IN THE MATTER OF ARLINGTON WORKS, ARLINGTON ROAD

Appeal PINs reference: APP/L5810/W/20/3249153

CLOSING SUBMISSIONS ON BEHALF OF THE LOCAL PLANNING AUTHORITY

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1. I stated at the outset that the appeal is misconceived and should, respectfully, be dismissed.

2. The evidence has plainly established that submission.

3. These submissions deal with:

   3.1. The loss of an existing safeguarded waste site.

   3.2. The loss of industrial land.

   3.3. The effect of the proposal in design terms.

   3.4. The appropriateness of the mix of uses and other matters.

   3.5. The weight to be placed on planning benefits.

   3.6. The planning balance.

A The loss of an Existing Waste Site

4. In this part of these closing submissions, I will deal with the policy position, followed by its application.

The FALP London Plan

5. Turning first to the FALP, as Mr Potter indicated and Mr Mehegan accepted[1], the aim for the distribution of waste facilities is to achieve net self-sufficiency; it is also to ensure that waste should be disposed of in one of the nearest appropriate installations (proximity principle)[2].

6. Mr Mehegan agreed that the FALP undertook a comprehensive assessment of waste issues[3], and the safeguarding of London's existing waste sites is critical to support achievement of those objectives.

7. The result of the FALP assessment was that existing waste sites should be clearly identified in waste plans and safeguarded[4].

8. Policies 5.16 and 5.17 are the emanation of those objectives. Policy 5.16 seeks the achievement of net self-sufficiency by 2026, and policy 5.17 sets out the mechanisms by which this is to be achieved[5].

9. Mr Mehegan accepted that policy 5.17 requires the management of waste to be dealt with through local plan preparation at the Borough level[6].

10. The policy makes clear that compensatory provision is a requirement[7], and that this must be for the maximum throughput the safeguarded site could have achieved[8]. It is clear therefore that compensation must be compensatory of the throughput of that site.

11. Mr Mehegan took an entirely incorrect view of what "compensation" meant for the purposes of the FALP (and the Local Plan, to which I will turn). As a matter of natural usage, "compensation" means to be put back what was lost. If there is a particular type of waste processing going on at the site in question, like waste oil refining, it could not be "compensation" to identify a facility that would not carry out such waste oil refining – that would not be replacing the actual use which will be lost.

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[1] XX.
[2] 5.73, CD B2. London plan.
[3] 5.78, Local Plan, B2.
[4] 5.82, ibid.
[5] pg 209, CD B2.
[6] policy 5.17(F) – (H).
[7] (H), policy 5.17.
[8] see F.17(H).

12. Given that compensation directly related in policy to "throughput", this is a further indicator that the compensation must be for the particular use carried on at the site. The throughput of waste oil may well be different in scale and will be different in kind to the throughput of, say, municipal solid hazardous waste.

13. Mr Mehegan's view was that compensation was restricted just to the general nature of the waste in question, namely, hazardous waste; but the obvious error in that approach is that it fails to ensure that the particular waste treatment operation carried on will be re-provided. So, in the particular context of this case, the identification and satisfaction elsewhere of hazardous waste capacity for solid waste, will lead to the loss of one of only 4 waste oil processing plants in London, with no re-provision of that loss provided for elsewhere.

14. Further, there is nothing within the FALP which indicates that compensation can mean just another site in a general waste stream. Policy 5.19 of the FALP highlights the particular importance of providing for hazardous waste treatment and does not indicate any different approach to the basis of providing compensation, referring back to policy 5.17.

The West London Waste Plan

15. The FALP post-dated the WLWP but its terms were known during the WLWP adoption[9]; the Appellant does not say that the WLWP is out of accord with the FALP. The WLWP makes clear that safeguarded sites are an essential resource to the West London area[10]. This was endorsed by the Inspector as a "sound" statement of policy; that was agreed by Mr Mehegan[11].

16. WLWP 2 is, of course, the principal relevant policy.

What is protected under WLWP2

17. There is no issue about what stands to be protected in this case. Mr Mehegan accepted that the policy applies to sites regardless of whether they are operational at the time of consideration or have been shut by the operator.

[9] Para 1.3.18 of the WLWP, CD B3
[10] 6.2.1, WLWP CD B3.
[11] XX.

18. He was right to make that concession. The protection in place is for existing waste management uses as defined by reference to what each site is lawfully permitted to do under footnote 28 of the WLWP and as specified in Appendix 2 of the WLWP. In relation to the site itself, it is lawfully permitted only for waste uses, and it is specifically identified in Appendix 2 for waste oil processing.

19. The interpretation of the policy as protecting safeguarded sites whether or not they are in active use makes obvious sense: it prevents simple closure of the facility and then reliance on that closure to facilitate redevelopment without any protection under the safeguarding regime of the London Plan or the WLWP. If simple closure were sufficient, it would run a cart and horses through the protection policy.

20. The reiteration of the need to protect waste management sites even if they are closed is also apparent in the Publication Version of the London Plan ("PVLP") which requires compensation in respect of a premises' maximum throughput which is determined over the last 5 years of throughput or, where not available, the potential capacity[12].

The area to consider when seeking compensation under WLWP2

21. The compensation provision under WLWP2 allows for compensation only if it is made elsewhere in the West London Boroughs. Again, this was accepted by Mr Mehegan.

22. This area is defined and includes only the West London Boroughs which are party to the WLWP (and that part of the Old Oak and Park Royal Development Corporation area within the London boroughs of Brent and Ealing and not outside).

23. While an email was sent by an officer of the Council on 7 March 2018[13], which stated that it would be possible to look outside the WLWP area, if compensation were not found in the WLWP area, no reliance could have reasonably been placed on this document. The email stated:

> "The views expressed in this email are informal only and do not prejudice any decision the Council may make on any future application which may be submitted in respect of the above property".

[12] Policy SI9, para. 9.9.2, pg. 423, CD D2.
[13] Para. 5.25, proof.

24. Further, it was made clear in the Officer's report[14] that the compensation proposed in the Waterman Report was unacceptable because, in part, it relied on facilities outside the WLWP area.

25. Further, of course, the meaning of policy is a matter of law and an officer's incorrect interpretation of the policy cannot override the correct meaning of the policy.

The type of compensation to consider under WLWP2

26. The compensation which is to be made is also clear. It is that which is "equivalent" in "scale and quality". This is a reference to the usual words of "quantity and quality" – i.e. it must be the same quantitatively and qualitatively. Consequently, like the FALP, if there is waste oil processing, it is necessary to identify sites with surplus capacity to carry on waste oil processing. The rationale behind that approach is the same as that underlying the FALP policies.

27. This reading is also reiterated in the previous part of WLWP2 which refers, in respect of development proposals, to the quantity of waste for which the site is currently permitted to manage.

28. Mr Mehegan's interpretation of this part of the policy was, with respect, entirely wrong. He considered that "quality" was a reference only to the place which the process had in the waste hierarchy.

29. But there is simply no basis for such a restriction. In fact, such an interpretation belies the error in Mr Mehegan's approach. By adopting such an approach, it is necessary to look at the specific use in question to see where it is in the waste hierarchy. His approach necessarily accepts the relevance of the particular waste processing use of the site. Yet his approach would exclude consideration of the actual use when asking whether a compensatory site is truly compensatory; on his view, it is enough to ask whether it is hazardous waste. The inconsistency is obvious: you must compare the capacity offered by the compensatory site against the specific capacity provided by the safeguarded site when assessing whether they are at the same level in the waste hierarchy, but you must then discount the actual use when asking whether it is compensatory and be content with only asking whether it is dealing with hazardous waste.

