BINDMANS LLP

Your ref:
Our ref: JHL
Date: 18 August 2012

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And by e mail to: Bernie.Ryan@haringey.gov.uk

Dear Sir

Proposed claim for judicial review

We are instructed by members of the Wards Corner Community Coalition ("WCCC"), an unincorporated umbrella association of individuals, tenants, businesses and traders' associations.

As you will know, for some time our clients have been concerned about decision making by Haringey London Borough Council's Planning Sub Committee ("the Council" and "the Sub Committee" respectively) in relation to the proposed redevelopment of Wards Corner on Seven Sisters Road by Grainger PLC. The latest decisions were those taken on 12 July 2012: permission was granted for the demolition of existing buildings and erection of a mixed use development subject to the fulfilment of various conditions.

For the reasons set out below we have advised our clients that these decisions were unlawful and cannot withstand judicial review.

The primary purpose of this letter, which is written in accordance with the Judicial Review Pre Action Protocol, is to offer the Council the opportunity to reconsider its position and agree either to:

1. revoke the permission granted on 12 July 2012; or

2. indicate that it will not oppose the decisions being quashed by the Administrative Court (in which case the proposed claim will need to be issued, but with a view to concluding it quickly on a cooperative basis).

If either happens, legal costs will be minimised and the Council will be able to redetermine the application in a lawful manner.

If, however, the proposed claim is to be resisted, your Pre Action Protocol response to this letter will need to summarise your position on our proposed grounds of claim and supply the information and documents requested below.

Either way, we ask for a substantive response within 14 days. Absent one, our instructions are to issue the claim. In the meantime please acknowledge receipt of this letter in writing. Further, if you are aware of anything that is likely to happen in the next 28 days arising out of the decision which forms the subject of the proposed claim (commencement of works, for instance), we ask that you say so in your acknowledgement letter or e mail, take such steps as are necessary to prevent this from happening and then confirm the position. For obvious reasons, as far as is possible we are anxious to avoid the interests of third parties being compromised by the Council's actions.

A copy of this letter has been sent to the beneficiary of the permission and consent, Grainger PLC. It is clearly an interested party for the purposes of CPR Part 54.7(b).

The details of the legal advisers, if any, dealing with this; their reference details; address for reply and service of court documents

Our details are given on the letter head above. This matter is being dealt with by John Halford, a Partner in the Public Law and Human Rights Department and Saadia Khan, a solicitor, under reference "JHL".

We assume that this matter will be handled by colleagues of yours in the Legal Services Department. Please advise us of their contact details when acknowledging receipt of this letter.

We also assume Grainger PLC's address for service is its head office i.e.:

Grainger PLC
Citygate
St James Boulevard
Newcastle upon Tyne
NE1 4JE

e mail: info@graingerplc.co.uk

and that it has yet to instruct legal advisers on this proposed claim and it will not be necessary to serve on any of its linked corporate identities such as the Grainger Trust.

The details of the matter being challenged

The 12 July 2012 decisions on applications HGY/2012/0915 and HGY/2012/0921 granting permission for the demolition of existing buildings and for the erection of a mixed use development and associated works.

Factual background

Wards Corner

Wards Corner is a site primarily occupied by an early-Edwardian department store building. The site is in the West Green Road/Seven Sisters District Centre and the area is predominantly made up of local independent traders with a mix of Indian, Turkish, Cypriot, Colombian and Afro-Caribbean influences. The site incorporates a well-established indoor market comprising 36 units of which 64% of traders are from Latin America or are Spanish speaking. The total retail floorspace on site is 3,182 square metres and the site includes 33 residential units along Suffield Road as well as first floor accommodation above the retail units on Tottenham High Road, Seven Sisters Road and West Green Road. Those business units and homes are predominantly occupied by members of BME communities.

Wards Corner and the rest of the development site falls partly within the Seven Sisters/Page Green and South Tottenham Conservation Areas (together "the Conservation Area"), which itself forms part of the Tottenham High Road Historic Corridor of six connected Conservation Areas. There is a single character appraisal for the Conservation Areas, the latest version of which was adopted by the Council in March 2009. Within the Wards Corner site there are two locally listed buildings: the 1909 Wards Corner building itself – the department store – and the premises at 1A-1B West Green Road. The row of terraces at 255-259 High Road is also considered to make a positive contribution to the Conservation Area.

The agreements

In 2004 a co-operation agreement was entered into between the Council and Grainger PLC and this was followed by a development agreement signed on 3 August 2007 (though a previous incarnation was agreed in November 2005). On the basis of these agreements, both the Council and Grainger PLC made various commitments and very significant sums of public money were pledged to the development.

The first application

Grainger PLC then began developing its plans with a view to seeking planning permission. A screening opinion was also issued by the Council on 20 June 2007 to the effect that those plans they were then framed was not Environmental Impact Assessment (EnvIA) development,

requiring assessment under the (then) Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999.

On 17 November 2008 application HGY/2008/0303 came up for discussion at a special Planning Committee meeting. That meeting was informed by an officers' report which purported to summarize the consultation responses, issues of controversy and relevant planning and other guidance. Various presentations and deputations were made to the meeting.

Advice was received from officers on certain matters, but there was no equality impact assessment of any kind before Committee members. The impact on equality of opportunity between persons of different racial groups, and on good relations between such groups, was not analysed in any other way.

There was some discussion at that meeting of an unusual feature of the development, given its scale, which was lack of provision of any affordable housing in the scheme. This was said to be justified by two things, however. First, there was a commitment by the Council which was set out in the officers' report in these terms:

> "The council as housing authority has given assurances regarding the provision of off site affordable housing to complement the proposed development and to fulfil the objective of comprehensive development of the Wards Corner brief. It is anticipated that affordable housing will be provided on other sites covered by the brief."

This was a reference to plans the Council then had to develop another site close by, Apex House.

