



Case No: AC-2024-LON-001321

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2024] EWHC 2368 (Admin)

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 10 September 2024

BEFORE:

MRS JUSTICE LANG DBE

BETWEEN:

THE KING
on the application of

JAMES FRANCIS PATRICK MONAHAN

Claimant

- and -

LONDON BOROUGH OF CAMDEN

Defendant

LAB SELKIRK HOUSE LIMITED

Interested Party

MR R HARWOOD KC (instructed by Goodenough Ring Solicitors) appeared on behalf of the Claimant

MS M ELLIS KC (instructed by London Borough of Camden Legal Department) appeared on behalf of the Defendant

MS J WIGLEY KC (instructed by Town Legal LLP) appeared on behalf of the Interested Party

JUDGMENT
(Approved)

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MRS JUSTICE LANG:

1. The Claimant renews his application for permission to apply for judicial review of the decisions made by the Defendant (“the Council”) to grant the Interested Party (“the IP”) planning permission and listed building consent for a substantial redevelopment at the eastern end of New Oxford Street, issued on 7 March 2024.
2. The Claimant is a local resident and retired architect who objected to the planning application on his own behalf and also as a member of the community coalition called “Save Museum Street” (“SMS”).
3. There are two grounds of challenge:
 - (i) the Council failed to consider whether there were alternatives to the height of the proposed tower, contrary to London Plan Policy D9;
 - (ii) the Council failed to have regard to its Site Allocations policy which allocated the West Central Street part of the site (Site 18) for mixed use development that required harm to designated heritage assets to be avoided.
4. Permission to apply for judicial review was refused by Mould J on the papers on 14 June 2024.

Planning History

5. The IP applied for, and has been granted, planning permission as follows:

“Redevelopment of Selkirk House, 166 High Holborn and 1 Museum Street following the substantial demolition of the existing NCP car park and former Travelodge Hotel to provide a mixed-use scheme, providing office, residential, and town centre uses at ground floor level. Works of part-demolition and refurbishment to 10-12 Museum Street, 35-41 New Oxford Street, and 16A-18 West Central Street to provide further town centre ground floor uses and residential floorspace, including affordable housing provision. Provision of new public realm including a new pedestrian route through the site to link West Central Street with High Holborn. Relocation of cycle hire docking stations on High Holborn.”

6. Selkirk House is a 17 storey building (53.6 metres above ground). The West Central Street component of the site falls within the Bloomsbury Conservation Area. Within this block, 10-12 Museum Street and 35-37 New Oxford Street are Grade II listed while the remainder are identified as positive contributors to the conservation area. The site is two blocks away from the British Museum.
7. The IP also applied for, and was granted, listed building consent for “alterations, including part demolition to 10-12 Museum Street and 35 and 37 New Oxford Street to provide flats and townhouses ...” including details.
8. Under the proposed development, Selkirk House is to be demolished from ground level upwards and replaced by a 19 storey building (73.95 metres above ground level), some 20.35 metres taller than at present. The scheme proposes a net increase in floor space of the buildings from 21,553 square metres to 28,309 square metres. The hotel in Selkirk House will be lost, along with car parking, and replaced in the main by offices. 19 flats, a 6 unit house in multiple occupation and 11 serviced apartments will be lost, but 44 residential flats created.
9. Consultees were highly critical of the proposed development. I refer to the summary of responses helpfully set out in the Claimant’s Statement of Facts and Grounds. Historic England objected saying:

“The proposals would harm the conservation area and through their settings multiple listed buildings by the considerable increase in the tall buildings height and bulk.”

They emphasised that Bloomsbury Conservation Area was one of the most important conservation areas in London and said:

“Situated just outside the conservation area the considerably enlarged tall building would exacerbate the existing visual discordance and contrast of scale with the historic townscape to the north... The proposed tower would have a particularly harmful impact, however, in views from certain important places in the Bloomsbury Conservation Area that offer some of the finest experiences of the area’s special character.”

10. By reference to the 2021 version of the National Planning Policy Framework (“NPPF”) Historic England advised:

“Paragraph 195 is clear that local authorities, when considering proposals that affect a heritage asset, should seek to avoid or minimise any conflict between the conservation of the heritage asset and any aspect on proposal. In practice, that means less harmful alternative solutions should be fully explored before any application for the current scheme was determined.”