[14] pg. 19.

30. The proper reading of WLWP2 is reiterated in the list of sites specified in Appendix 2[15]. As Mr Mehegan accepted, the activities are specific and not just related to a waste stream; Mr Mehegan also accepted that this was supportive of the Council's reading of the policy[16].

31. While the Appellant relied upon an email from the case officer[17] saying that the use of another hazardous waste stream is "fine", this should be discounted. First, the statement of a case officer cannot undermine the correct reading of a policy as a matter of law. Second, as Mr Mehegan accepted, the officer's report made several references which indicated that the Council was concerned to ensure the reprovision of the actual uses lawfully permitted to take place on the site (at pg. 19) – he said the report could reasonably be read in that way[18]. Consistent with this being the Council's concern (which was repeated in the Council's statement of case), Mr Mehegan (as he accepted[19]) looked to re-provide the actual uses when identifying compensatory provision, both in the application documentation[20] and in his proof[21]. Third, the email was also prefaced with the statement that the view expressed in the email was informal[22].

32. Even if the appellant had relied on this email, because of what was contained in the officer's report and in the light of the observation of Mr Mehegan that the comments in the report were at worst ambiguous; it was incumbent on the appellant to confirm the approach it intended to take with the Council. It failed to do that.

Waste Compensation

The importance of protection

33. The loss of this site should not be underestimated. The appeal site is one of only four specialist waste oil management facilities in London[23]. Further, as Mr Mehegan accepted, its loss will mean a 10% drop in net self-sufficiency in respect of the relevant

[15] pg. 69, WLWP, appx 2
[16] XX.
[17] 5.24, Mehegan proof.
[18] XX
[19] XX
[20] Pg. 20.
[21] Pg. 11.
[22] The emails were produced at the inquiry by Mr Villars.
[23] para. 30, Mr Potter proof, agreed Mr Mehegan.

waste types from 61% to 51%[24] for London as a whole. This represents a significant backward step against the stated objective of the London Plan to achieve net self-sufficiency by 2026.

Compensation under WLWP

34. In the light of the policy position set out above, the permitted lawful use of the appeal site is for refining waste oil[25]; it is that form of waste operation which must be compensated for. It is agreed that the extent of re-provision is defined by the maximum throughput and that the extent, i.e. the size of the site, is irrelevant to that issue[26].

How to identify the amount of throughput at the site to be compensated

35. The Appellant accepts that the throughput should be identified by reference to the PVLP calculation methodology (the maximum throughput over the last 5 years in the first instance[27]) and that the amount to be re-provided is 13,404 tonnes per annum based on the PVLP[28]. The alternative methodologies floated in Mr Mehegan's proof[29] can be ignored as irrelevant[30].

Whether provision just needs to be provided during the plan period

36. In his proof[31], Mr Mehegan referred to the view expressed in the Waterman report that it needed only to be shown that compensation could be provided at some point during the plan period[32].

37. This contention is obviously wrong. The proper interpretation is that it must be shown that compensation will be made available at the point at which the capacity at the safeguarded site will be permanently lost.

[24] AP Note, 17 January 2021, submitted to inquiry.
[25] Appx C, CDF43, Waterman Report, and Mr Villars, appendix A.
[26] Mr Mehegan, XX.
[27] Para. 9.9.2.
[28] 5.10, Mr Mehegan proof.
[29] Para.s 5.10 – 5.11.
[30] Agreed, Mr Mehegan XX.
[31] Para 5.7.
[32] CD F43, para. 3.22 and 3.23 WR.

38. Mr Mehegan's argument fails to resolve the wording of the WLWP policy itself. Policy WLWP2 itself states that compensation "is" made available – it is not saying "can be made available" or "is able to be provided".

39. Such an interpretation also ignores the wording in the FALP[33] that compensation "<u>will</u> be required".

40. The argument also has no internal logic. If the compensatory site needs only to be identified as having the potential to be provided at some point, without showing that it will be available at the point that the waste operation is lost, there may be no compensatory provision in the future at all. The decision maker must be satisfied that provision will be made on the grant of permission. That is why the suitability and deliverability of the capacity is an important consideration in the determination process. To defer consideration to some undefined point in the future would be contrary to the aim of achieving net self-sufficiency by 2026. Mr Mehegan acknowledged the force of that point[34].

<u>The Particular Sites</u>

41. And so I turn to the sites that have been identified by the appellant.

<u>The Position if the Appellant's interpretation of the policy is correct</u>

42. The appellant accepts[35] that, if compensation is required to be provided within the WLWP area for the waste treatment operation in question, there is insufficient compensatory provision.

43. As a starting point, only 1,000 tonnes of capacity have been identified as available at the Brent Oil Contractors site[36], but this is only for the transfer of waste oil, not its treatment. It cannot therefore be compensatory of the current use either in terms of its actual nature or in its place within the waste hierarchy (applying Mr Mehegan's more limited interpretation).

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33 Policy 5.17H, CDB2.
34 XX.
35 XX, Mr Mehegan.
36 Mr Mehegan proof, 5.18 as supplemented by the

44. The Heathrow airport street sweepings site, whilst it is within the WLWP area, does not have planning permission to treat oil from sources beyond the airport. It operates under PD rights[37].

45. The Quattro Southall site has only a temporary permission (as Mr Mehegan noted he was aware of[38]) which has now expired. Quattro itself acknowledges that its offer is conditional on the development of the adjacent quarry sites. As now established in Mr Potter's note, the quarry land is currently designated as green belt. While it may be earmarked for release via the Hounslow Local Plan Review, there is no guarantee it will be so, and to accept the contrary position would be predetermining the outcome of the Plan's examination. Moreover, there is no evidence that Quattro would be able to deliver a treatment facility for waste oil[39] on that land even if it were to be released. There is so much uncertainty for this offer to be delivered, it cannot be relied upon.

The Appellant's arguments

46. Even if the appellant's argument that the compensatory capacity needs only to be hazardous waste is adopted (which the Council says is unarguable), it still cannot comply with WLWP2.

47. First, the alternative capacity assessment method produced by Mr Mehegan on the day before he gave his evidence can be entirely rejected. It is based on a purely arbitrary approach of calculating 25% of the peak hazardous waste input for sites in the plan area to arrive at his result. As he accepted, Mr Mehegan's approach was entirely theoretical. He was not able to say whether any of these sites (beyond those the subject of the specific letters to which I will turn) will be able to deliver the 25% or indeed any additional hazardous waste capacity. Nor was he able to say (consistent with his own case) whether any of the sites would treat hazardous waste at the same level in the waste hierarchy[40].

48. As for the remaining sites:

48.1. It cannot be shown that the Quattro site can provide capacity for the reasons I have indicated above.

[37] Mr Potter response note on compensatory sites.
[38] XX.
[39] See the note on the Quattro letter from Mr Potter, CD [to be put on website].
[40] XX.

48.2. The Slicker site is not located either within the WLWP area or London, so simply cannot be considered to offer proper compensation. Aside from the terms of WLWP2, the appellant is unable to show that this site would have no adverse effect on the waste miles expended in transporting waste to this site, and the use of this site would be directly contrary to the aim of achieving net self-sufficiency.