Secondly, there was an analysis of the scheme's commercial viability contained in a "toolkit" prepared by Grainger PLC itself. This had been reviewed by the GLA, but the toolkit documentation was never made available to members of the Sub Committee because of concerns of commercial confidentiality. Grainger PLC's own conclusions about the need for the Council to override its own local plan were thus accepted at face value.

At the meeting's conclusion a vote was taken and, by the narrowest possible majority (the result thus turning on the individual votes of each councillor who was in favour), the proposal in the officers' report in favour of the permission and consent sought was approved.

The Harris case

As you will know, that decision was challenged by a member of WCCC, Janet Harris. At first instance, her arguments about the appearance of bias and breach the public sector equality duty that applied at the time (section 71 of the Race Relations Act 1976 (as amended)) were rejected by Keith Lindblom QC sitting as a Deputy High Court Judge. However, judicial review was granted and the planning permission quashed by a

Court of Appeal constituted with two extremely experienced planning judges (Pill and Sullivan LJJ) and an experienced equalities lawyer, Lady Justice Arden (*R(Harris) v LB Haringey* [2010] EWCA 703). Pill LJ held that the Council had not had regard to the need to "promote equality of opportunity and good relations between persons of different racial groups" under section 71. "Due regard" to equalities considerations had required an "analysis" of the material available to the Council with the specific statutory considerations in mind.

The second application

Grainger PLC then made a second, modified application again under reference HGY/2008/0303. This was presented to the Sub Committee on 20 July 2011.

Before the Sub Committee on this occasion was an equalities report by Cluttons that had been commissioned by Grainger PLC and an equalities impact assessment the Council had commissioned itself from a consultancy, URS Scott Wilson. Its work was "desk based and reviewed and analysed existing information" (see paragraph 2.1.2 of the assessment).

This and certain other shortcomings of the URS assessment were drawn to the Sub Committee's attention. There was some, limited discussion of the approach taken, but very little of on the content.

According to the approved minutes, when the legal issues were summed up by your colleague Ms Ledden, Sub Committee members were told that they:

> "had to satisfy themselves that they had had due regard to their duties under the Equalities Act"

This is, of course, circular and incorrect. The obligation is not to have due regard to the duties. It is, as the comments of Pill LJ quoted above made clear, to have due regard to the considerations listed in section 149 of the Equality Act 2010 (for example, the need to eliminate unlawful discrimination, a consideration not mentioned at any time).

As to issues of affordable housing, members had an officers' report which stated (at paragraphs 6.57 – 6.58) that the original toolkit had been considered by DVS, an arm of the Valuation Office Agency and that it had concluded that "the provision of affordable housing would make the scheme unviable". The report went on to say that a further appraisal had been submitted to DVS for the purposes of this application, but that it had not agreed the content. DVS had then prepared its own appraisal which apparently had also concluded that "the scheme was viable but only without affordable housing". The report then added this:

> " the council has entered into a development agreement with Grainger trust to redevelop the application site…

> The agreement requires the Council to provide any affordable housing required to be part of the development to be provided offsite with Apex House as a possible location for such provision. Officers are satisfied that due to the expense of developing the site and the associated implications for viability which have been independently confirmed as set out above, the scheme would not be viable if it included affordable housing. Therefore the provision of affordable housing at Apex House and/or another suitable site or sites within the borough is not required."

Self evidently, this represented a fundamental shift from the position taken on the first application. On that occasion, proceeding with the development despite the absence of any affordable housing on site was justified by the Council's own commitment to provide it very nearby. But in respect of the second application members were being told, albeit in somewhat garbled terms, that the cost to Grainger of including social housing as part of their development somehow justified the Council abandoning to its own commitment as a development partner. So formerly there had been some commitment to adhering to the spirit, if not the letter of UDP HSG policy HSG 4 and Policy 3A.9 of the London Plan. Now that had gone. But there was no indication whatsoever that members were made aware of this. Instead, they were simply told by Councillor Bevan that:

> "while the Council would want social housing and were generally wary of schemes when I was proposed, it had been independently confirmed by two external bodies that in this case the social housing would not be viable… Social housing was planned for the area, and that the number of social housing units in the area in future would exceed the number of housing units proposed in this application."

Pausing there, it is unclear who the two independent bodies were. Only one body independent of Grainger PLC, the DVS, had expressed a view. Further, that view was merely reported to members. DVS' own assessment, produced because Grainger PLC's own was not reliable, was not appended to the officers' report. There is nothing to suggest any member ever saw either of them.

In the officers' summing up, members were told by Mark Dorfman, Assistant Director, Planning and Regeneration and Economy that the development scheme offered "more homes" and that:

> "The Cabinet member for housing [Councillor Bevan] has confirmed that social housing was planned for this area, and that the viability appraisal demonstrated that social housing was not viable as part of this development."

Turning to conservation heritage issues, the officers' report followed the assessment in the Tottenham High Road Conservation Area Character Appraisal, that identified three buildings proposed for demolition as making a positive contribution to the Conservation Area, with the other buildings making only a neutral impact. It concluded that "[t]he loss of these buildings is considered to constitute "substantial harm"", but

considered that this was outweighed by the substantial public benefits of the proposal.

The Sub Committee disagreed and refused permission for the second application on the basis that:

> "1. The proposed development by virtue of its bulk, massing and design, neither preserves nor enhances the historic character and appearance of the Tottenham High Road Corridor/Seven Sisters/Page Green Conservation Area. Consequently the proposal is contrary to the aims and objectives of National Planning Policy Statement (PPS) 1: Creating Sustainable Communities (2005); PPS5, Policies UD3 'General Principles' and UD4 'Quality Design' and CSV1 'Development in Conservation Areas' of the Haringey UDP.
>
> 2. The proposed development would involve the loss of designated heritage assets as defined in Annex 2 of PPS5 and would constitute 'substantial harm'. The applicant has failed to demonstrate that the substantial harm is necessary in order to deliver substantial public benefits that outweigh that harm."

