to decide as to whether that target is achieved."

53. That echoed the position which had been set out in appendix 11. All that Mr Ashworth was pointing out was that in leading counsel's view a failure to hit the 50% target did not mean that there was a departure from the development plan.

54. It is clear that this was the understanding at least of Mr Edwards, who was the spokesman for the Claimant at the meeting. When called upon to make his presentation, he said this inter alia:

> "First of all, on housing. This area is becoming a luxury residential spot for European frequent travel letters, squeezing local communities out through the pricing system. It is therefore essential to safeguard housing as far as we possibly can, especially social housing for rent and especially family sized housing. I would say if relation to the comments made earlier that the Committee has the discretion to say whether a departure from the target is material or not. That is down to the Committee. There is no dispute about that. The scheme as it stands falls short of even the rather low housing targets long ago set by the council and the binding requirements in the revised UDP ..." (emphasis added).

55. Councillor Vincent, one of the two councillors who voted against the resolutions, asked Mr Ashworth:

> "Can you clarify for me about what you said about going back over history, because in our report under 3.4.2 -- and I'm trying to find the page of it now -- it does say we can review afresh, and it goes on to say "as long as we have clear justification". So could you just clarify that?"

56. Mr Ashworth answered:

> "The councillor is quite right. The legal position is as set out in the report and it is open to the Committee to consider afresh the applications in front of them. As the report makes clear, the advice from leading counsel and others is that there are no circumstances which would justify a different decision."

57. Again the answer is tied back to the advice in the report and Mr Ashworth is at pains to make it clear what is the advice of leading counsel. It was, of course, for members to decide whether or not they wished to follow that advice.

58. In my judgment there could be no sensible criticism of the advice given to the Committee during the meeting until we come to the following exchanges between Councillor Abrahams and Mr Ashworth at the start of the debate between members after the presentations and questions had concluded.

> "Councillor David Abrahams: It's just a brief comment. I've got sympathy for much of what has been said by the deputations, particularly about concern about the affordable housing element of the development and particularly about the amount of community space within the development, but I have to say that I'm not sure that any of the deputations have taken into account the legal advice that this Committee had been given, which is set out on page 26, Section 3 .4. What that legal advice says is we cannot tonight behave as if 9th

> March had never happened and that we were coming to this for the very first time. What the legal advice says to us is that we need to follow that Committee's decision in terms of the consents given under the section 106 heads of terms unless we find very clear justification in some change of circumstances since that time to depart from that resolution, and it warns us that if we don't do that, if we reject this package without very strong justification, we could end up in an enormous public enquiry with the threat of costs against the council for unreasonable behaviour. So this is an absolutely crucial point and I want members of the public and the deputations to understand that for me, personally, I do have sympathy with the points you have made, but given the nature of the legal advice set out on page 26, I don't feel able to turn down this package and I think many members of the Committee will feel similarly. Yes, I have been asked to ask Stephen Ashworth whether he's happy with my understanding of the legal advice," (emphasis added).

59. To which Mr Ashworth replied:

> "I think that was a very good and accurate summary of the advice in the report."

60. Councillor Abrahams' contribution to the debate was followed by that of councillor James King, who said this:

> "My comments are what follows on from Councillor Abrahams there. I have to say this is a really quite depressing experience. It's technical responsibility and accountability without any real decision-making power and that's a shame really when we are dealing with, you know, a development, you know, that frankly has a lot that's exciting about it and will bring of lot of developments for the borough. Briefly, for the record, if I had been there, here, in March I think I would have been very concerned about the departure from KC4. I think that there's a bit of smoke and mirrors here about the presentation. For the first 1,000 units it says there should be 50% affordable and 35% social housing but this isn't March. We have been given clear legal advice and those who voted in March are accountable for what they did then but I'm afraid that I have to follow the advice and consider whether or not there are any questions arising from the section 106 granted on the heads of terms".