48.3. The Powerday site is also outside the WLWP area. The site has planning permission limited to municipal and inert waste and there is no evidence that it can provide sufficient capacity to meet the need even for general hazardous waste processing. Mr Mehegan indicated that he had had some correspondence with the Powerday operators, but no attempt was made to submit this further material. It can therefore be discounted[41].

48.4. The Williams Environmental site is not within the WLWP area and so can be discounted on that basis[42]. Additionally, the actual nature of the operation is unknown (with no evidence being given as to its ability to process oil in the same way as the appeal site did), but also there is no evidence that the identified capacity of the site is available. Mr Mehegan accepted that the calculations he had undertaken in respect of this and other sites at appendix C of his proof were based on theoretical capacity only - there has been no additional correspondence provided by the appellant in respect of this site to establish that the capacity would in fact be deliverable.

49. For the above reasons, the compensation is inadequate and the proposal is in clear breach of policy WLWP2.

The Publication Version of the London Plan

50. Policy SI9 is the relevant policy[43]. The background to the policy is that there is an overarching aim to manage London's waste sustainably[44]. This includes the reassertion of the target of 100% net self-sufficiency by 2026, from the FALP, but this time within five years of adoption, making it that much more challenging. The consequence is that the current version of the PVLP incorporates a step-change in the approach towards waste management, as Mr Mehegan accepted.

[41] XX.
[42] Table 2, Mehegan Proof, pg. 11.
[43] pg. 422 CD D2.
[44] see policy SI 8, pg 409

51. Policy SI9 has the following attributes:

51.1. It requires the release of sites only through the plan process. The written statement makes clear that this is the right approach and that safeguarding issues should not the dealt with on an ad hoc basis[45] - that, as Mr Potter has said, can only relate to planning applications. Mr Mehegan suggested that "ad hoc" meant something else but he could not identify what that was[46]. When read in context, "ad hoc" really can mean nothing else but a planning application.

51.2. The requirement for plans to deal with the release of safeguarded sites, is set out in SI9 (C) which requires compensatory capacity to be provided within London. The PVLP requires that this will be dealt with through the plan preparation process.

51.3. That such matters are dealt with in the plan-making processes is indicated in para. 9.8.3 in making clear the need for discussions between the Mayor and the Boroughs. Further support is found in para. 9.8.10 which relates to the approach which should be adopted in the plan allocation procedure. It is also reiterated within para. 9.8.11. and para. 9.9.3.

51.4. There is a specific provision for hazardous waste within policy SI9 that, once allowed through the plan process, development proposals must make compensatory provision for hazardous waste sites which are lost. This is referring to the specific waste that must be secured by compensation. It is also dealing with how this matter should be addressed once the issues for safeguarding are resolved through the development plan process.

52. The reason why the release of safeguarded sites should be dealt with through the plan process is obvious. It allows for an overarching approach to be taken between authorities to avoid undermining the objectives of achievement of net self-sufficiency and the proximity principle for London as a whole. That simply cannot be adequately done on an ad hoc planning application basis.

53. As a result of this provision, if the PVLP becomes part of the development plan, the planning application would be contrary to this policy and should be refused in normal circumstances.

[45] Para. 9.9.1.
[46] XX

54. While I make that submission, it is right to note that there is no case which had decided the approach to be taken under policy SI9. As a result, it is requested that the alternative contention (made by the appellant) is also addressed in the Inspector's reasoning. Even if the appellant's argument is accepted, and the policy is read as allowing for development proposals to come forward, no different approach can be realistically identified from that set out within the FALP and the WLWP. Compensation must be forthcoming for the particular type of waste capacity, and the appellant has failed to demonstrate, for the reasons given above, that waste oil treatment processing to the target throughput is deliverable whether within the WLWP area or London as a whole. It is to be noted that the appellant did not argue that the reference in policy SI9 to compensation within London meant that the area-wide policy within WLWP2 had been superseded. Even if that is how it is to be read, it does not alter the above conclusion.

The Viability of Waste Oil Processing on the Site.

55. At certain points in this inquiry, it has been suggested that the Sharpes waste oil processing business was unviable (see for example the evidence of Mr Howe). This contention, if it is pursued, should be rejected. First the application of safeguarding policy is not made conditional on viability either within the WLWP or the London Plan (of either generation). It was perhaps in recognition of this fact that the applicant presented no evidence at the application stage to support its contention that the site was unviable in its existing state. The Appellant's statement of case[47] states that the site had become "less viable", not unviable. This point was obviously relevant and if a case were to be made it would have to have been established by way of figures that could be scrutinised. There has been nothing. This is particularly significant because, as has been reiterated in this inquiry, the appellant company (or the family members connected with it) have operated the site for many decades. This would affect the degree to which land costs might alter the viability of a particular process. But it is simply not possible to assess this issue.

[47] at 4.47

56. The closest that any concrete evidence came to making a case for viability is Mr Mehegan's reference to the evidence base document to the WLWP (the hazardous waste assessment)[48].

57. Notably, in this section of his proof, he did not actually reach a conclusion on whether this site is unviable. More importantly, Mr Mehegan's analysis was dealing with oil regeneration plants which are much more involved than the refining of waste oil to produce fuel substitutes. In short, the viability or otherwise of oil regeneration plants is completely irrelevant to demonstrating the viability of the existing use of the appeal site, as Mr Mehegan accepted[49].

58. The reality is that the site was at its peak production just before its closure: that does not suggest a lack of viability, quite the reverse.

The proposed Condition

59. I deal finally under this issue with the appellant's suggested waste compensatory capacity condition. It is surprising to say the least that such a fundamental change of approach by the appellant should be forthcoming so late in the day. If this condition was an acceptable approach, the compensatory provision evidence was entirely otiose. But since the appellant engaged fully with that debate, it shows that this condition is a desperate attempt to avoid the inevitable conclusions arising from the evidence presented to the inquiry.

60. Indeed, it is very poor quality of the appellant's case on this issue which renders this condition entirely unreasonable and contrary to the guidance contained in the NPPF as supplemented by the NPPG. That guidance makes clear[50] that pre-commencement conditions should not be imposed if there is no prospect at all of the condition being satisfied or performed within the time limit of the permission. There is no evidence at all that adequate compensatory provision has any prospect of being secured during the three-year life of the permission. None of the appellant's evidence addresses that question. None of the cross examination sought to test that issue and Mr Mehegan provided no evidence of the time scale for delivery of any of the compensatory provision. Indeed, as well as debated with him in cross examination, his ostensible

[48] At 6.3 in his proof, CDE9, pg 21.
[49] XX.
[50] NPPG, para. 9, conditions section.

position was that provision had to be identified only within the plan period, well beyond three years.

61. Second, contrary to the guidance contained within paragraph 55 of the NPPF, there is no clear justification for this pre commencement condition. It is submitted that the purpose in part of paragraph 55 is to ensure permissions can be developed out in good time and without undue restrictions. In the light of the fact that there is substantial evidence about the lack of deliverability of compensatory provision, there is simply no justification for now adjourning that question.

62. Third, the condition is to be rejected under para 55 of the NPPF because it fails to reasonably relate to the development in question. That is because it has been drafted in a manner which allows for hazardous waste generally to satisfy the compensatory provisions and for compensation to be delivered outside the WLWP area. For the reasons given above, both of those approaches would be contrary to policy and hence are unfounded.