11. Ms Ellis KC correctly points out that the final sentence that I have just cited from the Historic England letter, beginning with the words “In practice”, is not part of the NPPF text.
12. The Georgian Group and the Victorian Society, who are statutory consultees on listed building consent applications, objected to the adverse impacts of the proposed 19 storey building on the Conservation Area and heritage assets. SAVE Britain’s Heritage also lodged an objection, referring to the excessive height of the tower.
13. SMS objected, saying that no evidence had been presented to justify the increase in height and footprint of Selkirk House which would be harmful to heritage assets, and there was a failure to demonstrate that alternatives had been explored. SMS drew up an alternative scheme. The planning officer’s report (“OR”) said “[t]his is not taken into consideration” (OR 4.15).
14. The application was referred to the Greater London Authority (“GLA”), pursuant to the Schedule to the Town and Country Planning (Mayor of London) Order 2008, because it included a proposal for a building more than 30 metres high. GLA officers expressed concerns about the development. The GLA’s Stage 1 report said, at paragraph 72:

“The proposal would replace an existing unattractive and poor quality 17 storey building with a new tall building, which at 19 storeys and with a broader footprint, is significantly taller and bulkier than the existing building. The impact of the existing building are therefore exacerbated.”

15. In regard to heritage assets, it stated at paragraph 77:

“Harm to heritage assets would be contrary to London Plan Policy HC1(c), however, the NPPF heritage balance would also be triggered in accordance

with the NPPF. This harm would need to be able to be weighed against the public benefits of the proposal. London Plan Policy D9 also requires development proposals for tall buildings to take account of and avoid harm to London's heritage asset and their settings and requires clear and convincing justification for any harm and demonstration that alternatives have been explored and that clear public benefits outweigh that harm. GLA officers retain the view that a further reduction and height a refinement to mass of 1 Museum Street would lesser the harm.”

16. The GLA Deputy Mayor informed the Council that the application did not comply with London Planning Policy D9(C), for the reasons given in the GLA stage 1 report.
17. The Council's Planning Committee considered the application at their meeting on 16 November 2023.
18. Section 10 of the OR, titled 'Conservation and Heritage', stated at OR 10.2:

“Policy D9(C) on tall buildings is also relevant and states development should avoid harm to heritage assets and their settings which will otherwise require clear and convincing justification demonstrating that alternatives have been explored.”

The OR advised that the increased building height and bulk in the form of the scheme's proposed tower and the loss of buildings would have an adverse impact on listed buildings and the Bloomsbury Conservation Area (OR 10.18).

19. Discussing the replacement for Selkirk House the OR said both the additional height and associate massing would cause harm (see OR 10.1 and 10.42). It noted the harm from the existing building but identified specific harm as a result of the increased size of the tower (see OR 10.44, 10.46 and 10.47). The OR advised that there was less than substantial harm to designated and non-designated heritage assets. However, the OR went on to conclude that the significant economic, environmental and social benefits which the proposed development would deliver outweighed the less than substantial harm to heritage assets and so recommended that planning permission and listed building consent be granted.

20. The Committee accepted the OR's recommendation by 7 votes to 2. The GLA decided not to intervene because, in its view, the harm to heritage assets was outweighed by the public benefit of the scheme.

Legal Principles

21. The principles to be applied in considering challenges to the adequacy of a planning officer's advice was set out in *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314; 29 PTSR 1452, per Lindblom LJ at [42].
22. There is no general principle of law that the existence of alternative schemes is a mandatory material consideration when determining a planning application. That is the position even where the proposed development would cause adverse effects which are held to be outweighed by beneficial effects (see *R (Substation Action Save East Suffolk Limited) v Secretary of State for Business Energy and Industrial Strategy* [2022] PTSR74 at [209] - [211]). However, an alternative scheme will be a monetary material consideration, if so required by statute or policy, or where it is so obviously material that it would be irrational not to consider it (see *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2010] 1 PNCR 19).
23. Whilst the interpretation of a planning policy is a matter of law, its application in any particular case is a matter of planning judgment for the decision maker, subject only to challenge on irrationality grounds (see *Tesco Stores Ltd v Dundee CC* [2012] PTSR 903).

Grounds of challenge

24. Despite the strong objections to this development on the grounds of harm to heritage assets, including the Bloomsbury Conservation Area, this Court cannot substitute its view of the planning merits for that of the Local Planning Authority and so permission to apply for judicial review will only be granted if the Council's decision-making discloses an arguable error of planning law.

Ground 1

25. In Ground 1, the Claimant submits that the Council failed to consider whether there were alternatives to the height of the proposed tower, contrary to London Plan Policy D9.
26. London Plan Policy D9(B) states that tall buildings should only be allowed in areas identified in the development plan by the local planning authority. This Council has not identified any such areas.
27. Policy D9(C) states that development proposals should address the impact listed, which include at (C)(1)(d):

“proposals should take account of, and avoid harm to the significance of London’s heritage assets and their settings. Proposals resulting in harm will require clear and convincing justification, demonstrating that alternatives have been explored and that there are clear public benefits that outweigh that harm.

