Neutral Citation Number: [2019] EWHC 2219 (Admin)

Case Nos: CO/178/2019 and CO/179/2019

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

IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

AND IN THE MATTER OF AN APPEAL UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Judgment handed down at:
Royal Courts of Justice, Strand, London, WC2A 2LL

Date: 27/08/19

Before:

MR JUSTICE KERR

- -

Between :

LONDON BOROUGH OF TOWER HAMLETS	**Claimant/ Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendants/ Respondents**
- and -	
(2) ANGELIC INTERIORS LIMITED (in Administration)	

- -

Mr Matthew Reed QC and **Mr Matthew Fraser** (instructed by **Tower Hamlets Legal Services**) for the **Claimant/Appellant**
Mr John Jolliffe (instructed by **Government Legal Department**) for the **First Defendant/First Respondent**
Ms Saira Kabir Sheikh QC and **Mr Ned Westaway** (instructed by **Jones Day Solicitors**) for the **Second Defendant/Second Respondent**

Hearing date: 9th July 2019

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Approved Judgment

The Hon. Mr Justice Kerr:

Introduction

1. This is an unusual case in which a planning inspector allowed appeals against rebuilding orders made after the unlawful demolition by persons unknown of three unlisted buildings in a conservation area of Tower Hamlets. The inspector effectively reasoned that the demolition had done more good than harm as it would lead to suitable development of the site. Although there was no current proposal to develop it, he was confident there soon would be.

2. The claimant and appellant (the council) applies for statutory review of, and appeals against, the inspector's decision on 17 December 2018 to allow three appeals against the relevant enforcement notices issued by the council on 21 August 2017, requiring recreation in facsimile of the demolished buildings at 2, 4 and 6 East Ferry Road, London E14 (nos. 2, 4 and 6). Waksman J granted permission on 26 February 2019 for both challenges to proceed.

3. The council asserts that the decision to allow the appeals and quash the enforcement notices proceeded from a misinterpretation of paragraph 196 of the National Planning Policy Framework (NPPF) and was irrational and inadequately reasoned. The defendants and respondents (the Secretary of State and Angelic Interiors) defend the reasoning and decision. They assert that the decision discloses no error of law, is rational and adequately reasoned.

4. One of the main areas of debate before me was whether the "public benefits of the proposal" (in the words of NPPF paragraph 196) should extend to likely benefits of new development of a site, facilitated by demolition of buildings on the site, where there is no current application for planning permission to develop the site; or whether those words are restricted to the public benefits of demolishing the buildings, without considering any likely future development.

The Facts

5. Two of the three houses were built in 1858 to 1860. The third was added in 1886. They are Victorian workers' cottages. No. 6 was, it has been presumed, reduced to a ruin by bomb damage during the Second World War. It is shown as a ruin on a 1949 map. Experts consider them to be the last remaining dwellings from the Victorian workers' district of Cubitt Town which formed the south eastern side of the Isle of Dogs.

6. In 1975 the area called Coldharbour was designated as a conservation area. It formed a narrow strip between the docks to the west and the river to the east, including Bridge House Quay. The conservation area included listed buildings but did not then include Nos. 2, 4 and 6, which were not listed buildings. They were not considered to have major architectural significance.

7. In 1981, no. 4 was adapted by the addition of a second floor in a new gable end facing the street. In 1984, the façade of no. 2 was reconstructed. In 2005, the council was not committed to retaining the three houses, unlisted and then outside the conservation area, and was in discussions about possible development of the land on

which they stood, which would have involved their demolition. But those discussions did not bear fruit; the houses stayed.

8. In 2008, the conservation area was extended to include part of East Ferry Road, including the three houses. In 2010, Cubitt Town was defined as falling within a "very high growth" area in the council's core strategy. The site had no allocation in the emerging local plan but, the inspector noted, was suitable for "high density housing projects" in an area already destined for major housing growth in the borough with the largest housing demand in London.

9. The inspector thought the houses were "not the last fragment of a historically significant but now lost development"; rather, they were "three remnant buildings in a sea of modern development". To suggest that this made it all the more important to preserve them was "to adopt a collector's mentality". He considered that they have "no great historic significance", because of "the substantial modern changes they had undergone".

10. In June 2016, the council received a complaint that the three houses had been demolished, without planning permission. The demolition was illegal and may have been a criminal offence. The council tried to find out who had done it. To this day, they have not prosecuted anyone. A gentleman named Magus Davey has since produced a witness statement admitting responsibility for the demolition but asserting that he did so in good faith not realising the council would be unhappy about it.