B. The loss of industrial land

The Strategic Position - The FALP

63. The appellant accepts that policy 4.4 of the FALP[51] is not a development control policy but sets out the strategic position and is related to local plan preparation only. Consequently, industrial land development control policy is to be addressed in local plans[52].

The RuTLP and Policy LP42

64. The background to LP42 is important.

65. The Richmond Employment Sites and Premises Study 2016 Update[53] informed the production of the local plan. This indicated that there was a significant gap between the demand for industrial premises and the lack of available supply[54] and

[51] pg. 151, CDB2.
[52] Agreed, XX, Mr Villars.
[53] CD E32
[54] para. 4.9

recommended the more stringent controls under LP42 (at 4.9). As Mr Villars accepted, the stringent approach contained in LP42 was found to be justified by the Local Plan inspector[55].

66. The plan has reiterated in strong terms[56] that the whole of the borough has a very limited supply of industrial land. Further, it is to be noted that the South London Partnership has identified an acute shortage of small light industrial units[57] which has been used to inform the Council's direction of travel document[58].

What is meant by "industrial" and the loss of the waste site?

67. Mr Villars accepted that policy LP42 applied to the waste related part of the site. That is plainly right since the written statement to the policy defines industrial land as including sui generis employment uses[59]. On any basis, this is a significant amount of land. It amounts to about half of the site (the CLEUD says that this is about 800 square metres).

What is meant by the loss of industrial land under LP42?

68. The policy sets out a presumption against the loss of industrial land and space. The appellant accepts that the policy is seeking to protect not only floorspace within buildings but industrial land generally including open areas[60]. There is an obvious logic to such a reading because many industrial uses will have and will require outside space to carry on the use.

69. As a result, the waste use and areas surrounding the industrial buildings, as well as the buildings themselves, will be regarded as industrial land and will be covered by the policy.

The application of LP42 to the current site – the loss of land and premises and the need to market.

The loss of land

70. As a result, the waste-related land will be lost through the proposed redevelopment. This will engage the need to market under LP42. Mr Villars accepted that this was the

[55] Scott Davidson proof, para. 6.32, ref IR para. 100.
[56] Para 10.3.2
[57] IN the South London Partnership Industrial and Business Land Study referred to in CD E13.
[58] CD E13, pg. 29.
[59] 10.3.1
[60] Mr Villars, XX.

case[61]. I will address further in these submissions the suggestion that the policy is not engaged because of the ability to change uses within the industrial buildings under class E. However, the fundamental error in Mr Villar's argument is that the Class E point does not apply to the waste related part of the Site at all.

The loss of building floorspace

71. It is now agreed that the net internal area of the industrial floor space on the site reduces from 849 sqm to 512.5 sqm[62] with the proposals. It has been floated in evidence that some amount of the existing floor space is in B1(a) use and so this should not be included within the industrial floor space loss calculation. The difficulty with such an assertion is that there is no adequate basis upon which the argument relies. Mr Villars produced this evidence in his proof. It should have been presented much earlier on and if necessary have been the subject of a CLEUD application to establish the lawfulness of the B1(a) floorspace. The appellant cannot say that the Council has not taken issue with this point - it did in cross examination. It had no opportunity to query these figures any earlier than the provision of a draft statement of common ground (in the discussions on which the council did take issue with the agreed uses). Consequently, no weight can be placed upon this evidence.

72. Even if this argument is accepted, the point goes nowhere for two reasons. First, the B1(a) element adds up to 119 sqm of the existing 849 sqm. Removing this element from the existing floorspace calculation still leads to an overall loss of industrial floor space. Second, the same process would have to be undertaken in respect of the proposed floor space, and, as I deal with later, the result of adopting a 50-employee generation figure for that space is to assume that all the floor space is in B1(a) use[63]. However, the point is considered, therefore, the result is a significant drop in industrial floorspace with the proposal.

73. Again, this engages the need to market.

74. The appellant has also argued that there is no loss of industrial floor space because the industrial units on the site are capable of being used in the future for other use

[61] XX.
[62] See Ms Dyson's floorspace note.
[63] That is also apparent from the marketing report (CD F27) which shows Hey clear financial imperative towards maximising office use of the premises as against B1(c) with rents for the former over double the latter.

under either permitted development rights or through the use classes order by virtue of the use now falling into class E. As a starting point, the problem with Mr Villars' approach is that it fails entirely to recognise the terms of LP42 which relates to existing industrial floorspace; the land has not changed out of industrial use. Given that this is what LP42 is concerned with, Mr Villars' argument can at best only be a material consideration. It does not affect the application of the policy. Ultimately, Mr Villars accepted that if the policy did apply to existing uses the requirement to market was engaged.

75. Additionally, however, the argument has no weight even as a material consideration. What is being contended for is a fall back. However, the appellant has not established there are any practical prospects of the fall back being realised – it is merely theoretical[64]. Mr Villars' evidence on this point can be completely discounted because, as he accepted, he did not have any expert experience of the market for the use of the premises for non-industrial purposes. Mr Weeks was the expert presented by the appellant, and his clear evidence was that there was no real prospect of refurbishment of these units. In these circumstances it cannot reasonably or realistically be contended that the unit would be used for purposes outside of the current uses. Moreover, if there is a change from B2/8 to B1, the B1 use would occur after 1 September 2020 and, in these circumstances, the attribution of class E could not be made, at least until July 2021. This is made clear by terms of the transitional provisions within para. 7 of the Use Classes (Amendment) Regulations 2020. Moreover, the change which would have to occur would have to be for all of the industrial land and there is simply no evidence that this is at all realistic.

Whether there has been a contravention of the need to market

76. On any reasonable basis, it would usually be concluded that a failure to market comprised a breach of the obligations contained within LP42. However, Mr Villars argued that there was not a breach of the policy because, if there had been marketing, it would have shown that there was in fact demand for the industrial premises. Such an argument is, with respect, completely unarguable. The point of marketing is to enable an applicant to disapply the presumption against the loss of industrial land set out within LP 42. I f it is accepted that there would be a market for the industrial premises, then necessarily the presumption against the loss of those premises under

[64] This being the test set out *R(Mansell) v Tonbridge & Malling Borough Council* [2019] PTSR 1452.

LP42 is not lifted and the proposal will be contrary to it. Mr Villars' interpretation sought to turn reality on its head – the essence of his position was that showing a market for the industrial premises meant no contravention of the plan.

The application of the sequential approach in LP42

77. Irrespective of the contravention of LP42 in respect of the failure to market, the appellant's case also fails to comply with the sequential approach contained in the second part of the policy.

78. There are, in fact three stages to the sequential approach. The first is that there must be marketing for redevelopment for industrial purposes to show that there is no demand for that redevelopment.

79. The next stage is to consider redevelopment for office or alternative employment purposes which are not industrial (at 2). It is only once these stages have been passed that a developer can justifiably turn to consider a mixed use of employment and residential. In this case, the appellant has failed to provide any evidence of the unfeasibility of such redevelopment. In fact, the evidence has clearly shown that there was no consideration of any such developed; Mr Howe stated that he had not and had not been asked to consider such a development[65]. Probably the reason for this is because, had such a development been considered, it would have been both feasible and viable. Mr Weeks provided confirmation that there was a very high demand for commercial development in this area and a market for development of wholly commercial premises on the site, whether in their existing form or in any redevelopment[66]. While Twickenham studios will no doubt make this point, the existence of their offer entirely contradicts any suggestion that industrial redevelopment is not possible on the site.