Again, the Sub Committee's decision was finely balanced. Four members were in favour of the development and five were against. But the Sub Committee was not equivocal about the reasons for refusal: six of the nine members present voted to endorse those quoted above. The notice of refusal was issued on 3 August 2011.

The appeal

The decision on the second application was appealed by Grainger PLC under section 78 of the Town and Country Planning Act 1990 to a planning inspector (reference APP/Y5420/A/12/2169907/NWF). In light of the grant of the consents now challenged Grainger PLC withdrew this appeal on 27 July 2012 (though initially they sought to hold the appeal in abeyance pending the expiry of a three month period for potential challenge).

The third application

Meanwhile, on 25 June 2012 the Sub Committee came to consider a third application for planning permission for the site, which led to the decisions that are the subject of this proposed claim.

The main changes were a £300,000 reduction in the education and road improvement provision formerly part of the section 106 agreement, the abandonment of the voluntary payment to market traders equivalent to that under the Landlord and Tenant Act 1954, the erection of two small closed kiosks referred to as "memory boxes" on the proposed development site which are intended to contain photographs and salvaged pieces of the demolished structures, removal of a storey from the highest element of the scheme and a number of changes to the exterior.

No environmental impact assessment (EnvIA) was undertaken. The Council relied upon a re-determination of the 2007 screening opinion, that came to the same conclusion that the proposal was not EnvIA development.

The officers' report before the Sub Committee set out its authors' view that the previous reasons for refusal had been addressed:

> "The scheme addresses the first reason by amending certain elements of the design so that building has a more positive relationship with Conservation Area by having a bulk, massing and design commensurate to the character and intensity of activity in this location and sympathetic to the architectural language of the area while retaining the legacy of the Wards Store building through the 'Memory Boxes'.
>
> In respect of the second reason, the significance of the Conservation Area as a single "heritage asset" has been assessed and it is considered that demolition of all buildings on site, while entailing the loss of some buildings of architectural interest, would not result in "substantial harm". This less than substantial harm is considered to be outweighed by the significant physical and economic regeneration benefits of the scheme."

The assessment referred to was that done by David Wyn Lewis and dated April 2012. This is a very lengthy document that appears to have been put together in part in preparation for the withdrawn appeal. It disagrees with the Council's Conservation Area Character Appraisal in a number of important respects. Most relevant for the purposes of the resubmitted proposal, Mr Lewis' assessment revised the contribution provided to the conservation area of three of the site's buildings (the Ward's Corner building at 227 High Road, 255-259 High Road and 1A-1B West Green Road). It stated that instead of positive contributions, 227 High Road and 255-259 High Road only made neutral contributions and that 1A-1B West Green Road made only a minor local positive impact. Other buildings made a negative impact, in Mr Lewis' view, also contrary to the Character Appraisal.

On the other hand, English Heritage, Haringey Design Panel, Tottenham Conservation Area Advisory Committee, SAVE Britain's Heritage and a number of other local consultees objected to the proposal on heritage grounds.

Appended to the officers' report was a revised version of the URS Equality Impact Assessment. Also appended was a table, prepared by officers, drawing on URS' work, which purported to identify the impact of the development on a number of groups defined by protected characteristics and, where that impact was negative, what was intended by way of mitigation. The detail of these documents is discussed below.

As on the previous occasion, Sub Committee members were told in the officers' report that DVS had considered a viability study (presumably in the form of the toolkit, as before) and DVS had "reported that the appraisal is reasonably based" and, like Grainger PLC, had "come to the conclusion that the scheme is not viable if it included affordable

housing" [sic]. The comments in the report on the second application about the costs to Grainger PLC having the consequence that provision of affordable housing by the Council were repeated verbatim. DVS' own assessment of the viability of the scheme, prompted by concerns about that produced by Grainger PLC for the purposes of the second application, was not mentioned. The only appraisal documentation put before members was a short summary of DCS' latest assessment. The Council's past commitment to construct affordable housing as a development partner was not mentioned. Reference was made in the officers' report to the NPPF and 2011 London Plan. UDP policy AC3 was also noted, but not HSG 4.

In their report and at the meeting, officers recommended that permission be granted, subject to conditions. That recommendation was accepted by a majority of the Sub Committee's members. Once again, the decision was finely balanced, by five votes to four.

The notice of planning permission was issued on 12 July 2012. Strikingly, the reasons for approval are more expansive than those contained in the officers' recommendation or put before the Sub Committee. In full they are as follows:

> "a) It is considered that the principle of this development is supported by National, Regional and Local Planning policies which seek to promote regeneration through housing, employment and urban improvement to support local economic growth.
>
> b) Having regard to paragraphs 128 and 129 of the National Planning Policy Framework the local planning authority agrees with the expert advice produced on behalf of the applicant regarding the significance of the designated heritage asset. In particular, it is accepted that:
>
> > (i) the character of the Conservation Area has been substantially determined by the High Road (together with the buildings flanking it) and the impact of changing transport requirements/infrastructure, land use, social structures and retail facilities;
> >
> > (ii) the Conservation Area and its immediate setting are not now generally characterised by consistency of architectural or townscape style, appearance or quality;
> >
> > (iii) the Wards Corner building has been substantially altered and significant elements of its original design have been lost, all of which detract from any significance that it had;
> >
> > (iv) the terrace formed by 229 - 259 High Road has been seriously compromised by alterations and poor quality shop-fronts; and
> >
> > (v) with the exception of 1A and 1B West Green where a small positive contribution is acknowledged, the buildings on site are considered to provide only a neutral contribution.
>
> c) The scheme is considered to be of a high-quality design which enhances the character and appearance of the conservation area by

having a bulk, massing and design which is commensurate to the location and is sympathetic to the architectural language of the Tottenham High Road Corridor/Seven Sisters /Page Green / Conservation Area. The scheme reinforces local distinctiveness and addresses connectivity between people and places and the integration of new development into the built historic environment. It is considered that the development proposal will result in less than substantial harm to the significance of the designated heritage asset and any harm is outweighed by the public benefits brought about by regeneration of the site. The scheme is considered to comply with paragraph 134 of the National Planning Policy Framework. Even if (which is not accepted by the local planning authority) the proposal was considered to result in substantial harm to the designated heritage asset, it is considered that such harm is outweighed by the substantial public benefits that arise.