11. The council then used its power to serve enforcement notices, all dated 21 August 2017, requiring the three houses to be rebuilt in "facsimile". More than three such notices were served, because it was then unclear who owned the site and the houses. For present purposes, nothing turns on that lack of clarity about ownership. Eventually it became clear, and is now common ground, that the site is owned by Angelic Interiors, now in administration.

12. Angelic Interiors was never a property developer. It did not at any time apply for planning permission to demolish the three houses, nor to construct any new development on the land on which they stood before being demolished. However, Angelic Interiors did not want to rebuild them and therefore, in September 2017, appealed against the three enforcement notices served on it.

13. In a pre-inquiry email of 7 November 2018 the inspector, Mr Simon Hand, gave expression to what he regarded as the main issues. These included what the likely future of the three houses was; "should they have been demolished anyway because they were dangerous or would they have been bound to go sometime in the future when the whole area was redeveloped"; or "should they have been restored and remain as part of an improvement scheme…".

14. The inspector would have to consider, he added, if the houses should not have been demolished, whether it would be reasonable and proportionate to require them to be rebuilt. Was there, he asked, "a difference between concluding that it was premature to demolish the buildings without an acceptable scheme for replacements, and now arguing that having been demolished they should be rebuilt". If rebuilt, "what will the rebuilt buildings look like?", he asked.

15. Following a site visit on 12 November 2018, the inquiry was held on 13 and 14 November. The inspector received written and oral closing submissions from counsel. Mr Reuben Taylor QC argued that there was no proposal to develop the site, nor any indication of a future proposal or funding for such a proposal; and that the demolition had harmed the significance both of the conservation area, a designated heritage asset, and of the buildings themselves.

16. He submitted that since the harm caused to the significance of the conservation area was not disputed, there was conflict with various local policies and although the harm was less than substantial, paragraph 196 of the NPPF required a balance to be struck, giving great weight to the less than substantial harm to the significance of the conservation area. There would have to be a clear and convincing justification for the harm.

17. Mr Taylor submitted that there was none. No definable public benefits fell to be weighed on the other side of the balance; there was "no evidence of any … appetite for redevelopment of this site", nor that any concrete development proposal would be made. Angelic Interiors had said it wished to sell the land but there was no evidence that its administrators had decided to do so. There was no public benefit to weigh against the admitted harm, he argued.

18. For the administrators, Mr Ned Westaway submitted in written closing argument that an acceptable scheme for redevelopment "would be forthcoming" and would provide a better solution "in heritage terms" than facsimile reconstruction. He took issue with the council's proposition that likely future redevelopment must be disregarded because there was no current proposal. Furthermore, the historic value of the buildings was low; "the case for their heritage significance is notably weak".

19. Mr Westaway dismissed as "wholly unrealistic" the proposition that because the inspector could not himself grant planning permission for an alternative scheme, he must proceed on the assumption that the site would be left empty if the orders to rebuild were set aside. The "development opportunity" is "a material consideration as it flows directly from the grant of permission for demolition". Development would, for sure, follow on after sale of the site.

20. Accepting that paragraph 196 of the NPPF was "engaged", he argued that the "public benefits of the proposal" included "securing its optimum viable use" and that meant considering likely future development, as a public benefit flowing from the demolition, although the only evidence was of a scheme called the "Turner scheme" prepared by architects as "a suggestion of the kind of scheme that can and should come forward for this site".

21. The inspector issued his written decision on 17 December 2018. He allowed the three appeals and quashed the enforcement notices. He granted retrospective planning permission for demolition of each of the three houses, subject only to a condition that a scheme for the "interim treatment" of the site must be submitted to and approved by the council, to keep the site tidy and in good order.

22. Leaving aside issues not relevant for present purposes, his reasoning was in summary as follows. He described as "too simplistic" the council's argument that there were no public benefits to weigh in the scales against the (less than substantial) harm to the

significance of the Coldharbour conservation area. He was willing to weigh on the public interest side "the history of potential and actual development in the area", evidenced by the Turner scheme.

23. He then set out the history and the characteristics of the houses. He assessed the degree of harm to the significance of the conservation area as at the very low end of the "less than substantial category" and the historic interest of the three houses as minimal. He turned to the benefits "that might flow from the demolition". He noted that the council itself had been willing to countenance demolition of the houses and development of the site in 2005.