Summary

80. As a result of this, the second part of the LP42 requirements are clearly contravened as well.

Other Material Considerations

[65] XX.
[66] XX, MRQC.

81. While ordinarily I would deal with material considerations at the end of these submissions (and I will return to them at that stage), it is worthwhile pointing out that the appellant has relied upon two matters to deal with the obvious contraventions of local plan policy in this case. The first relates to what is said to be a contradictory approach by the authority in other cases. The 2nd is that the development will provide for enhanced and upgraded commercial units. I deal with these in turn.

Other examples of Authority Decisions on Industrial Sites

82. The other examples relied upon by Mr Villars[67] are completely inapposite. It perhaps goes without saying that each proposal must be considered on its own merits. It also perhaps is hornbrook law that an authority cannot be estopped from reaching a particular conclusion because of its previous decisions. But neither of these two observations need be relied upon because the other cases involved entirely different circumstances and do not justify non-compliance with LP42 in this case. Ms Dyson[68] has comprehensively dealt with the differences between those cases and this (and Mr Batchelor has done so as well[69]).

The provision of upgraded facilities

83. While it is right that a degree of weight should be attached to the provision of upgraded commercial floor space, it is very limited in this case. That is so for two reasons. First, the provision is made contrary to development plan policy and it would be inappropriate to place any significant weight upon a proposal which intrinsically is operating contrary to policy which seeks to preserve the physical extent of existing industrial land and the preservation of an industrial site as a whole in any redevelopment. Second, the proposal will allow office use within the premises. The extent of this was not capable of being quantified by Mr Villars, but for reasons given below, it is clear that the expectation is that a considerable amount of the premises will be used in that way; Mr Weeks' evidence that he was expecting a substantial amount of office use within the development[70]. Again, it is obviously inappropriate to place any real weight on office floor space which is being delivered in clear contravention of the aims of LP42.

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[67] Proof 3.16.
[68] Rebuttal, CDI21
[69] CDI24.
[70] XX.

The PVLP

84. And so I turn to the PVLP. Policy E4[71] will replace policy 4.4 of the FALP. There is no difference between the parties as to the overarching approach within policy E4 that industrial protection and management will be undertaken on a plan, monitor and manage approach[72]. It follows that it is for local authorities to principally control how they deal with industrial land protection. It is not suggested by the appellant that policy E4 has rendered policy LP42 out of date. Indeed, given the Local management strategy approach set out in policy E4, it is clear that policy LP 42 is consistent with it.

Policy E7 and intensification

85. Rather, the Appellant's approach is to rely upon the terms of policy E7 and suggest that the development amounts to intensification as allowed under that policy.

86. Before I deal with the approach adopted by the appellant, it is to be noted that industrial intensification is not specifically endorsed within the local plan. The London plan has consequently supplemented the local management approach within the borough. There is not an inconsistency/conflict between the plans, but rather a development of the policy approach. As a result, the terms of section 38(5) the 2004 Act are not engaged.

87. Turning therefore to the appellant's case on E7, Mr Villars accepted that the appellants case could not rely upon part C(1) or C(2) of E7 but had to rely upon C(3)[73]. He also accepted the point made by Mr Davidson[74] that to comply with that part of E7, it is necessary to comply with the terms of policy E 2[75].

88. Mr Villars accepted[76] that the Council's area was one "identified in a local development plan document where there is a shortage of lower cost space or workspace of particular types, uses or sizes" under policy E2. He also accepted that E2.C(1) could not be satisfied in this case. It is necessary therefore for the appellant to rely, if at all, upon part E2.C(2) and show that "an equivalent amount of be use class business space is reprovided in the proposal which is appropriate in terms of type use and size".

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[71] pg. 275, CDD2.
[72] See part C of E4.
[73] XX.
[74] EC
[75] XX
[76] XX

89. Mr Villars argument as to why the proposal satisfied this element was, with respect, unarguable. He accepted that the phrase "loss of existing B use class business space" in the first part of the policy referred to physical floor space and the same phraseology in part C(2) had the same meaning. But he argued that so long as the proposal was appropriate in terms of type, use and size it did not matter that the same amount of floorspace was not provided. In short, he read the first part of C(2) ("equivalent amount" etc) and the second part ("in terms of type" etc) as disjunctive. But such a reading of the policy is simply impossible - it fails to acknowledge the words "which is" in the middle of that sentence. The appellant's case was entirely based upon a basic misreading and misunderstanding of the central policy. Read properly, the appellant's case could simply not comply with policy E2. The intensification argument flatly expires on this basis alone.

90. Further and in any event, as Mr Davidson made clear[77], it is not possible to regard substantial losses of existing floorspace as intensification under the London Plan. You will recall his point that part A of policy E7 indicated that intensification had a particular meaning (under (1) – (4) of part A) which did not involve the loss of industrial floorspace (and it is to be noted incidentally that Mr Villars did not seek to rely on any of the elements of part A in making his case). As Mr Davidson said, the clear purpose of the London plan policies was to ensure that intensification led to no loss in floorspace.

91. An argument was made by the appellant that the proposal involved an intensification of employment density. Given that the proper approach is to avoid any substantial loss in floorspace itself, this argument is irrelevant to the London plan policies.

92. However, even if this point does hold some relevance, on the facts, such a contention cannot be made.

93. The Appellant's density calculation morphed as the case went on. The original calculation was contained in Mr Week's proof of evidence. He confirmed that he had relied upon what he thought were the minimum space standards for office developments when reaching the view that there would be an increase in employment numbers on the site from 17 to 50. He acknowledged, however, that the expectation was that the proposed employment space would accommodate B1(b) and (c) type

[77] EC

uses. He accepted that the HCA density calculation guidance[78] showed that these sorts of uses had much lower densities than office uses. If a density of 47 sqm (which is the figure for B1(b) and (c) uses) was used, only 10 - 11 employees would be generated, less than the existing position.

94. Faced with this problem, Mr Villars sought, for the first time, to rely upon the HCA guidance to establish a higher level of employment generation with the proposed floor space. He argued that the proposed space would be occupied by occupiers who fell within "the small business workspace" category and that, therefore, the densities were between 10 and 15 square metres. The problem with that contention was that he failed to recognise the range of densities within that category. Densities for "small business workspace" could be as low as 60 square metres. Again, in these circumstances, the employment generation would be lower than the existing position. And the problems grew from there. Because, importantly, the appellant has absolutely no idea - and more importantly no evidence - to establish what the actual occupation position will be. No attempt was made in the evidence of Mr Weeks to arrive at any sort of conclusion on this point - and he was the appellant's market expert.

95. Additionally, there is an inherent imbalance in the appellant's density calculation approach because, whilst the proposed densities were based on potential occupation, the existing floor space employment position was based on the actual occupation. Any fair calculation of the density differences between the existing and future scenarios should be carried out on an equivalent basis. This would avoid any imbalances arising from, for example, an appellant's possible lack of enthusiasm for the current floorspace when seeking the site's redevelopment.

96. Finally, the density calculations of both Mr Weeks and Mr Villars did not make any provision for the employment potential of the waste site (that is, some 800 square metres with a potential density of 36 sqm[79]).

97. As a result of the above matters, it is simply not possible to endorse the density arguments of either Mr Weeks or Mr Villars.

98. Given the above, there is a clear contravention of the local and strategic industrial protection policies.

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[78] Page 29, CD H16.
[79] Pg 29, CD H16.