d) The Planning Application has been assessed against and on balance is considered to comply with the:

o National Planning Policy Framework;

o London Plan Policies 2.15 'Town centres', 3.3 'Increasing housing supply', 3.4 'Optimising housing potential', 3.5 'Quality and design of housing developments', 3.6 'Children and young people's play and informal recreation facilities', 3.8 'Housing choice', 3.9 'Mixed and balanced communities', 3.12 'Negotiating affordable housing on individual private residential and mixed use schemes', 4.7 'Retail and town centre development', 4.8 'Supporting a successful and diverse retail sector', 4.9 'Small shops', 4.12 'Improving opportunities for all', 5.2 'Minimising carbon dioxide emissions', 5.3 'Sustainable design and Construction, 5.7 'Renewable energy', 5.10 'Urban greening', 5.11 'Green roofs and development site environs', 5.14 'Water quality and wastewater infrastructure', 5.15 'Water use and supplies', 5.21 'Contaminated land', 6.3 'Assessing effects of development on transport capacity', 6.5 'Funding Crossrail and other strategically important transport infrastructure', 6.9 'Cycling', 6.10 'Walking', 6.12 'Road network capacity', 6.13 'Parking', 6.14 'Freight', 7.1 'Building London's neighbourhoods and communities', 7.2 'An inclusive environment', 7.3 'Designing out crime, 7.4 'Local character', 7.5 'Public realm', 7.6 'Architecture', Policy 7.8 'Heritage assets and Archaeology', 7.9 'Heritage-led regeneration', 7.15 'Reducing noise and enhancing soundscapes'; and

o London Borough of Haringey Unitary Development Plan (UDP) 2006 Policies G2 'Development and Urban Design', G3'Housing Supply', UD2 'Sustainable Design and Construction', UD3 'General Principles', UD4 'Quality Design', UD6 'Mixed Use Developments', UD9 'Locations for Tall Buildings', HSG1 'New Housing Developments', HSG4 'Affordable Housing', HSG7 'Housing for Special Needs', AC3 'Tottenham High Road Regeneration Corridor', M2 'Public Transport Network', M3 'New Development Location and Accessibility', M5 'Protection, Improvements and Creation of Pedestrian and Cycle Routes', M9 'Car- Free Residential Developments', M10 'Parking for Development', CSV1 Development in Conservation Areas', CSV2 'Listed Buildings', CSV3 Locally Listed Buildings and Designated Sites of Industrial Heritage Interest', CSV7 'Demolition in Conservation Areas',

> EMP3 'Defined Employment Areas - Employment Locations', EMP5 'Promoting Employment Uses', ENV1 'Flood Protection: Protection of the Floodplain and Urban Washlands', ENV2 'Surface Water Runoff', ENV4 'Enhancing and Protecting the Water Environment' ENV5 'Works Affecting Watercourses', ENV6 'Noise Pollution', ENV7 'Water and Light Pollution', ENV11 'Contaminated Land' and ENV13 'Sustainable Waste Management'."

Legal framework

Local planning authorities are entrusted by Parliament to determine planning permission applications with local circumstances in mind. However, their discretion is constrained by a number of EU, statutory and common law obligations.

Planning decisions

Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires local authorities to determine applications in accordance with their development plans unless material considerations indicate otherwise. Accordingly, they must consider whether proposals are in accordance with the policies those plans encapsulate. See thus (in relation to the predecessor, section 54A of the 1990 Act), *City of Edinburgh Council v Secretary of State for Scotland and another* [1997] 1 WLR 1447, at 1459 (as applied in England by *R v Leominster District Council, ex parte Pothecary* [1998] JPL 335, at 341).

These authorities explain that the decision-maker must:

1. properly interpret the development plan;

2. decide whether the proposed development accords with the plan;

3. identify and take into account all the other material considerations to which he should have regard; and

4. assess the other material considerations and decide whether the development plan should be accorded the priority given to it by the statute.

It follows that an authority can approve developments which are contrary to its local plan if, and only if, there are clearly identified material considerations which justify departing from it.

Moreover, members of planning committees charged with these functions must exercise them diligently and independently. There is no power to delegate their decision making functions, or any part of them, to a third party.

Conservation Areas

Local planning authorities have a duty to designate areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance as Conservation Areas under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the 1990 Act").

Section 71 of that Act provides that:

> "(1) It shall be the duty of a local planning authority from time to time to formulate and publish proposals for the preservation and enhancement of any parts of their area which are conservation areas.
>
> (2) Proposals under this section shall be submitted for consideration to a public meeting in the area to which they relate.
>
> (3) The local planning authority shall have regard to any views concerning the proposals expressed by persons attending the meeting."

The general duty with regards Conservation Areas is that:

> "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, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area." (section 72(1))

The 1990 Act duty has been described as a "statutory mandate … to pay special regard to the preservation of heritage assets" (see *R (Gibson) v Waverley BC* [2012] EWHC 1472 (Admin)). It is interpreted broadly: the duty to preserve or enhance the character or appearance of a conservation area applies throughout the whole of a conservation area, not merely to those parts which display the special characteristics which led to its designation (*R (University College London) v First Secretary of State* [2004] EWHC 2846 (Admin)). There is no doubt that it is engaged in the determination of planning applications. It is also necessary to obtain conservation area consent where a proposal involves the demolition of any building within a Conservation Area (section 74).

In London, it is always necessary to consult English Heritage when an application is made for conservation area consent (section 14).

Housing issues in the development plan

Haringey's UDP includes the following policy HSG4:

> "AFFORDABLE HOUSING
>
> Housing developments capable of providing 10 or more units will be required to include a proportion of affordable housing to meet an overall borough target of 50%. The proportion negotiated will depend on the location, scheme details or site characteristics."