24. He pointed to the undoubted pressure to build new homes; 3,931 needed to be built each year from 2015 to 2025. While there was no concrete planning application and the future of Angelic Interiors was in doubt, the site was a "prime location" for new flats, as the Turner scheme illustrated. As there was no current planning application, he described the benefits of housing development at the site as "speculative"; but it was "highly likely" a suitable proposal could be found.

25. Balancing that public interest against the harm done by the demolition, the balance came down in favour of the demolition having done more good than harm. The harm was very low, the buildings had very little historic significance and were in poor condition and would probably have been demolished anyway to make way for a comprehensive development scheme. Those benefits "outweigh the harm identified", he decided.

26. He granted planning permission for the demolition accordingly. He added that had his decision been more finely balanced, he considered whether the remedy of a "complete rebuild" would be "proportionate". While agreeing that it is "important that the loss of historic buildings should not be seen to be condoned", he questioned the need for rebuilding dwellings of "such low historic significance". He took the view that it would not be proportionate to require complete rebuilding.

Relevant Law and Policy

27. The power to issue an enforcement notice for breach of planning control is found in section 172 of the Town and Country Planning Act 1990 (the TCPA 1990). The notice must state the breach of planning control and specify the steps needed to remedy it (section 173 of the TCPA 1990). An interested person may appeal to the Secretary of State against the notice (section 174(1)). An appeal may be brought on various grounds (section 174(2)).

28. Those relevant here are in sub-paragraphs (a) and (f). Omitting irrelevant parts, under (a), the ground is that "in respect of any breach of planning control … constituted by the matters stated in the notice, planning permission ought to be granted …". Under (f), the ground is that "the steps required … to be taken … exceed what is necessary to remedy any breach … or … to remedy any injury to amenity … caused by any such breach".

29. The Secretary of State (in practice, personified by an inspector) may, where the appeal is allowed, "grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control …" (section

177(1)(a)). In considering whether to do so, the Secretary of State "shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations" (section 177(2)).

30. Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the PLBCAA 1990) gives special status to buildings, whether or not listed, in a conservation area. In the exercise of planning functions "special attention shall be paid to the desirability of preserving or enhancing the character or appearance" of the conservation area (section 72(1) of the PLBCAA 1990).

31. It is a crime, as well as a breach of planning control, to cause or permit demolition of a building in a conservation area without planning permission: section 196D(1) of the TCPA 1990. This is subject to a defence of urgent necessity on safety grounds, with the burden of proof on the defendant (section 196D(3)).

32. The NPPF states government policy in planning cases, which must be treated as a material consideration. The correct interpretation of its provisions is a matter of law for the court, but it should not be construed as though its provisions were statutory or terms of a contract; many of its broad statements of policy pull in different directions. The weight to be given to conflicting considerations is a matter of planning judgment, not a question for the court.

33. Section 16 of the NPPF deals with "[c]onserving and enhancing the historic environment". Heritage assets are irreplaceable and should be conserved in a manner appropriate to their significance (paragraph 184). By paragraph 189, under the sub-heading "[p]roposals affecting heritage assets" local planning authorities "[i]n determining applications" should require the applicant to describe the significance of affected heritage assets including any contribution made by their setting.

34. Paragraph 192 requires local planning authorities to take into account, when determining planning applications:

> a) the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
>
> b) the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
>
> c) the desirability of new development making a positive contribution to local character and distinctiveness.

35. When considering "the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance" (paragraph 193).

36. Any harm to or loss of a designated heritage asset should require "clear and convincing justification" (paragraph 194). Where the harm to the significance of the heritage asset concerned will be less than substantial, that harm "should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use" (paragraph 196).

37. Paragraph 198 reminds us that heritage assets should not be lost to plans that are then not executed. Local planning authorities "should not permit the loss of the whole or part of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred".

38. The council emphasised, and I accept, that the phrasing of the NPPF, and numerous paragraphs of the accompanying Planning Practice Guidance (PPG), treat development proposals as effectively synonymous with planning applications to develop land. The council stresses that in the present case the only current "development proposal" was what could be called demolition *simpliciter*, without any application to build on the site afterwards.