C. The Design-Related Objections

99. It was clear from the evidence presented by Mr Sellers that the Council has carefully considered the design aspects of the proposed development. He was clear as to how the development is cramped and contrived, how it is out of character with the local area and unacceptable as a form of design looking at the site in isolation.

100. I deal firstly with the issue of overdevelopment, followed by the effect of the scheme on the BTMs.

Overdevelopment

Policy Issues

101. There was a considerable amount of agreement between Mr Howe and the Council about the relevant approach as a matter of policy.

102. A fundamental tenet of national policy is that any proposal should be sympathetic to local character and history[80] and should add to the overall character of the area over the lifetime of the development[81]. Mr Howe accepted that these aims apply irrespective of the nature of the site being considered – and that must apply to sites which are not very visible. What policy requires (he accepted[82]) is an assessment of the effect on the character of a local area when considering the development in question. Such an imperative is contained in the National Design Guide[83]; this requires that a development be "integrated into its wider surroundings and is based on an understanding of the pattern of build form in the area"[84].

103. The same approach is taken in strategic policy. The FALP[85] requires all new housing development to enhance the quality of local places, considering physical context and local character. The importance of building on the existing character of an area is also identified[86]. In areas of poor or ill-defined character, policy requires that the

[80] para. 127(c), NPPF.
[81] 127(a) NPPF.

[82] XX
[83] CDA3.
[84] pg. 11, CD A3.
[85] Policy 3.5
[86] in policy 7.4., in A. and B.

development should build on the positive elements that can contribute to establishing an enhanced character[87].

104. The PVLP reiterates this point requiring the design-led optimisation of a site by reference to the site's context[88]:

105. In short, the need to respond to existing local character is an essential aim of national policy. While Mr Howe stated that these policies are most applicable to larger, more open sites set within the public realm where members of public can see the development[89], nowhere in the documents is there any such delineation. Moreover, Mr Howe accepted that a distinction is to be drawn between visual effects and effects on character and there may be an effect on character without there being a visual impact[90]. He also accepted that the character of different areas is defined by a kinetic experience, moving from Arlington Road with its character into the Site. Mr Howe agreed that it can be jarring to move from one character area immediately into another area with a different character.

106. Local Plan policy follows the above approach, making an analysis of context and local character central to an assessment of a development[91].

107. Policy LP39 is of particular importance in the context of this site. It is specific about the relevance of looking at local character when assessing backland development, requiring factors to be fulfilled when addressing that issue. Of course, this policy is requiring (consistent with the above) a proposal to consider the character of a local area irrespective of whether it can be seen from public vantage points since it is specifically dealing with backland development. Mr Howe accepted this[92]; he also accepted the policy applied since this was a backland site[93]. Moreover, the policy is specific in saying that development must "reflect the character of the surrounding area". That is so even though it may be backland and there are limited views of it.

<u>The effect of these policies</u>

87 Ibid.
88 policy D3, pg. 115, CD D2.
89 at para. 3.14.
90 XX.
91 Policy LP1.
92 XX and see para. 3.14.
93 XX, in the context of paragraph 9.6.5 of the Local Plan.

108. Mr Howe specifically accepted[94] that these policies establish that:

108.1. it is important to properly understand and characterise the area one is dealing with;

108.2. The focus on a proposal must be on delivering development which positively enhances the character of an area;

108.3. The focus must be on producing development which builds on and reflects the positive characteristics of an area; and,

108.4. It is not sufficient to simply say that the development is better than the existing development.

The Appellant's design approach

109. But the appellant's approach was clearly contrary to these policy requirements. Several references can be identified in Mr Howe's evidence but the essence of his design philosophy in this case was clear in the following: "the proposal largely has to establish its own place with its own identity".[95]

110. What Mr Howe has essentially concluded is that because, the site is backland with limited views of it, he did not need to concern himself with the relationship of the site to the neighbouring character areas.

111. Associated with this, the DAS shows no design options beyond the pre-application scheme; and no evidence has been presented in this inquiry of the appropriateness or inappropriateness of less dense forms of development. In short, the design looked to the site itself without any consideration of whether some more respectful approach was capable of being undertaken or was more appropriate.

The current character of the area

112. As Mr Sellers indicated, and as Mr Howe agreed, the relevant character is defined in the village guidance for East Twickenham[96]. It is fair to note that the area is comprised of some blocks of flats, but, looking specifically around the appeal site, Mr Sellers is plainly right that the predominant character is residential with two storey semi-detached properties. He noted that these properties have a characteristically

[94] XX.
[95] 6.15.2 and 3.14 – 3.17 and 6.15.3.
[96] CDC3, pg. 40.

fine grain with substantial gardens. These characteristics carry over into Heathcote Road. As for the mansion blocks on Arlington Road, these have large plots with generous gardens. These points were all agreed[97].

The character of the Site

113. The important buildings on the Site are the BTMs of course. The importance of the BTMs in character terms is indicated by the fact that, as Mr Howe acknowledged, the BTMs should "inform" the height and scale of the proposal[98]. The BTMs are acknowledged as having an intimacy of scale[99]. The site has no buildings higher than the BTMs, except for the existing chimney. It is possible to gain views of the BTMs from the north of the site. The BTMs have no buildings which obscure the first floor. The view out of the BTM mews is open[100]. The site has no higher buildings than 2 storeys.

114. Additionally, the current route into the site and through to the BTMs is, as Mr Sellers stated[101], essentially the same as it was historically, as far back as the construction of the BTMs[102].

Relationship between the BTMs and the Proposals and the Effect of the Proposal from a Site-wide perspective

115. The problem with the design proposals is that they pay no proper regard either to the local character or to the characteristics of the site itself.

115.1. Looking at the position on the site, the Scheme is overbearing, overdeveloped and cramped. It pays no adequate regard to the scale of the BTMs and essentially ignores them. As just some examples of the situation, the following is to be noticed. The small block is higher than the BTMs by one storey. The larger block is higher than the BTMs by two storeys. At eaves level, the main block is just under 4 metres higher than the BTMs and only a few metres from it (5.26, BS). The small block obscures the eastern BTMs' rear façade[103]. The form and scale of the proposed buildings are different from the BTMs. The use of a false mansard is not to be found in the BTMs. The only similarity is in the use of a yellow stock brick. The small block does not

[97] Mr Howe, XX.
[98] XX and see para. 3.11.
[99] Agreed, Mr Howe
[100] Mr Howe, agreed, XX.
[101] EC.
[102] And see BS, pg 6 – 1905 map.
[103] see visual at BS pg. 16.

have any visual relationship to the BTM it is joined to. The horizontal elements of both the main or small block do not line up with any part of the BTMs. The main block has blocked any view of the BTMs from the northern entrance to the Site. There is clearly no "intimacy of scale" apparent (and agreed) in the proposals.

115.2. Looking northward from within the BTM, the view out is now blocked. The southern elevation of the main block facing the BTMs is 13 metres wide, wider than the width of the accessway between the BTMs and the end elevation of one of the BTMs combined. The spatial relationship between the two BTMs meeting each other is not repeated or reflected in any part of the new development.

115.3. The historic roadway is removed and replaced by a circuitous route.

115.4. There is a dramatic horizontal emphasis in the eastern façade of the main building which clearly emphasises the extent of the development. This can be left to your judgment, Sir, but the position, it is submitted, is clear given the use of the "heavy"[104] balconies and the lack of any real vertical references. The appellant took Mr Seller's observation that the articulation in the eastern facade of the main building was "subtle" as a compliment - far from it, Mr Sellers' point was that it was largely unappreciable and ineffective.