61. The Committee did not accept the initial draft of the minutes which had been prepared by officers and amended them so as to include the statements of Councillor Abrahams and Councillor King. The minutes, as finally approved by the Committee, include the following:

> "Councillor Abrahams stated that he had sympathy with much of what had been said by the deputies particularly on affordable housing and on community space. However, he was not sure that the deputies had taken into account the legal advice that had been provided to the Committee. The advice was that the Committee could not behave as if the March general purposes (development control) Subcommittee meetings had never happened and members needed to follow the Subcommittee's decisions in terms of the consents given and the section 106 heads of terms unless members found very clear justification in some change of circumstances to depart from those decisions. The advisor further warned that if members rejected the recommendations without strong justification then Camden could end up in a substantial public inquiry with the threat of the award of costs against the council for unreasonable behaviour. This was absolutely crucial and therefore, given the nature of the legal advice received, he did not feel able to turn down this package. Mr Ashworth confirmed that Councillor Abrahams' statement was an accurate summary of the legal advice provided to members in the

> officers' report. Councillor King expressed concern that in his view members of the Committee had technical responsibility for the application without any real decision-making power. This was unfortunate, as the Committee were dealing with a development that had many worthwhile aspects and which would bring many benefits to Camden. He stated that if he had made the original decision, he would have been very concerned about the departure from policy KC4. However, the Committee had been given very clear legal advice that he would follow" (emphasis added).

62. If Councillor Abrahams had not said the words that I have underlined, there could have been no possible criticism of any of the advice given to the Committee, whether orally or in writing at any stage of the proceedings.

63. In deciding whether any infelicity in this one piece of advice is sufficient to negate all of the other entirely correct advice, it is necessary to bear in mind not only the observations of Lord Justice Judge in Oxton Farms, which apply with even greater force to advice, whether legal or otherwise, which is given "off the cuff" during the course of a meeting, but also the dicta of Lord Justice Pickford in R v London County Council, ex parte London and Provincial Electric Theatres Limited, 1915, 2 King's Bench 466 at page 490 (g) to 491 (a):

> "I see no evidence that the council acted upon any but a perfectly proper ground. With regard to the speeches of the members which have been referred to I should imagine that probably hardly any decision of a body like the London County Council dealing with these matters could stand if every statement that a member made in debate had been taken as a ground of the decision. I should think there are probably few debates in which someone does not suggest as a ground for decision something which is not a proper ground and to say that because somebody in debate has put forward an improper ground the decision ought to be set aside as being founded on that particular ground is wrong."

64. While I accept Mr Hobson's submission that Mr Ashworth was in a special position because he was at the meeting specifically to give the members of the Committee legal advice, it is the cumulative impact of the legal advice which he gave which is important. It is impossible to ignore all of the remaining, wholly correct, advice when considering whether in saying that Councillor Abrahams' statement was "a very good and accurate summary of the report", Mr Ashworth was inadvertently putting an erroneous gloss on the remainder of that advice and thereby fettering the members' discretion.

65. In my judgment that submission is simply unrealistic. I accept the submissions of Mr Corner QC and Mr Lindblom QC on behalf of the interested party, that Councillor Ashworth was not attempting to formulate a statement of legal principle. Rather he was summarising and accepting the advice of the Defendant's officers and legal advisers that in the real world, absent some material change of circumstances, it would not be possible as a matter of fact, not law, to provide a "clear justification" for a change of mind. Given the length of the consultation process leading up to the March 2006 decision and the very detailed consideration that was given to all of the relevant issues at that time, that is a wholly unsurprising conclusion. This was not a case where it could sensibly be said that the earlier decision had been reached after perfunctory or inadequate consideration. The various criticisms of the March 2006 officers' report which had been made by the Claimant in correspondence were answered in appendices 10 and 11 of the November 2006 report and those criticisms had have not been pursued in these proceedings.

66. I am therefore satisfied that considered as a whole the advice given to members did not fetter their discretion or "box them in". I accept Mr Hobson's submission that Councillor Abrahams and Councillor King and possibly other members of the Committee did feel themselves "boxed in" by the March 2006 decision, but they were not "boxed in" by erroneous legal advice or by an erroneous understanding of the legal advice that they had received. They were boxed in by their realisation of the

practical reality that in the absence of any material change of circumstances they would be unable, as a matter of fact (not law) to demonstrate that there was a good planning reason for a change of mind.