39. The parties also drew my attention to the following passage in the PPG, at paragraph 020, in the context of "[d]ecision-taking: historic environment":

> **What is meant by the term public benefits?**
>
> Public benefits may follow from many developments and could be anything that delivers economic, social or environmental progress as described in the [NPPF] … Public benefits should flow from the proposed development. They should be of a nature or scale to be of benefit to the public at large and should not just be a private benefit. However benefits do not always have to be visible or accessible to the public in order to be genuine public benefits.
>
> Public benefits may include heritage benefits, such as:
>
> - sustaining or enhancing the significance of a heritage asset and the contribution of its setting
> - reducing or removing risks to a heritage asset
> - securing the optimum viable use of a heritage asset in support of its long term conservation.

40. I will avoid unnecessary citation of guiding authority. The principles are well known. Material considerations must be taken into account (here, as expressly provided in section 177(2) of the TCPA 1990) but the weight to be given to them is a matter for the judgment of the decision maker. Decisions must pass the test of rationality but must be read without undue legalism. Reasons must deal with the principal controversial issues but need not be discursive.

41. In the statutory review proceedings, the validity of the inspector's decision is questioned under section 288(1)(b) of the TCPA 1990 on the grounds that his action was not within the powers conferred on him by the TCPA 1990 or was taken without complying with the relevant requirements of that Act. In the appeal proceedings, the council, relying on the same case, appeals "on a point of law" under section 289(1) of the TCPA 1990.

42. In the context of appeals under section 289 of the 1990 Act, CPR 52PD paragraph 26.1(15) provides that "[w]here the court is of the opinion that the decision appealed against was erroneous in point of law, it will not set aside or vary that decision but

will remit the matter to the Secretary of State for re-hearing and determination in accordance with the opinion of the court".

The Issues, Reasoning and Conclusions

43. I record first certain matters of common ground. First, demolition of the three houses has caused harm, but less than substantial harm, to the significance of the Coldharbour conservation area. That was also common ground before the inspector. While there is no requirement to quantify the "less than substantial harm", the inspector found that it was at the lowest end of the spectrum.

44. Second, it is common ground that, in the phrase "the impact of a proposed development on the significance of a designated heritage asset" (NPPF paragraph 193), the "proposed development" here is demolition *simpliciter* of the three houses, without redevelopment or any concrete plan for redevelopment of the site; and the "designated heritage asset" is the Coldharbour conservation area.

45. Similarly, in paragraph 196 of the NPPF, the "development proposal" causing harm that "should be weighed against the public benefits of the proposal", in the present case denotes, and denotes only, the demolition *simpliciter* of the three houses, again without redevelopment of the site or any concrete plan to redevelop it. The "designated heritage asset" is, again, the conservation area.

46. The main issue in the case is therefore whether the correct interpretation of paragraphs 193 and 196, read in their context, permit an inspector to have regard to non-specific but likely future development proposals which, if they were implemented, would deliver a public benefit that could in principle outweigh the harm to the significance of a designated heritage asset.

47. This inspector treated the likely implementation of future development proposals as relevant. He treated the current absence of a specific proposal as a matter going to weight not relevance; the public benefit was "speculative" and the weight to be given to it "reduced accordingly". The council says that was a misinterpretation of the NPPF, irrational and a failure properly to perform the inspector's duty under section 72 of the TCPA 1990.

48. I paraphrase the main arguments of Mr Matthew Reed QC, for the council, as follows:

    (1) The "public benefits of the proposal" in paragraph 196 means the public benefits consisting of the proposal; thus, the phrase refers only to the public benefits, if any, of the demolition *simpliciter* of the three houses, without any plan for any replacement buildings.

    (2) The policy of paragraph 196, read in context, is that heritage assets should be preserved unless and until the harm their loss would cause is properly justified by benefits that will be delivered by the development which causes the harm.

    (3) Speculative future benefits that may arise if permission to demolish is given but are not secured by the demolition itself as part of a development proposal or by a condition or via a planning obligation, do not count as public benefits; otherwise, permission can be given for developments harmful to the significance of heritage

assets, leaving sites empty and without any concomitant benefit to the public outweighing the harm.

(4) The NPPF and PPG are replete with references to a "proposed development" and a "development proposal", the latter phrase being interchangeable with "an application" (e.g. in paragraph 197 of the NPPF). Those references all pre-suppose that "development" is something that creates not just destroys, i.e. more than just demolition.