The buildings should positively contribute to the character of the area.”

28. The Council was required to have regard to the provisions of the development plan under section 70(2) of the Town and Country Planning Act 1990. The development plan includes the London Plan.
29. The Claimant contends that the Council failed to consider the alternative of a lesser tall building as required by Policy D9(C)(1)(d). In my judgment, Policy D9(C)(1)(d) does expect and require alternatives to have been explored by the point where proposals are being presented. The nature of any such alternatives will vary depending upon the site and the scheme. In this case, the obvious potential alternatives were the construction of a less tall and/or intrusive building, or the redevelopment of the existing Selkirk House.
30. In my view, it is clear that the IP and the Council did consider these alternatives. The IP’s Planning Statement, the Design and Access Statement and the Townscape Visual Impact and Heritage Report described how the current scheme had evolved over a number of years, following consultation with the Council, the GLA, Historic England and the stakeholders. The scheme had been reassessed in the light of the recent listing of some of the building in 2023. As a result roof extensions were removed from listed buildings in the northern block, and a one storey reduction made to the east and most building in the northern block. The current scheme included comprehensive and

substantial amendments made to an earlier scheme submitted in 2021, including the removal of two storeys from the height of the tower from 21 to 19 storeys, with the stated aim of preserving and enhancing designated heritage assets.

31. This history was recognised in the OR, at OR 11.45 to 11.50. At OR 11.50 the OR stated the changes made sufficiently addressed the comments made by the design panel and therefore needed no further review. The changes to the scheme were also referred to at the Committee Meeting. At OR 27.10, the planning officer also recognised that the IP had:

“... sought to mitigate harm as far as possible, this scheme having evolved from an earlier proposal where the tower was higher and there were more significant works to the West Central Street block.”

I accept the submission that this passage indicates that the Council accepted that it was not possible or viable for the IP to make further reductions. The Council’s independent viability consultant confirmed the scheme was on the edge of viability (OR 7.25 to 7.31).

32. In my view, it would be artificial and unreal to hold that consideration of alternatives at the site, prior to the submission of the current scheme and in the context of an earlier scheme, could not be relied upon when assessing compliance with the policy requirement in Policy D9(C)(1)(d). In my view, the approach taken in the OR, which gave an account of the various iterations of the proposed development was rational and appropriate on the facts of this case.
33. The IP’s Planning Statement, at paragraph 5.17, stated that detailed consideration had been given to the retention of the existing buildings upon site, particularly Selkirk House. A detailed Retention and Redevelopment Options Review and Whole Life Carbon Comparison were submitted with the application. The OR recognised that options for re-use of Selkirk House, instead of demolition, had been fully explored. The OR considered that “these would not have been able to deliver on as many of the social, economic and public role objectives of the development” (OR 18.56). The conclusion in the OR also discussed alternatives to demolition (OR 27.1, 27.4). In my view, there was no legal requirement for the Council also to assess the SMS scheme for re-use of the existing buildings. However, it was circulated to Committee Members in

advance of the Committee Meeting and referred to at the meeting, so it was not overlooked.

34. The OR expressly referred the Committee to London Plan Policy D9(C)(1)(d) at OR 10.2 and it was applied at OR 27.10. Therefore members were aware of the need to consider alternatives and, in my view, they applied the policy requirements lawfully, in the exercise of their planning judgment.
35. For these reasons, I agree with Mould J that ground 1 is unarguable and does not have a realistic prospect of success, therefore permission is refused on ground 1.

Ground 2

36. In Ground 2, the Claimant submits that the Council failed to have regard to its Site Allocations policy, which at Site 18 allocated the West Central Street part of the site for mixed-used development but required harm to designated heritage assets to be avoided.
37. In 2013, the Council adopted its Site Allocations document which forms part of the development plan. Site 18 covers “land bound by New Oxford Street, Museum Street and West Central Street”. It includes the northern block of the development, that is the West Central Street buildings, but not the southern part where Selkirk Tower is situated. Buildings identified in the explanatory text to the Site Allocation policy as making a positive contribution to a conservation area include 16A, 16B and 18 West Central Street which are to be demolished under the proposed development scheme.
38. The material part of the policy states:

“Development will be expected to:

...