We have explained above why the UDP is particularly significant in law.

It is to be read in the context of and is reinforced by, among other things, UDP paragraph 4.5, policy HSG1, paragraph 4.17-4.19 and 4.23, the 2008 Housing Supplementary Planning Document at pages, the Council's Housing Strategy 2009-2019 and the current London Plan which provides materially:

> "Policy 3.12
>
> NEGOTIATING AFFORDABLE HOUSING ON INDIVIDUAL PRIVATE RESIDENTIAL AND MIXED USE SCHEMES.
>
> Planning decisions and LDF preparation
>
> A The maximum reasonable amount of affordable housing should be sought when negotiating on individual private residential and mixed use schemes, having regard to:
>
> a) Current and future requirements for affordable housing at local and regional levels identified in line with policies 3.8 and 3.10 and 3.11.
>
> b) Affordable housing targets adopted in line with police 3.11,
>
> c) The need to encourage rather than restrain residential development (Policy 3.3).
>
> d) The need to promote mixed and balanced communities (Policy 3.9)
>
> e) The size and type of affordable housing needed in particular locations.
>
> f) The specific circumstances of individual sites.
>
> B Negotiations on sites should take account of their individual circumstances including development viability, the availability of public subsidy, the implications of phased development including provisions for reappraising the viability of schemes prior to implementation ('contingent obligations') and other scheme requirements.
>
> POLICY 3.13
>
> AFFORDABLE HOUSING THRESHOLDS
>
> Planning decisions and LDF preparation
>
> A Boroughs should normally require affordable housing provision on a site which has capacity to provide 10 or more homes, applying the density guidance set out in Policy 3.4 of this Plan and Table 3.2.
>
> B Boroughs are encouraged to seek a lower threshold through the LDF process where this can be justified in accordance with guidance, including circumstances where this will enable proposals

> for larger dwellings in terms of floorspace to make an equitable contribution to affordable housing provision."

Public sector equality duties

Most urban planning decisions, especially those relating to London, will impact on communities in a way that triggers one or more of the public sector equality duties now consolidated in section 149 of the Equality Act 2012. Any doubt on this was resolved by *Harris*.

Section 149 provides materially:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to-
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> >
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> >
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).
>
> (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to -
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> >
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> >
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

Subsection (7) provides that the relevant protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

When due regard to any of the three needs this listed above is required, a number of things must be done by way of information gathering and analysis before a lawful decision can be made.

At a minimum due regard will always entail:

1. collection and consideration of data and information in relation to the people directly and indirectly affected by the decision, policy or proposal in play;

2. ensuring that data and information is sufficient to enable the body in question to assess whether the decision might amount to unlawful discrimination and/or might impact on the promotion of equality of opportunity and/or the fostering of good relations;

3. if there is, or might be, such an impact, a proper appreciation of its extent, nature and duration - see *R (Lunt and another) v Liverpool City Council and Equalities and Human Rights Commission (Intervener)* [2009] EWHC 2356 (Admin) at [44]:

> "A lawful exercise of discretion could not have been performed unless the Committee properly understood the problem, its degree and extent."

4. consideration of all available means by which adverse impact on groups with a particular protected characteristic might be mitigated, see Elias at [97], *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC Admin 2026 at [43] observing that once Ealing had:

> "identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution."

and *R (E) v JFS* [2009] UKSC 15 per Lord Hope at [212]:

> "There is no evidence that the governing body gave thought to the question whether less discriminatory means could be adopted which would not undermine the religious ethos of the school."

and

5. if the impact does result in unlawful direct or unjustifiable indirect discrimination, that is to say it directly or indirectly disadvantages a group with protective characteristics, the abandonment or reversal to the decision or policy (as it cannot be implemented in such circumstances);

6. alternatively, if the impact would result in unjustifiable indirect discrimination absent justification, the justification must be clearly explained so that the decision maker can grapple with it and its consequences.

Basis for the proposed claim

When considered against this legal backdrop, at least seven fundamental flaws in the Council's decision to grant planning permission and conservation area consent become apparent.

1. Failure properly to appraise the Conservation Area and unlawful downgrading of heritage assets

The Council failed to have any or any sufficient regard to the Tottenham Conservation Area Character Appraisal (CACA) prepared under section 71 of the 1990 Act. Instead it relied upon David Lewis' assessment that significantly disagreed with the CACA. This is significant as it represents the only basis upon which the Council differed from its second reason for refusal in 2011, namely that the proposal would constitute "substantial harm" and that the applicant failed to demonstrate that this was necessary in order to deliver substantial benefits. As will be recalled, that reason was endorsed by a majority of the members of the Sub Committee, so the basis for departing from it needed to be compelling and clearly reasoned.

This represents a failure to have regard to an important material consideration – the significance of the Conservation Area. Alternatively, it constitutes an unjustified and unlawful failure of consistency in decision-making and departure from the 2011 determination. In any event it constitutes the misuse of the planning system to downgrade the Conservation Area, something with worrying wider consequences. All three points are sufficient reasons to quash the decisions.

A few features of Mr Lewis' assessment may be emphasised:

1. it reassessed the significance of heritage assets throughout the Conservation Area – in every case reducing their significance, and hence the protection that would be granted to them;

2. it included and gave considerable weight to the "contribution" of 20th Century buildings outside of the Conservation Area to its character – buildings that do not fall within the Conservation Area and have never been assessed for their heritage significance;

and

3. it focussed excessively upon the High Road, concluding that the Conservation Area "is dominated and seriously damaged by the highway structure and its engineering" so that that it is "not now characterised by consistency of architectural or townscape style".

In relation to the Wards Corner building at 227 High Road, Mr Lewis' conclusions were really very stark: he stated that it has "never made a significant contribution", only ever "neutral" and:

> "I am inclined to state because of its severely reduced scale and bland plain-ness, it now actually detracts from the conservation area."