(5) Unauthorised demolition in a conservation area is a crime and it would be odd for the crime to benefit the public. The council's interpretation is also supported by section 17(3) of the PLBCAA 1990, which includes the safeguard that consent to demolish a listed building may be made subject to a contract for and grant of planning for "redevelopment of the site".

(6) The respondents' proposition that public benefits need not be certain of accomplishment (relying on *Mansell v. Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2018] JPL 176 and *R (Shimbles) v City of Bradford MDC* [2018] EWHC 195 (Admin), [2018] Env LR 25) does not address the heritage assets context and does not extend to purely theoretical future benefits, where there is no "fallback" proposal linked to an existing proposal and no firm intention on anyone's part to develop at all.

(7) The inspector's decision allows the site to remain undeveloped for ever, contrary to paragraph 198, not mentioned in the decision, stating that authorities "should not permit the loss of the whole *or part* of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred" (counsel's emphasis).

(8) Even if the inspector correctly interpreted paragraph 196, it was irrational to conclude that the market would deliver public benefits sufficient to outweigh the harm: the local plan said nothing about the site; Angelic Interiors merely asserted an intention to sell it but had not tried to; there was no buyer, no sign of even an embryonic plan to develop, no design or project team, no funding and nothing to indicate when if ever these things would appear; and there was no examination of appetite for development that would retain the replacement buildings and build round them.

(9) The inspector's reasons were insufficient; he did not adequately address these points. To refer to the "indicative" Turner scheme and to say that the benefits were "speculative" and the weight given to them "reduced accordingly" was not sufficient to address the detailed arguments about the absence of any present development proposal. Nor did he appraise possible development that would retain the replacement buildings.

(10) The council could not properly understand why it had lost the appeals unless the inspector explained how the benefits of granting permission for the demolition would necessarily result in public benefits that would outweigh the harm, to be given great weight, to the significance of the conservation area which the demolition would cause.

49. For the Secretary of State, Mr John Jolliffe made submissions which I paraphrase briefly, thus:

(1) The inspector should not have to blind himself to material considerations. The public benefits of a proposal, for the purposes of paragraph 196 of the NPPF, include any benefit that flows or is likely to flow from the proposal. If the proposal is demolition of existing buildings, the inspector cannot realistically ignore benefits likely to result from the site being vacant.

(2) Although the "proposal" here was demolition *simpliciter*, without any present application to develop the site, the benefits in paragraph 196 include "where appropriate, securing its optimum viable use", i.e. optimum viable use of the heritage asset; that language is wide and embraces more than just the benefits directly flowing from the demolition of the three houses; it embraces potential as well as actual benefits.

(3) The council's interpretation of the provisions, if accepted, would make the appeal process in the present case arid and futile; the appellant could not hope to win the appeal. The court should lean against such a stilted and technical approach to the provisions, unless constrained by clear words not found in the provisions.

(4) The council's submissions to the inspector appeared at times to accept that a balance had to be struck; yet, on the council's case now, there is no balance to strike because the factual content is all on one side of the balance and none on the other.

(5) The inspector is required by section 177(2) of the TCPA 1990 to take account of all material considerations. He is therefore not permitted to overlook a material consideration, even if it consists of an event – a viable development application – that has not yet happened but is, objectively, very likely to happen because of the surrounding circumstances.

(6) Here, the likely future event is a viable planning application to develop the site. The inspector was bound as well as entitled to have regard to the ripeness of the site for housing development and the pressing need for it. The weight to be attached to that consideration was a matter for his planning judgment, short of irrationality.

(7) The criminality of the demolition is not relevant; it is part of the regime for securing observance of the planning laws but says nothing about the result those planning laws should produce in appeals such as these. The threshold for judging the inspector's decision is that of rationality and the criminal law does not assist with applying that threshold.

(8) The reasons challenge lacks merit because it is obvious from the written decision why the inspector decided the appeals in the way he did. If he was permitted to take account of likely future development, it is plain that he did so and he gave cogent reasons for doing so; namely, the need for housing in Tower Hamlets, the suitability of the site for providing it and the readiness of players in the market to meet the demand.

(9) Even if the inspector erred in law, it is highly likely that he would have allowed the appeal under section 174(2)(f) of the TCPA 1990 ("… that the steps required … to be taken … exceed what is necessary to remedy any breach or … to remedy any injury to amenity … caused by any such breach"). He saw the merits of the conservation area as so limited that he regarded the requirement to rebuild as disproportionate, as he stated.