67. Before considering the extent to which the advice of the Defendant's officers and legal advisers could be said to have boxed in the councillors specifically in respect of the two concerns that had been raised by the Claimant in these proceedings, affordable housing and historic buildings -- it is necessary to mention a letter which was written by Councillor de Souza, one of the members of the Committee, to the editor of Camden New Journal, which was published on 30th November 2006. In that letter she said in part:

> "The decision to go ahead with King's Cross plan is a sad one. Myself and other councillors on the Committee were unhappy about this proposal for a number of reasons, including how far short it falls of the 50% affordable housing target, only a 10% renewable energy provision when Camden's policy sets this as a minimum, a large number of car parking spaces encouraging road travel, demolition of historic buildings, little green public space and poor integration into the surrounding area which falls part into Islington. Members of the Committee were, however, given a strong legal steer but the issue was simply whether the section 106 agreement was consistent with the heads of term agreed by the last Committee in March 2006 and that we should only make a different decision if there had been a material change in circumstances since then. I could not support the plan, but considering the advice given to us, I felt it necessary only to abstain. The manner in which this decision was made was also a cause for concern."

68. While I am happy to look at what advice was given in the Committee meeting itself, I give little weight to letters written after the event by individual councillors. In my judgment the observations Pickford LJ in the London County Council case (see above) apply with even greater force to points made by councillors in correspondence after the event. The dangers of relying on such a letter are obvious. Whatever else may be said about the "strong legal steer" it is plain from the transcript of the meeting that the members were not told "that the issue was simply whether the section 106 agreement was consistent with the heads of terms agreed by the last Committee in March 2006":

69. See the Chairman's opening remarks, which I have set out above. See also the wide-ranging nature of the questions asked by members, the presentations given to members and the points made by members when debating the matter among themselves, which in the interests of brevity I have not set out.

70. In the Vale of Glamorgan case there was a real chance that members might have taken a different view had they not been wrongly "boxed in" by the planning officer's advice as to the lack of relevance of personal circumstances as a material planning consideration (see pages 101-104).

71. In the present case there is nothing in the officers' report or the transcript of the meeting to suggest that the members' consideration of the justification for demolishing Stanley Buildings North and Culross Buildings might have been constrained by any advice given by the Defendant's officers or legal advisers, whether that advice was correct or incorrect.

72. I accept Mr Hobson's submission that it is evident from appendix 11 to the officers' report and the transcript of the meeting that the amount of affordable housing and in particular the "shortfall" from 50% was an issue of "real substance and concern" to some members of the Committee.

73. The same cannot be said of Stanley Buildings North and Culross Buildings. They were not mentioned at all during the course of the discussion. Mr Hobson submitted that that was because the debate was constrained to a discussion of the 106 agreement, but I have rejected that submission for the reasons set out above. It flies in the face of the transcript of the meeting.

74. On the facts, therefore, even if contrary to my view there were defects in the advice given to members, those defects could have had no practical consequence so far as the claimant's concerns about the historic building issue were concerned.

75. If, contrary to my view, there were defects in the advice given to members as to the extent of their discretion generally to reach a different conclusion from that which had been reached in March 2006, were those defects carried forward in the specific advice as to the extent to which members could exercise their discretion in respect of the affordable housing issue?

76. In my judgment the answer to that question has to be: "No." Whatever view is taken about the legal accuracy of the advice given to members in all other respects, the advice given to them both in the body of the report and in appendix 11 as to the adequacy of the percentage of affordable housing and whether or not the Committee could decide for itself whether the failure to meet the 50% target meant that there was a departure from the development plan and, if so, whether that departure warranted refusal of planning permission, was impeccable. For the reasons set out above, although the members were told during the course of the meeting what was the view of leading counsel advising the council, that did not, as Mr Hobson put it, "rein back" the breadth of discretion which was left open to the Committee members in the report and in appendix 11. Members may well have been "reined back" in practice, because they would have appreciated the need to think very carefully before disagreeing with the advice of their officers and legal advisers, but they would have been well aware, as members of the Development Control Committee, that while it was for officers and lawyers to advise, it was for members to decide. The members were told in terms in the report and in appendix 11 and at the meeting that it was ultimately for them to decide whether the shortfall from 50% resulted in a departure from the development plan and, if so, whether that departure would warrant a refusal of permission. The summary reasons for granting permission (see above) make it clear that members were satisfied that the proposals were in accordance with the Development Plan.

77. That they so concluded was not the consequence of inaccurate legal advice or a misunderstanding of accurate legal advice. It was simply a recognition of the practical realities following the March 2006 resolution.

78. For these reasons the applications must fail.

79. However, having heard argument for more than a day, it would be somewhat churlish to conclude that permission to apply for judicial review should be refused. What I propose to do, therefore, because it is in the interests of all parties for there to be a definitive conclusion in this matter, is to grant permission to apply for judicial review, but I do so solely for the purpose of dismissing the substantive application.