The relationship of the proposals to the surrounding area

116. Again, there has been no attempt to produce a development which is respectful or referential of the local area. Some examples suffice. The generosity of the spatial character in terms of garden space is not apparent. The generosity of the landscaping is not to be found in the development. The gardens are very small, only 4 metre long, and there are no front gardens, only balconies. The flats in the main block face directly on to the shared surface road. The fine grain of the two storey residential properties is not to be found in any part of the development.

117. This is a scheme which has no real regard to the local area. Mr Howe's reliance on the apartment blocks along Arlington Road is unjustified given the predominately two-storey residential nature of the area and the extent of landscaping and generous space associated with the apartment blocks.

The Heritage Effects on the BTMs

[104] Howe EC.

Policy on Heritage Matters

118. The protective nature of heritage policy both at a national level and locally is unquestionable. Heritage assets are as a matter of government policy to be regarded as an irreplaceable resource and should be conserved[105]. The aim in any development is to ensure that such assets can be enjoyed for their contribution to the quality of life of existing and future generations[106]. There is a requirement to consider the opportunities to draw upon the contribution made by the historic environment to the character of a place[107].

119. The government seeks a positive strategy for conservation as set out in the NPPG. The Guidance is clear that development should make a positive contribution to or better reveal the significance of a heritage asset[108]. This is reiterated in the National Design Guide which says that well-designed buildings are those which are influenced positively by the significance and setting of heritage asset[109].

The Assessment in this Case

120. Of course, the assessment of impact in this case is two-fold:

120.1. Harm to the BTMs' significance arising from harm to their setting;

120.2. Harm arising from the loss of fabric.

The Merits of the BTMs

121. No criticism can be sensibly made about the merits of the BTMs. They went through the proper processes of designation[110]. The merits of the BTMs were objected to by the appellant, but the Council considered that they merited designation. Mr Howe accepted[111] that the buildings meet some of the criteria within the SPD *Buildings of Townscape Merit* (CD C8) (particularly, (b), (e), (f)); he accepted that their value lies in the extent of their original fabric and intact nature[112] (at 7.12) and their "unusual survival".

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[105] para. 184, NPPF.
[106] para. 184.
[107] para. 185.
[108] 3/31, in the historic environment section.
[109] para. 47, CDA3.
[110] para. 6.12.1, proof.
[111] XX.
[112] Proof, 7.12 and XX.

122. Mr Howe made some attempt to suggest that the BTMs were not significant since there was no specific mention of them in the relevant part of the Village SPD, but only two sets of buildings are referred to in the whole document[113] of the (at least) 60 btms identified on the SPD plan[114]. The fact that they are identified explicitly on the SPD plan establishes their significance, like all the other btms.

The Setting of the BTMs

123. Mr Howe accepted that the setting is defined by (a) where you can see the buildings from; (b) what you see from the buildings themselves[115].

124. In the present case, the setting includes the views of the BTMs from within the courtyard but also the locations from which the BTMs are perceived at a distance, from the north. These views have been improved with the removal of the various oil tanks; it is to be noted, however, that Mr Howe was unaware of this because he did not know the tanks had been removed when he wrote his proof.

125. The setting includes the views out of the courtyard towards the north with clear views of the roofs against the sky, as Mr Howe agreed[116].

126. The setting allows for views of the eastern side of the eastern BTM at first floor level. None of the existing buildings obscure that view.

127. The setting follows the historic position since the site was, as Mr Sellers noted, largely devoid of any other buildings[117].

The effect on the setting of the BTMs

128. The proposals have a dramatic and destructive effect on the setting of the BTMs. The reason for such a significant effect is because, rather like the approach towards the character of the area generally, Mr Howe considered that the BTMs were largely inconsequential in defining the design approach to the site – "out of sight, out of mind"[118]. With such an approach, it really did not matter what the effect was on the setting of the BTMs.

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[113] buildings opposite Turner (pg. 30) and St Stephen's gardens, pg. 28.
[114] See pg. 13.
[115] XX.
[116] XX.
[117] see BS fig 1, pg. 6.
[118] XX.

129. The views from the north are essentially removed; this cannot sensibly be regarded as "better revealing" the significance of the BTMs.

130. Part of the eastern BTM is covered up and its rear façade is largely obstructed; this cannot better reveal the significance of the BTMs.

131. The BTMs are now viewed against buildings which are up to 4 metres taller at the eaves than the BTMs. That cannot be regarded, sensibly, as conserving the setting of the BTMs. Rather, as a matter of fact, it will remove part of their setting.

132. In the end, Mr Howe's position was clear[119]. He accepted that there was a detrimental effect on the setting of the BTMs but contended that this was outweighed by the renovation works to them. On any realistic basis, the renovation works cannot be regarded as getting close to balancing such harmful effects.

Effect on the Fabric of the BTM

133. It became apparent during the inquiry that the proposals would involve the loss of original fabric of the BTMs, and it is notable that one of the principal reasons for the protection of the BTMs in policy was their untouched nature. There was no apparent reason for proposing the removal works, and it does not seem that there is any necessity for the incursion.

Inevitability of effect on the BTMs

134. Mr Howe argued that any meaningfully sized proposal would have such an effect on the BTMs[120]. However, he undertook no assessments to establish that. Again, there were no other options provided by which he could establish this contention.

Summary

135. As a result of the above, the scheme is plainly a breach of strategic and local design plan policy.

D. Mix of Uses

136. The Council has remaining concerns regarding the mix of uses. These relate, in the main, to the difficulties in co-location in the context of this case arising from the employment units being located to the rear of the site. Ms Dyson explained the

[119] XX.
[120] Para. 7.9.

potential problems arising from that situation, even though the traffic issues have been overcome.

E. Transport

137. The transport issues identified by the Council have been overcome (albeit very late in the day because of the appellant's delay).

138. A revised layout has been provided which addresses the problems associated with the accessway (again, very late in the day).

139. The problems associated with on-street parking are dealt with by the parking permit restrictions contained in the s. 106 obligation. That provision is lawful: it was made clear in *R (oao Khodari) v Kensington Borough Council* [2018] 1 WLR 584 that a no-permit obligation is valid when made under s. 16 of the Greater London Council (General Powers) Act 1974; the current obligation is (when completed) made under that Act in part.

CO2 Emissions and Play space

140. Both of these issues have been resolved through the s. 106 obligation.

F. Other Material Considerations

Housing Land Supply

141. It is quite wrong, however, for the appellant to contend that the Council cannot establish a 5-year housing land supply.

142. There are two aspects to the appellant's case. The first is that the council cannot establish the deliverability of the sites which it has identified on the supply side of the calculation. The second is that the 5YHLS calculation should include a shortfall which arises from applying the PVLP housing requirement to the period 1st April 2019 to 31st March 2020[121].

143. The context needs to be borne in mind. The appellant recognises that the council can establish a 5-year housing land supply against the FALP housing requirement. This is so even if the Appellant is correct in its assertions regarding the supply of sites[122].

[121] Greece statement on housing page 7, first table.
[122] Agreed statement on housing, pg 7.

