

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

CO/1185/07

BETWEEN

**THE QUEEN
On the application of
KINGS CROSS RAILWAY LANDS GROUP**

Claimant

- v -

LONDON BOROUGH OF CAMDEN

Defendant

- And -

**(1) ARGENT (KING'S CROSS) LIMITED
(2) LONDON & CONTINENTAL RAILWAYS LIMITED
(3) EXEL PLC**

Interested Parties

**SKELETON ARGUMENT ON BEHALF
OF THE FIRST DEFENDANT**

For hearing: 24th May 2007

Time Estimate: 1 ½ days

Reading Time: ½ day

RECOMMENDED READING

Claimant's Grounds	[1/10-36]
Witness statement of Michael Edwards	[1/37-60]
March Committee Report:	[1/124-178]
Section 7	[1/354-387]
Minutes of March Committee	[1/179-86]
Correspondence	[1/187-216]
November Committee Report	
Main Report	[1/217-241]
Appendix 1	[1/395-422]
Appendix 3	[1/423-433]
Appendix 11	[1/434-442]
Minutes of November Committee	[1/261-275]
Transcript of 16th November Meeting	[1/443-483]
Draft PPS3, Annex A	[1/349-352]
PPS3, Annex B	[1/309-323]

REFERENCES IN THIS SKELETON

[x/y] are to **[Bundle No./page]** pages in the **2 Bundles**
CGy are to paragraph **n** the **Claimant's Grounds**
CSkz are to paragraphs in the **Claimant's Skeleton**

INTRODUCTION

1. By Order dated 23rd February 2007 Collins J. directed a “rolled up hearing” of the Claimant’s application for judicial review of the London Borough of Camden’s decision, taken on 16th November 2006 and notified in Decision Notices dated 22nd December 2006, to grant the various permissions and consents necessary for the King’s Cross Central Redevelopment.
2. This Skeleton Argument is filed on behalf of the London Borough of Camden, (“LBC”). LBC resists the application for judicial review. For the reasons set out in detail below, LBC submits that:
 - (1) the primary question for the Committee to determine was whether the applications before it were in accordance with the development plan. The Committee concluded that the applications were in accordance with the development plan. The Claimant does not challenge this conclusion or the basis on which it was reached;
 - (2) the Committee was correctly advised as to the status of the 9th March resolution and as to its powers on 16th November 2006. There is no merit in the Claimant’s contention that members of the Committee misunderstood that advice;
 - (3) even if (which is not accepted) any of the Councillors’ comments were not an entirely accurate summary of the legal advice provided to the Committee, that does not in itself justify the challenge. The reasons for the Committee’s decision were found in its formal resolution; and have not been challenged;
 - (4) the Defendant was not required to take the matter back to Committee because, following the meeting on 16th November 2006 but before the Decision Notices were sent, PPS3 had been issued. It is not claimed that PPS3 as a whole required the application to be referred back to Committee, simply that a single definition within it so required. In fact, there was no significant change between the draft PPS3 and the final PPS3, no change in relation to the relevant definition, and in any event the shared equity and shared ownership products being provided as part of the development are “affordable housing” within the definition of PPS3.

BACKGROUND

3. This section should be read together with the Defendant’s Statement of Facts (issued separately).
4. In these proceedings, the Claimant challenges one outline planning permission, four listed building consents and four conservation area consents, applications for which

had been made by Argent (King's Cross) Ltd ("Argent") in May 2004.¹ The permission and consents all relate to the redevelopment of the Kings Cross Railway Lands, and for the purposes of this challenge, no distinction is drawn between them.