- Retain and preserve the architectural and historic character of the listed buildings under heritage assets on the site.
- Preserve and enhance the character and appearance of the Bloomsbury Conservation Area, the setting of listed buildings including the British

Museum and sustain and enhance the other buildings which positively contribute to the conservation area ...”

39. The OR only referred to the Site Allocations policy in the section titled “Principle of development” at OR 6.8, as follows:

“6.8 Adopted Camden Site Allocations (2013) designate the WCS block for mixed use development by conservation, extension or partial redevelopment for mixed use development.”

It is clear that OR 6.8 did not reference the policies on heritage harm in the Site Allocations document.

40. At OR 6.9, the OR also summarised the emerging Site Allocations document but observed that it had not been through examination in public and so had limited weight at this time. The emerging Site Allocations document is not relied upon by the Claimant in this case.
41. The Site Allocations policy was not listed in the section titled “Policies and Guidance” though the “Draft Site Allocations Plan (2020)” was listed.
42. Importantly the Site Allocations document was not included in the summary of policies set out in section 10 of the OR on Conservation and Heritage. In section 10, the OR summarised the relevant provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990; the relevant Local Plan and London Plan policies; and the NPPF. The OR went on to apply the statutory and policy provisions to the proposed development, identifying less than substantial harm to the heritage assets to which great weight should be given. In the conclusions (at OR 27.10 and OR 27.14), the OR identified two breaches of heritage policies - Policy D2 of the Local Plan and Policy HC1 of the London Plan.
43. I accept the Claimant’s submission that the OR ought to have considered the Site Allocations policy in OR section 10 on Conservation and Heritage and, if it had done so, it is arguable that the OR would also have identified a breach of that policy. The fact that the policy uses the word “expected” rather than “required” and that the general provisions of the policy talk of guidelines and flexible application, depending upon the

circumstances does not mean that a breach can be overlooked. After all, a decision maker can only apply a guideline flexibly if they first consider the policy.

44. The Council and the IP submit that the omission is of no significance because similar or more restrictive policy provisions on heritage harm are to be found in the general heritage policies which were taken into account by the Council. I accept the Claimant's submission that it is arguable that the significance of the Council's error was that it failed to take into account its allocation policy for this particular site. Arguably the allocation policy did not form part of the Council's consideration of whether the proposal accorded with the development plan as a whole, and so whether the statutory presumption in favour of the development plan supported or opposed the scheme.
45. When refusing permission, Mould J considered that the planning officer would not have lost sight of the Site Allocations policy as he had earlier referred to it at OR 6.8. However, I am concerned that Committee Members would not have had the Site Allocations policy in mind as a heritage policy, or when applying the advice given by the planning officer in his conclusions at OR 27.9 to OR 27.14, because it had not been identified to them as such, either at OR 6.8 or in section 10 of the OR.
46. However, if the heritage harm provisions of the Site Allocation policy had been properly drawn to the attention of the Committee Members, in addition to Policy D2 of the Local Plan and Policies HC1 and D9 of the London Plan, I consider it is highly likely that the outcome would not have been substantially different because the Committee would still have concluded that the overall heritage harm, including the Allocations policy, was outweighed by the benefits of the proposed development. The policies and the heritage harm which the Committee did consider covered essentially the same ground as the Site Allocations policy. The OR applied the NPPF, which was fully set out at OR 10.14, and applied it in the 'Conclusion', at OR 27.10 and OR 27.11. At OR 27.14, the OR concluded:

“In conclusion, the proposed development does conflict with policy D2 of the Local Plan and HC1 of the London Plan but there is not considered to be conflict of the development plan as a whole. This scheme will deliver new homes and jobs, as well as safer, more attractive and more inclusive public realm. The architectural design of the new buildings is very high quality. The proposals would assist in delivering the objectives of growth in the Tottenham

Court Road Growth Area and contribute to the Council's wider vision and objectives for this part of the borough, including a balance mix of uses, including housing and affordable housing, significant provision of offices and other employment facilities, an excellent public realm and optimising densities. Taking account of the policies of [the] development plan and all the material planning considerations, the proposals would deliver significant social environmental and economic benefits that outweigh the less than substantial harm to heritage assets and it is therefore recommended that planning permission be granted."

47. In my view, even if the OR had also identified the Site Allocations policy, as well as a breach of that policy in regard to heritage harm, I consider that the OR's recommendation would have been the same and that recommendation would have been accepted by the Planning Committee. Therefore, applying section 31(3)(d) of the Senior Courts Act 1981, it is highly likely that outcome would not have been substantially different if the conduct complained of had not occurred. Accordingly, I refuse permission on Ground 2 also.

48. In conclusion, permission to apply for judicial review is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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