The Council agreed with this expert advice generally and "in particular" its downgrading of the significance of particular heritage assets.

Mr Lewis' assessment contrasts starkly with the approach in the CACA, a document adopted on 9 March 2009 and following public consultation in 2007. Where it does give reasons for its differences these are because it takes fundamentally different positions as to what is relevant to the assessment of significance. The assessment is also contrary to Grainger PLC's and the Council's view in 2011 and the consistent views of all of the important statutory and non-statutory consultees. For example, instead of considering that 20th Century buildings and the High Road traffic and tarmac defined the Conservation Area, English Heritage stated that:

> "[t]he character of the conservation area is derived principally from the Victorian and Edwardian development of the area as a local civic, residential and commercial centre".

SAVE Britain's Heritage made similar representations.

The Council's current view undermines heritage significance and offends against the purpose of the 1990 Act and the statutory mandate of a local planning authority to preserve *or enhance* the character and appearance of historic areas.

Furthermore, the assessment is an unlawful attempt to produce alternative guidance to the CACA without any sort of consultation – even with the Council. Under section 71, the CACA was submitted for public consultation and the Council took account of the public's views in producing it. Alternatively or in addition it is an unlawful attempt to change the boundaries of the Conservation Area to include 20th Century buildings that have not been considered of cultural, architectural or heritage significance.

In any event, there is no legal or policy justification for Mr Lewis' radical and catastrophic downgrading of heritage protection. The assessment and the officers' report suggest that the NPPF provides such a justification, but it cannot. The NPPF does little more than simplify and restate established heritage policy (under PPS5). Paragraph 128 states that planning authorities "should require an applicant to describe the significance of any heritage assets affected including any contribution made by their setting." It is impossible to read into this an invitation to produce a 101 page report dismantling the understood basis for local heritage protection.

To summarize, the Council's and Grainger PLC's approach is unlawful on a number of bases. It undermines the statutory purpose. It promotes inconsistency in decision. In relation to Wards Corner, it means that no proper assessment of heritage significance was undertaken.

It is not necessary to demonstrate it, but it was nothing less than irrational for the Council to adopt an approach that went against all local, national, statutory and non-statutory advice received to date about the Conservation Area.

2. Failure to consider the impact on unlisted buildings

In addition, the Council failed to consider at all the loss of the two locally listed heritage assets in the Wards Corner site. This was because it focussed upon the re-appraising the Conservation Area as a whole. This was in contradiction to its development plan. The text to policy CSV3 states that the Council attaches "special importance" to the protection of locally listed buildings. The NPPF includes locally listed buildings in the definition of heritage assets. Had the Council paused to consider the individual significance of these buildings recognised on its own register, it may well not have come to the same decision.

3. Mischaracterisation of consultation responses on heritage and design and failure properly to consult

In addition there were two distinct failures in the Council's treatment of the consultation process.

First, the officers' report misled the Sub Committee as to the substance of the Design Panel's consultation response. No reference is made to it in section 8.16 (Design). Instead it is referred to at paragraphs 7.7-7.9, but markedly *only* positive comments are reported. The Design Panel was consulted exceptionally on 31 May 2012. Its response is hostile, it is necessary here only to refer to the "Consensus and Conclusions" section:

> "Overall the panel were concerned that the detailed resolution of the design was unsatisfactory. It was described as too bland, too like international airport or hotel architecture for a vibrant urban location. It needed more, and more harmonious, differentiation of its different parts, along with detailing appropriate to its residential uses."

The Design Panel's report was not included in the agenda of core documents provided to the Sub Committee behind the officers' report.

Secondly, the Council did not follow the proper procedures relating to consultation with English Heritage set out in section 14 of the 1990 Act. English Heritage was notified of the application on 7 June, the Council was therefore precluded from considering the application until the processes within section 14 including the lapse of 28 days had passed. The Council in fact held an expedited special Sub Committee hearing only 18 days after notification.

4. No due regard given to equalities issues

There is no question that the proposed development of Wards Corner impacts differently on people with different protected characteristics.

Questions of whether the development advances equality of opportunity and fosters good community relations inevitably arise. As much is clear from paragraph 37 of *Harris*; URS and the Council both accepted that when considering the third application. Some regard was undoubtedly had to equalities issues. However, the equality impact assessment relied and officers' report relied upon by the Council as the means of discharging its duty to have due regard are defective in five respects.

First, information for the analysis of impact was not properly gathered. URS' original equality impact assessment was based on a desktop review of old data. For the purposes of the third application, URS sought to remedy that by undertaking direct face-to-face surveys of residents, market traders and other business owners. Pausing there, we consider this to have been an entirely appropriate, indeed necessary, exercise.

But problems arose from the way it was carried out. The surveys were undertaken over a four-day period straddling a single weekend. The surveyors only gathered information by speaking to people directly. Page 4 of URS' EIA (also found at page 139 of the officers' report) discusses the response rate which is 43% (assuming that the figures for residences, market stalls, shops and other businesses are accurate). Whilst that is troubling in itself, it masks a further problem. The response rate in relation to market stalls is fairly high at 69%, but less than half of non-market stall shops/businesses were able to or did respond. The response rate in relation to residences was lower still at 18%. On any reasonable view, statistically reliable conclusions cannot be drawn from the survey.

Compounding this, there were no other means by which residents, stallholders, or the owners of shops or other businesses could feed information into the survey (if they happened be absent, or simply busy, when the surveyors called). It would have been relatively easy to create online versions of the questionnaires used (they were after all computerised) to facilitate other responses. URS do not explain why this was not done. Nor do they explain why the survey took place over such a short timescale.

It inevitably follows that that due regard could not be had. The problem, its degree and extent could not be calibrated. It was of obvious importance to gather sufficient data about the matters that were the subject of the survey to enable meaningful conclusions to be drawn. That did not happen.

Secondly, there were three important issues which the survey could not satisfactorily address, partly because of the way it was framed, but also because other information needed to be gathered but was not.