5. The redevelopment of the Kings Cross Railway Lands has been proposed for many years. LBC, with its neighbour the London Borough of Islington, has carried out major community consultation on the King's Cross area over a five year period. The proposal has been the subject of statutory consultation in the development plan process and non statutory consultations in connection with the SPG. Full details of this consultation (which the Office of the Deputy Prime Minister has described as an example of best practice) are set out in the accompanying Defendant's Statement of Facts. As appears from that Statement, both the Claimant and the local community have been given every opportunity to influence and shape the development process, and the Claimant has been actively involved throughout it.
6. The applications were considered by LBC's General Purposes (Development Control) Sub-Committee ("the March Committee") over two days on 8th and 9th March 2006 [179-186].
7. The March Committee received advice from officers in a report of over 670 pages which set out in detail the proposals, the development plan, material policies, relevant considerations, representations received on the applications and the recommendations of officers ("the March Report", excerpts at [1/124-178]). LBC draws attention to the following aspects of the March Report:
 - (1) the Report set out the numerous components of comprehensive development in the wider King's Cross Opportunity Area, of which the Argent scheme is a major part. In particular, it described the complex programming required for delivering the £1bn investment in transport infrastructure at the King's Cross/St Pancras interchange, much of it below ground (paras 1.5.6. – 1.5.6.10 [1/128-129]) and noted that elements of the Argent proposals were "on the programme's critical path" (paras 18.4.5-18.4.7 [2/703-704]).²
 - (2) the Claimant's objections to the proposal were set out at para 3.12.66 of the March Report [2/687]. The issues raised by the Claimant in relation to housing were all covered in Section 7 [1/354-387]. The "heritage objections" to the loss of the listed buildings were covered (over 80 pages) in Section 9;
 - (3) appended to the Report were letters dated 27th October 2004 and 28th November 2005 from English Heritage, in which English Heritage welcomed the proposals and advised that there was sufficient justification for the demolition of the listed buildings [708-716] and [736-745].

¹ See Claimant's grounds para 3 [11] for a complete list

² See further the Defendant's Statement of Facts

No part of the March Report or the Members' decision upon it has been challenged in these proceedings.

8. Besides receiving the March Report and taking written representations, a significant part of the meeting in March was taken up allowing individuals and organisations (including the Claimant) to make verbal representations to the Committee.
9. Against this background, on 9th March the Committee resolved **[1/183-185]**:
 - (1) that outline planning permission should be granted, subject (inter alia³) to completion of the necessary Section 106 agreement ("the Agreement", the proposed Heads of Terms for which were before the Committee);
 - (2) that it was minded to grant the other applications, subject (inter alia) to the grant of outline planning permission; and
 - (3) that LBC's Director of Culture and Environment be granted delegated authority to finalise the terms of the Agreement, subject to the Agreement being referred back to the Committee for final consideration

("the March decision"):

10. In accordance with the March decision, the applications were reported back to Committee on 16th November 2006 for consideration of the Agreement which had been negotiated in the intervening period. In that same period:
 - (1) Local elections had brought about a change in political control at LBC, with corresponding changes in the composition of the Committee;
 - (2) LBC had adopted its Replacement Unitary Development Plan ("RUDP");⁴
 - (3) The Claimant, through its then solicitors Earthrights, had written to LBC, urging it to reconsider the March Committee's decision: see letters of 8th September 2006 **[187-203]** and 18th October 2006 **[207-212]**. Denton Wilde Sapte had responded on behalf of the Council, indicating that the Committee would be made aware of the issues raised, but that "the recommendation to the Committee will be that there are no changes in circumstance that would justify the Committee reaching a different view to that reached ... on 9th March": see letters of 29th September 2006 **[204-206]** and 6th November 2006 **[213-216]**. DWS's letter of 29th September 2006 specifically asked

³ The other contingencies were that the Mayor of London confirmed that no direction would be issued (which he subsequently did, on 17th March 2006) and the Government Office for London confirmed that there would be no call-in (which it did on 11th April 2006)

⁴ NB however that the RUDP was at a relatively advanced stage at the time of the March Committee, and that its policies were referred to in the March Report with a recommendation that "significant weight" could be attached to them: see paras 2.4.2-2.4.3 of the March Report **[143]**.

Earthrights to confirm that there were “no other concerns that have not been raised” [1/206]. It will therefore be noted that Earthrights did not ask to LBC to reconsider the matter afresh on the simple basis that the Committee had a discretion to reach a different conclusion. Earthrights’ request for reconsideration was specifically made on the basis of alleged defects and omissions in LBC’s consideration of the applications in March. None of the seven separate areas of concern raised in connection with the March Decision have been pursued in this Claim.

11. In advance of the meeting on 16th November 2006, the November Committee received a further report (“the November Report”) which, with appendices, ran to almost 900 pages. At paras 3.3.1-3.3.3 the November report provided an update on the following aspects [1/227-228]:

- (1) The Mayor of London had determined that he did not wish to exercise his powers of direction, and was content for Camden to proceed with decision-making
- (2) The Government Office for London responded similarly on behalf of the Secretary of State, commending Camden for its assessment

12. Advice on the nature of the March resolution and the scope of the November Committee’s powers was set out in paras 3.4.1-3.4.8 of the November Report [1/228]. The adoption of the RUDP was dealt with in paras 3.5.22-3.5.28 [1/231]. Additional matters raised by Earthrights were dealt with in an appendix to the Report: see Appendix 11 [1/434-442]. It is significant that:

- (1) In their letter dated 11th December 2006, EarthRights solicitors stated that they agreed that "*the advice in paragraph 3.4.2 of the November Committee Report was correct*": [1/286]. This advice was that the Council could review the applications afresh and if, so minded, reach a different conclusion. Even now the Claimant does not contend otherwise;
- (2) No complaint is made by the Claimant that the November Committee was not made aware of the issues raised in Earthrights’ letters, nor (save for the Claimant’s argument that the November Committee misunderstood the extent of its power to view the applications afresh) is there any challenge to the adequacy of the way in which those matters were dealt with.