50. For Angelic Interiors, Ms Saira Kabir Sheikh QC made submissions mostly consistent with Mr Jolliffe's which I do not repeat; and she made certain further points including, in my paraphrase:

(1) Appeals against enforcement notices where there has been a breach of planning control are remedial, not (unlike the criminal law) punitive; hence, lesser measures than required under the enforcement notice must be considered where appropriate: section 174(2)(f) of the TCPA 1990, and see *Tapecrown Ltd v. First Secretary of State* [2006] EWCA Civ 1744, [2007] 2 P & CR 7, per Carnwath LJ (as he then was) at [46].

(2) Material considerations in planning law are not limited to what is certain, as demonstrated by the decisions in *Mansell* and *Shimbles*. The heritage context does not alter that. Whether a public benefit is too remote is for the inspector to decide, not the court, within the bounds of rationality. It is a question of fact and degree, not one of interpretation of the NPPF.

(3) Paragraph 198 of the NPPF did not feature in the council's submissions to the inspector and is not germane; there was no loss of the whole or part of a heritage asset. The three houses were not heritage assets. The inspector properly rejected a condition that a redevelopment plan must be produced within one to two years; redevelopment could be left to the market.

(4) The inspector properly considered the Turner scheme probative of what the market would be likely to produce. He was entitled to give such weight to it as he thought fit. His decision on the balancing exercise was a classic exercise of planning judgment which cannot be faulted. The council's submissions merely amount to disagreement with the outcome.

(5) Once it is accepted that the inspector did not misinterpret the NPPF provisions, it cannot be said that he failed to perform his duty under section 72 of the PLBCAA 1990, nor that his decision was other than rationally grounded, nor that the reasoning was inadequately set out so that the council did not know why it had lost the appeals.

(6) If the inspector were found to have misinterpreted the NPPF provisions, then it would be accepted that he would not necessarily have allowed the appeal under section 174(2)(f) of the TCPA 1990, which the inspector abbreviated to "the proportionality of the requirement to rebuild". But if he correctly interpreted the NPPF provisions, he would clearly have allowed the appeal under ground (f).

51. Turning to my reasoning and conclusions: I begin with the statutory provisions. Section 174(2)(a) of the TCPA 1990 enables an appeal to be allowed on the ground that planning permission ought to be granted, but only "in respect of any breach of

planning control … constituted by the matters stated in the notice". Section 177(1)(a) likewise empowers only the grant of planning permission on appeal "in respect of the matters stated in the enforcement notice as constituting a breach of planning control".

52. The matter stated in the notice was, and was only, demolition of the three houses. Therefore, the inspector could only allow the appeals under ground (a) by granting planning permission for demolition *simpliciter*. He could not have granted planning permission for a scheme for development of the site, even if one had been before him. Permission for any such scheme would have to have been sought from the council, not the inspector in the appeals.

53. The application of those provisions in this case is slightly odd and artificial. When the inspector determined the appeals, he had to decide whether to grant planning permission for demolition *simpliciter*, since that was the only unlawful act against which relief was sought in the appeals. Yet, had Angelic Interiors sought permission from the council for demolition *simpliciter*, armed with only the Turner scheme and an avowed intent to sell the site, it is hardly likely the council, or any local planning authority, would have granted it.

54. The provisions of the NPPF are statements of national policy, not statute. Their focus tends to be prospective, on what should be permitted to happen in the future, rather than whether there should be retrospective validation of what has happened in the past. As everyone agreed, the inspector was nonetheless required to treat the relevant NPPF provisions as material considerations. He was right to do so.

55. In the context of harm to the significance of a heritage asset, here the conservation area, the balancing exercise that the inspector had to undertake was, on the "harm" side, to balance the harm done by demolition *simpliciter*, not unlawful development such as adaptation of the three houses. Put crudely, it was demolition of the houses, without any replacement, that had to do more good than harm. The public benefit had to come from the site being vacant.

56. It is counter-intuitive to propose that unlawful (and criminal) demolition of buildings forming part of a conservation area, harming the significance of that conservation area, can do more good than harm. No sensible planning application to demolish would be made on that basis and a planning consultant suggesting such an application would soon be short of clients.

57. Still, for the inspector's decision to be lawful, and for the challenges to fail, it has to be a defensible conclusion that demolition without replacement, leaving the site razed to the ground and vacant, without any replacement development, and doing harm to the significance of the conservation area, is more good than bad. Baldly stated in that way, the proposition is remarkable.