To begin with, the survey dealt with stallholders and the owners of other businesses in a significantly different way. The former were asked a number of searching questions about the likely viability of their businesses if the development took place and, in particular, whether they were likely to be able to relocate in the space to be set aside for a

market in the new development. The answers were telling (see below). But like questions were not asked of the other businesses currently based on the site. This omission is inexplicable; one of the avowed aims of the scheme is to create small retail units which will enable locally owned businesses, and those owned by BME people in particular, to continue to trade locally in future (see e.g. paragraph 8.4.18. of the officers' report). Whether this aspiration is realistic or not is obviously important, indeed critical, in equality terms.

Nor did the survey explore the needs of a different group – the customers of the stallholders or other local businesses. As regards the market, this issue is grappled with to some extent elsewhere in the EIA and report. But other locally-owned businesses also meet the particular needs of other local communities, predominantly BME. The officers' report asserts that such needs can be met locally elsewhere, but there is no explanation for less still evidence supporting that assertion, certainly not in the EIA.

Most troubling is the lack of reliable information about rehousing of people who currently live in the residential properties that make up the upper stories of the properties which will be affected by the development. Members were told in the Officers' report that those who are "long-term Council tenants" will be rehoused. Those left will, by definition, be either short-term Council tenants with no or little security, or private tenants. There will be no affordable housing in the new development, so these people have no realistic prospect of being rehoused.

It was said, as noted above, that initiatives elsewhere in the borough will create "social housing". But at best this is a blinkered, utilitarian approach to an important issue; there is absolutely no guarantee, and indeed it is inherently unlikely, that people whose homes are demolished as a result of the new development will be rehoused in social housing anywhere else in the borough. Any economically active family, couple or individual living by themselves, is very unlikely to be awarded sufficient priority in the Council's housing allocation scheme to qualify for housing in the new properties. Even families who are not economically active and who may be eligible for social housing if the development goes ahead, will join the bottom of a very long queue. The EIA touches on this in the most superficial way, mentioning at 4.2.33-4 that the Council will 'engage' with affected tenants and 'brief' the local housing association. That cannot as amount to rational mitigation for homelessness.

Given the limited data gathered about residents' race and origin, it seems likely that the overwhelming majority of those affected in this way will be from BME backgrounds. This is something of such significance that it cannot lawfully be ducked. Indeed, it was one of the very issues identified in *Harris* at paragraph 37 as demanding analysis. If anything, a reader of the report and the EIA is likely to be seriously misled about what will happen to this group of people, assuming that

they will somehow migrate to settled social housing elsewhere in Haringey.

Thirdly, a major flaw in the EIA and officers' report is the way they purport to address the position of non-market businesses. In fairness to the authors of the EIA, they highlight the fact that it is uncertain whether the overall effects of the development will be positive in terms of employment (because, in their view, some current local businesses will either relocate elsewhere or be closed down: see paragraph 7.4.3.). However, ultimately the EIA is equivocal on this issue describing, the problem as a "risk of a potential negative impact". Identifying risks in this way is not adequate for the purposes of section 149: the Council has to positively decide whether there is a negative impact or not, and who will be affected if there is. Only then can it decide whether that impact is justifiable in terms of the needs identified by section 149.

Fourthly, a difficulty arises in relation to the market traders' situation. The EIA itself is a well meaning attempt to gather their views about their future. It demonstrates that they are overwhelmingly pessimistic about the usefulness of the proposed mitigation measures (views which, importantly, URS do not dismiss as incredible or exaggerated) . What is missing however, and critically so, is any meaningful, evidence-based view – an analysis - on whether stallholders' misgivings are well founded or not. Suppose the stallholders are right about the difficulties associated with relocation, then the market will be gone from Wards Corner forever. That would represent a very weighty factor in the balance against the development being granted permission (demonstrated by the GLA's unwillingness to approve the development if there was no place for the market within it). If, on the other hand, the mitigation measures in the section 106 agreement are likely to lead to the market being re-established after a period of temporary relocation, the impact of the development inequality terms as regards the market will be temporary and very considerably less.

All this begs the question of what is more likely to happen. Neither this EIA nor the officers' report answers that question. The mitigation measures are simply asserted as having been developed to address the problem. But no view is reached on whether they are likely to succeed or not. Given what the stallholders have said, the Council had to reach a reasoned, rational view on this question for itself as part of having due regard to the development's impact on this particular group. It did not do so.

There is a fifth and final, market-related issue of importance. The current approved scheme does not comply with the GLA's critical recommendation that the existing market is not forced to leave Wards Corner until an alternative temporary site has been identified. What is proposed instead is the appointment of a relocation facilitator and various workshops intended to enable stallholders to relocate as a group. A scenario may therefore arise where no alternative temporary site has is identified before the market is effectively evicted and the

development proceeds. This risk is a highly relevant factor, but it is not grappled with in the officers' report nor did members confront it themselves.

5. No justification for the approach taken to affordable housing provision

Notwithstanding the shifts in planning policy nationally and locally since the first application, policy HSG4 of the 2006 UDP remained intact. Within its terms it was permissible for there to be a departure from the 50% affordable housing requirement and, indeed, it would be permissible to depart from the policies on the basis of other material considerations. But, plainly, if either of those courses was to be adopted, it could only be on the basis of members of the Sub Committee being able to evaluate the claimed justification for the departure.

In fact, the officers' report did not refer to policy HSG4 at the relevant sections, or relate the substance of policy HSG4 with regard to the need for affordable housing provision. Members were prevented from considering the point, relating to an important aspect of the development, where section 38(6) of the 2004 Act applied.

Furthermore, the approach of the Council was inconsistent with its approach in 2008 for the same development site, contrary to the principle of consistency in decision making (see *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P & CR 137). The Sub Committee members were not reminded of the basis on which they had agreed to the first application: the Council's own commitment to provide affordable housing as a partner to this particular development, nor were they told that commitment had been reneged upon, less still why. Such reasons that were given had to do with the costs of the development to Grainger PLC. Those costs could not represent a rational basis for the Council to decide its commitment should not be honoured.