144. Additionally, the appellant accepts that the housing need figure arising from the SHMA is irrelevant to the five-year housing land supply calculation except in circumstances where the PVLP is not adopted / published before end of March 2021 and this decision is not issued until after that point. Plainly, the decision will be reached well before then. I should add that, even if the decision is not reached until after that point, as Ms Capper has indicated in her contribution to the housing supply agreement document[123], it is quite clear that the government is expecting housing need to be resolved through revisions to the London Plan. This is a material consideration which, properly, overrides the relevant terms of para 73 of the NPPF.

145. Additionally, the housing delivery test results show that no further steps are required to be undertaken by the borough.

146. I turn therefore to the appellant's case. Regarding the contentions that a significant number of the identified sites are undeliverable, they should be rejected. Ms Capper has indicated[124] why it is that the objections made by Mr wood are wrong. That evidence has been supplemented by her contributions to the agreed statement. The fact that the appellant has overstated its case is clear from, for example, the acceptance that the Homebase site was wrongly objected to[125]. Indeed, a site which has been included as providing 80 units by 2025 is very conservative given that there is an expected completion (of the developer) of 453 units by 2024[126].

147. It should be noted that many of the contentions made by Mr Wood rely on the lack of evidence presented to demonstrate deliverability in this case. While that is rejected, such a submission is without any force given the extremely late provision of the detail of the appellant's case on supply matters. As I stated in the housing supply round table, the appellant did not provide (contrary to the Planning Inspectorate guidance) the full details of its case in ether the grounds of appeal or the statement of case. It did not provide anything in advance of the proofs of evidence contrary to the guidance

123 See page 2.
124 CDI23.
125 Pg 4, statement of agreement housing issues.
126 Ibid.

set out in the CMC note. In these circumstances the appellant simply cannot rely upon the absence of information to justify arguments of undeliverability.

148. As a result, the council's supply schedule is robust.

149. The second point which the appellant makes is that there is a need to account for a shortfall of some 332 units, reflecting the alleged failure to meet the PVLP requirement figure between first April 2019 to 31st of March 2020[127]. But the error here is striking. What the appellant has tried to do is apply the PVLP requirement to a period when the PVLP figure was not a housing requirement figure. Between April 2019 and March 2020, of course, the correct figure against which to assess a shortfall or not was that contained within the FALP. As the appellant accepts, there was no shortfall against the FALP during this period.

150. In fact, the appellant's reliance on its contended shortfall derives directly from the AMR calculation which included the shortfall because it was to be expected that the PVLP would have been part of the development plan during the currency of the AMR. But it was not.

151. There is no justification for backdating the PV LP requirement figure. No part of the PVLP indicates that that is what should happen. The fact that the figure is a 10 year figure from 2019 does not justify its substitution for the FALP figure since it was in draft. Rather, the figure is a 10-year figure which provides the basis for an annualised housing requirement figure when the PVLP is formally published. There is nothing in the NPPF which indicates that there should be backdating of the figure to a point before the figure was adopted.

152. Accordingly, the appellant's calculation against the PVLP[128] requirement should be rejected.

Affordable housing and housing provision generally

[127] Pg. 8, ibid.
[128] Pg 8, ibid.

153. It is recognised that there is a substantial shortfall in affordable housing within the borough. However, the weight to be attached to this factor is, as Mr Davidson indicated, moderate or (as Ms Dyson termed it) reasonable. There are two reasons for this.

154. First, the need for affordable housing must be viewed in the light of the other policy imperatives contained within the development plan. Significant weight cannot be attached to affordable housing when its delivery arises directly from a contravention of to important policy restrictions (waste and industrial protection). The plan has made a balance between these various needs and the plan strategy is to protect these sorts of sites from residential development which in the ordinary course of events will deliver affordable housing. LP42 itself shows that industrial is more significant to residential proposals by placing mixed use proposals at the bottom of the sequential hierarchy of development options. The plan strategy itself therefore has deemed the weight to be placed upon affordable housing delivery as lower than the weight to be attached to existing industrial/safeguarded waste site protection; there is no suggestion by the Appellant that the basis for such protection – i.e. the limited amount of industrial land in the Borough and the importance of ensuring waste sites are protected – is out of date. In these circumstances, it is entirely reasonable to give only moderate weight to affordable housing.

155. Second, and more basically, the affordable housing offer is simply policy compliant. No greater level of affordable housing has been provided beyond the expected 50% the shortfall is viability justified but that does not make it exceptional.

156. Similarly, with regard to housing delivery generally, while there are some benefits associated with this, it is, as Ms Dyson indicated, to be given little or no weight. The same reasons above apply: the only way in which residential development is realised is by contravening clear protection policies; it would be illogical to give such housing provision substantial weight when the up to date local plan has placed greater weight on the protected sites.

The Argued benefit of Ceasing the unneighbourly waste use

157. The appellant has sought to rely upon the complaints which have been made about the site in the past to argue that there would be a substantial benefit arising from the

cessation of the waste use. That contention should be rejected, it is submitted. First, the local plan makes clear that it is a particular feature of the borough that industrial uses take place near residential premises. Secondly, there is very limited evidence of any recent complaints relating to the site. Most of the complaints were made 10 years or more ago. Many of them relate to issues (like gas smells) which are unattributable to the appeal site or (like hours of use issues) which are common to any industrial use. Moreover, there is little evidence that the complaints were substantiated. Thirdly, and in any event, this material consideration cannot be given any significant weight because the waste plan for the borough was drafted in the clear knowledge that this site was reasonably close to residential premises, and the conclusion was reached that the site should be safeguarded. That was even though an attempt had been made during the plan making process to de-allocate the site. Consequently, if these complaints were given overriding significance, that would side-step the plan making process.

Economic benefits

158. No real weight should be placed on the suggested economic benefits associated with the redevelopment scheme. The economic benefits also need to be balanced against the loss of income generating industrial floor space; as Ms Dyson indicated[129], the overall effect is a net disbenefit.

159. Additionally, any economic benefits associated with additional spend through the construction and operation of the site would also be experienced if there was a policy compliant redevelopment of the site for wholly industrial purposes.

Brownfield Land Use

160. The NPPF is only supportive of the use of brownfield land which is "suitable"[130] and where there are "appropriate opportunities". Plainly, proposals which involve the development of land in contravention of the industrial and waste protection policies could not be regarded as either suitable or appropriate. As a result, this factor should be given no real weight.

[129] EC.
[130] Para. 118(c).

G. The Balance

161. In any planning application /appeal determination it is necessary to conclude whether a proposal is in accordance with the development plan under section 38(6) of the 1990 Act. In this case it is clear that the proposal is contrary to the development plan. This is the case whether or not the PVLP replaces the FALP.

162. As a result, the appeal should be dismissed unless material considerations indicate otherwise.

163. Those material considerations have been dealt with above, and as Ms Dyson has stated, they do not come close to establishing that permission should nevertheless be granted. They are generally only to be given some weight and whether or not the contraventions of industrial and waste policies are viewed in isolation or cumulatively, they cannot realistically provide any reasonable basis for concluding that permission should be granted.

164. As I have indicated above, the appellant cannot establish a 5YHLS shortfall, and as a result, the tilted balance in paragraph 11 of the NPPF is not engaged. Even if it were, again it is absolutely clear that the harm arising from the loss of this waste and industrial site and the heritage and design harm caused by the scheme would significantly and demonstrably outweigh the benefits. The conclusion on the tilted balance could not reasonably be decided otherwise.

165. As a result of the above, the appeal should, it is respectfully submitted, be dismissed.

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