58. My first thought on hearing argument was that the proposition cannot be correct. If only demolition is on the table, and demolition is harmful, how then can it do more good than harm? Can it be good and bad at the same time, and more good than bad? At this stage, considerations of "proportionality" (inaccurate shorthand for the section 174(2)(f) ground of appeal) do not arise.

59. I have found this part of the case difficult. The difficulty in the heritage context is highlighted by the wording of the NPPF provisions. As the council points out, they are replete with references to new development: "a proposed development" (paragraphs 193 and 195), "a development proposal" (paragraph 196) and "the new development" (paragraph 198).

60. These provisions all refer not to the ashes from which the phoenix will rise, but to the phoenix that will rise from them. They refer to what is intended to be built, not to a vacant site. That is the natural reading of the words. Yet, in the present case, the "proposed development" is, artificially, the unlawful demolition and nothing else. The NPPF provisions, on the other hand, assume not just a future intention to develop but a positive proposal to do so.

61. The question remains whether, absent such a proposal, the gap can be filled by invocation of likely future development. It is also worth remembering that demolition *simpliciter* is not always purely harmful. Circumstances may change materially between service of an enforcement notice and the hearing of an appeal. For example, the condition of the site might deteriorate. There could be ground contamination or flooding.

62. With those thoughts in mind, I found considerable force in the council's interpretation of the provisions and in particular paragraph 196 of the NPPF. But in the end, I have concluded that the council's interpretation is too purist. I remind myself that the inspector faced with these appeals was not conducting a legal and intellectual exercise. He was considering pragmatically the situation on the ground.

63. I consider, after reflection, that the respondents are correct to rely, in the present context, on the *Mansell* decision as authority that planning benefits do not have to be certain to be material. The objective likelihood of a benefit being enjoyed in future must be relevant to weight, even short of certainty, a commodity as rare in planning as in other walks of life (death and taxes apart).

64. This can be tested by supposing there *had* been a concrete proposal to develop the site. The council might have argued that the proposal was far fetched, would never happen, the developer was likely to become insolvent, and so forth. The council would, in that scenario, be asking the inspector to measure the objective likelihood of the claimed benefit being delivered. Conceptually, the position is no different where no actual proposal is yet on the table.

65. The circumstantial evidence (of the market, the need for housing and so forth) is still logically probative of the objective likelihood of the benefit being delivered. There might be a draft proposal, or a half complete draft proposal. If so, the inspector would have to evaluate them. Similarly, he was right to evaluate the probative force of the Turner scheme, indicative though it was, against market conditions and demand for housing of the type considered in it.

66. To put the point another way, if the balance of good and harm can change post-demolition, for example by supervening ground contamination or a post-demolition planning application, I see no reason why the balance cannot also change post-demolition by the advent of an uncertain "*Mansell*" benefit, or by a change in the

degree of likelihood (for example, by changes in the market or demand for housing) that it will accrue to the public.

67. Viewed in that light, the issue seems to be essentially one of remoteness. It must, then, be an issue for factual evaluation by the inspector and for his planning judgment, controlled by the threshold of rationality. In the end, I accept the submission of Ms Kabir Sheikh QC that the inspector could have decided that the benefits were too remote, but he did not.

68. I accept the respondents' interpretation of the heritage provisions in the NPPF with a degree of hesitation. I am conscious that it is a liberal construction and not a strict pro-heritage construction such as the council is advocating. Nevertheless, on balance I think the respondents' is the correct one, bearing in mind that the NPPF provisions are statements of policy not law and the language of the provisions is not restricted in the way the council contends.

69. For completeness, I would add that I do not find persuasive the argument that if the council's interpretation were correct, the appeals would have been arid and futile and bound to fail. In very many cases of outright unlawful demolition of buildings, harming the significance of a heritage asset, an appeal is highly likely to fail, and rightly. If it were otherwise, unscrupulous persons might be encouraged to damage heritage assets, thinking they could get away with it on appeal. No one should think that.

70. I therefore reject the first ground of challenge. I come next to the second and third grounds. In my view, they could not succeed independently of the first ground. The respondents are correct to point out that the charge of irrationality and absence of adequate reasoning comes back to whether or not the inspector misapplied national policy.

71. If he correctly applied the regime of the NPPF, the absence of a current and concrete development proposal does not make future development prospects an immaterial consideration. If it is a material consideration, he must take it into account (section 177(2) of the TCPA 1990). On that footing, it was not irrational to do so.