The members were given assurances about social housing. But any general plans for social housing in Tottenham were a secondary consideration at best: social housing and affordable housing are simply not the same thing (for the definitions used by the Council itself see paragraphs 5.1 and 5.3 of its 2008 Housing Supplementary Planning Document). This error was especially important given economically active current residents of Wards Corner were most unlikely to be eligible for social housing, but they might be eligible for affordable housing (see also paragraph 4.21 of the text to policy HSG4 that provides policy support for the need to provide affordable housing other than social rented accommodation in the east of the borough).

There is nothing in the evidence on viability that was put before the Council that overcomes these failings. Members could not "assess the other material consideration", that is what the toolkit had to say "and decide whether the development plan should be accorded the priority given to it by the statute" without actually seeing the toolkit and DVS' full assessment. It appears they were provided only with a summary of

DVS' view on the latest toolkit. The fact that the toolkit had been reviewed was of limited relevance: the Sub Committee could not lawfully delegate its own assessment function to another body. It needed to assess matters for itself.

The following are the principal matters that the Council needed to turn its mind to:

1. what had been done to secure the maximum social housing as part of the development? Even had it been available, the viability assessment would not answer that question. Members needed to be persuaded nothing more could be done;

2. members of the Sub Committee needed to have and consider the evidence which justified or explained the absence of any affordable housing provision (given the UDP and London Plan policies quoted above). This was not before them. For the issue to be left to officers or others in considering the viability assessment was either an unlawful delegation, a failure to consider material considerations, or a failure on the committee's part to give effect to the policies;

and

3. the Sub Committee had repeatedly been told the toolkit is demonstrated that "the scheme" would not be viable if it included affordable housing. What they were unable to assess (and no-one else had assessed either) was whether the scheme could be modified so as to include affordable housing. That was a material consideration they had to take into account, especially as the Council had reneged on its own affordable housing commitment. As DVS pointed out in its summary view of the latest toolkit, this was a significant omission:

> "4.2 C [Cluttons, on Grainger PLC's behalf] has not prepared a viability report showing a policy compliant development. This is because they consider it to be unnecessary in view of the lack of viability even without the provision of viability. C have therefore shown a viability assessment purely based on the application proposals to demonstrate lack of viability on a policy compliant scheme."

Overall, had the Council had proper regard to the development plan and their own earlier approach, it is likely that they would have rejected or at least sought to modify the development to comply with the policy requirements.

6. Failure properly to carry out the environmental impact assessment process

WCCC is concerned that the environmental impact assessment process was not properly carried out in this case. It is accepted that the development is Schedule 2 development, so that in principle, EnvIA was

required. However the Council appears to have relied upon a 2011 re-determination of an outdated 2007 screening opinion. Major urban redevelopment such as the proposal in this case have major environmental impacts and on the face of it, it is surprising that an assessment of those impacts was not required in this case. In any event, it is at least probable that there was no reconsideration of the screening process subsequent to the judgment of the Court of Appeal in *SAVE Britain's Heritage v Secretary of State for Communities and Local Government* [2011] EWCA Civ 334; [2011] PTSR 1140. In *SAVE Britain's Heritage* Sullivan LJ criticised the domestic approach to the EnvIA of historic assets, emphasised the references to "cultural heritage" in Article 3 and Annexes III and IV of the European Directive on environmental impact assessment and commented (albeit in a different context) that

> "It is a curious, and thoroughly unsatisfactory, feature of the Demolition Direction that those demolitions which are most likely to have an effect on the cultural heritage—the demolition of listed buildings, ancient monuments and buildings in a conservation area-are effectively excluded from the ambit of the Directive."

Further information is sought below to confirm that the screening decision (or decisions) in this case were lawfully made.

7. Unlawful expansion of the reasons relied upon for the decision

The Sub Committee decided (by a narrow majority) to accept the recommendation in the officers' report. That report put certain reasons before the Sub Committee. However, the reasons set out in the 12 July 2012 notice are greatly expanded, referring to specific details and whole chapters of policy not included in the recommendation before the Sub Committee. It is therefore not possible to have confidence that the reasons relied upon in the notice are properly those of the Council in accordance with Article 31(1)(a) of the Town and Country Planning (Development Management Procedure) (England) Order 2010.

Conclusion

For all the above reasons, in making the decisions to grant planning permission and conservation area consent, the Council acted unlawfully *inter alia* by disregarding its statutory duties and failing to have regard to important considerations. Had the Council acted properly it is very likely, given the narrow margin by which the Sub Committee resolved to grant the consents, that the decisions would have been made differently. It is only necessary that the decisions *might* have been different, see *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1989) 57 P & CR 306. The decisions therefore must be quashed.

Action that the Council (as proposed defendant) is being asked to take

Please see above.

The details of any interested parties

Grainger PLC (details as above).

Details of any information sought and documents that are requested as relevant and necessary

Please address the following questions and requests using the enumeration below. Where you are unable or unwilling to do so, please say so in terms and give full reasons.

Please provide:

1. details of internal guidance, policies and memoranda on the discharge of section 149 in relation to planning functions issued to officers and Sub Committee members (if any exists);

2. confirmation that the Sub Committee's members did not see the toolkit or the DVS assessment, or its own analysis (save for the summary) in relation to the second or third applications or, if any did see it, who did and when;

3. copies of any decisions made in this case in relation to the environmental impact assessment process, including the screening opinions of 20 June 2007, and that of 2011, and any correspondence with third parties in relation to the same;

4. e mails, memoranda, notes and any other documents recording the reasoning of officers in their acceptance of Mr Lewis' assessment; and

5. e mails, memoranda, notes and any other documents recording the decision making process that led up to and the actual decision to abandon the commitment to development of affordable housing at Apex House and as development partner.

We look forward to receiving this information and your substantive response to this letter by the proposed reply date, 3 September 2012.

Yours faithfully

BINDMANS LLP