72. I reject the council's free standing contention that, quite apart from the interpretation of the NPPF provisions, it was irrational to decide that the market would produce suitable and beneficial housing development soon. It is true that the inspector could not say what type of development that would be, nor that it would certainly occur; but those were points he was entitled to weigh when considering the public benefit side of the balance.

73. I do not see any want of rationality in reasoning that the site would soon attract developers like flies to a honeypot and that this would probably have led to demolition of the three houses soon anyway. The circumstantial evidence supporting that finding was not lacking: the prime location, the pressing need to build housing in the borough, the appetite shown by other housing developments nearby, the indicative Turner scheme and the intention to sell and strong likelihood of sale of the site for development.

74. As for the reasons challenge, did the inspector properly set out his thinking? Manifestly, he did. The reasoning need not be discursive. It is commendably succinct but clear and full. He explained exactly why he was confident that delivery of the public benefit he anticipated could be left to the market. He made all the points I have just mentioned, in support of his conclusion. The council cannot complain that it does not know why it lost the appeals.

75. I did consider carefully whether the reasoning touches adequately on the possibility of a development scheme that would leave the three houses intact, whereby the developer would build round them and keep them in place. If the inspector had simply assumed, without considering the issue properly, that the public benefits derived from anticipated development would be lost unless the demolition were permitted, that could have been a flaw in the reasoning.

76. However, I have concluded that the inspector did adequately, though briefly, consider this point and that it was a matter for his planning judgment. His consideration of likely development proposals such as the one illustrated by the Turner scheme (involving 22 new dwellings) included the council's 2005 discussions which would have involved demolition of the three houses.

77. He observed (paragraph 30) that there appeared to be "no constraints that would prevent a housing scheme of significantly greater density than 3 units from being successful on the site". And at paragraph 34 when carrying out the balancing exercise, he opined that permitting the demolition would deliver the public benefits of "redevelopment of the site with a much larger number of dwellings than would be the case if the demolished houses were rebuilt".

78. To conclude, I am satisfied for all those reasons that the inspector did not err in law by misinterpreting the relevant provisions in section 16 of the NPPF, principally paragraph 196; nor did he reach a conclusion that was too speculative to be rational; nor did he explain his reasoning insufficiently. None of the three grounds of challenge is made out and all must fail.

79. For completeness, I add that had I found any flaw in the decision, I would not have accepted the argument that the decision should be left to stand because of the high likelihood that the inspector would have allowed the appeal on the basis of section 174(2)(f) of the TCPA 1990, stated in abbreviated form as "proportionality".

80. The inspector dealt with this issue briefly at paragraph 35 of the decision. He acknowledged that the enforcement system is remedial and not punitive and that the only possible remedy for unlawful demolition is a complete rebuild. He must therefore have rejected the application of the first limb of section 174(2)(f): that "the steps required…to be taken…exceed what is necessary to remedy any breach".

81. Rather, he appears to have been of the view that the second limb of (f) applied: that the complete rebuild required to remedy the breach would "exceed what is necessary…to remedy any injury to amenity … caused by any such breach". I have difficulty with that reasoning. What was the "injury to amenity" caused by the unlawful demolition? The inspector did not say. He did not say there was none, though he clearly thought it was limited.

82. I would have thought the injury to amenity must be the loss of a sense of history experienced by viewers passing by the three houses who are given a window into the past heritage of the lost working class district of Cubitt Town, a perspective to set against the modern Docklands developments nearby. How could that injury to amenity be remedied by doing nothing? The inspector did not say.

83. I do not think it could be and I do not think section 174(2)(f) could properly have been invoked by the inspector, had he erred in any other way. The *Tapecrown* decision is not in point; it was a case about unlawful development, not unlawful demolition. The issue was whether lesser measures than outright demolition would suffice to right the wrong done. No lesser measures than a complete rebuild could be proposed here. It is an all or nothing case.

84. Nonetheless, for the reasons already given I must dismiss the appeal and the application for statutory review. I do so without much enthusiasm, reminding myself that the enforcement system is remedial not punitive. I must put aside the affront to the rule of law and criminal activity seen in this case, as well as the loss of the three houses and their contribution to our historic environment, however limited some may consider it. My discomfort does not make the inspector's decision unlawful and I must and do uphold it.