13. Extracts from the advice presented in the November Report are set out para 27 of the Claimant’s Grounds [1/17]. The November Report also advised that [1/233]:

“3.5.38 In the March Committee Report Officers advised that there was no material departure from the development plan. Having taken account of the adoption of the RUDP, and considering the development plan as a whole, Officers remain of that view.

3.5.39 Committee will need to consider whether they agree with this conclusion. If not Committee will need to consider whether that departure warrants a different overall conclusion ...”

14. In addition to the November Report, the November Committee received oral advice, inter alia from officers and from Mr Stephen Ashworth of Denton Wilde Sapte. A transcript of the debate is at [1/443-483]. In particular:

(1) In introducing the application, the Chair of the Meeting (Cllr Dawn Somper) explained that [1/447]:

“I’m just going to say a few words about why we are considering this matter tonight. It’s because the March Committee specifically asked [us] to approve the King’s Cross Section 106 agreement.

Members will have read the report and the appendices, I hope, including the section 106 and as members are aware the report has been specifically endorsed by Timothy Corner QC...

Section 3.4 of the report deals with the nature of the March resolution. It says that legally we are not restricted tonight to just looking at the section. 106. However, it also sets out potential consequences of amending the March decision without a proper planning justification and leading counsel has advised that in his view, although there have been some changes in planning circumstances ... these are not significant and don’t justify decisions that are inconsistent with those made in March.”

(2) LBC’s planning officer, Mr Robert West, advised (inter alia) that [1/449]:

“... our recommendation is that taking everything into account, the decision of the March Committee to grant the various permissions should be ratified. The principal issue for consideration by this committee should therefore be whether the final drafting of the 106 agreement reflects the heads of terms adequately that the Council resolved to approve in March. It is no surprise that there is a lot of legal scrutiny from external advisors and you now have the QC’s opinion as the chair has referred to. This says that you may take the recommended decisions.”

(3) Cllr Abrahams specifically sought clarification of leading counsel’s view that the application complied with the relevant policies. Stephen Ashworth, from Denton Wilde Sapte, explained that [1/451]:

“The policy which he [leading counsel] is concerned with talks about the percentage of houses that need to be built out. That is expressed as a target. Counsel’s view is that where a target is expressed in those sort of terms that it is for the Committee to decide as to whether that target is achieved and if you don’t hit 50% you can still be in accordance with the Development Plan.”

(4) Cllr Sue Vincent sought clarification of the advice in para 3.4.2 of the November Report, noting that it advised that “we can review afresh ... as long as we have clear justification” [1/465]. Stephen Ashworth replied that:

“The Councillor is quite right. The legal position is as set out in the report, that it is open to Committee to consider afresh the applications in front of them. As the report makes

clear the advice from leading counsel and others is that there are no circumstances which would justify a [fresh/different?] decision.”

15. Further extracts from the discussion at the meeting are set out in **CG28-31 [19-21]**. Concerning the quotation (at **CG28.4**) from the observations of Cllr Rea, what Cllr Rea said (in full) was **[1/479]**:

“I am encouraged by some of the things you [Roger Madelin, Argent] have said tonight. I came tonight thinking this is a really tight corset we’re going to have to be squeezed into, there’s no way out. Our legal advice says so, we’re going to vote for it. And now you’re actually talking about all the flexibilities that might come and I’m really encouraged by that. But I want to make sure that with those flexibilities Development Control still keeps a handle on any changes

So, although I was against the proposal in March, I still think there are things I don’t like, I have hopes that over the next ten, fifteen years some of these things will get put right.”

16. Concerning the adequacy of the affordable housing, comments made by Mr Edwards on behalf of the Claimant recognised that members had been advised that the Committee was free to reach a different conclusion, and urged them to do so. In particular, Mr Edwards said **[1/453]**:

“I would say in relation to the comments made earlier that the committee has a discretion to decide whether a departure from the targets is material or not. That is down to the Committee – there is no dispute about that ...”

17. The November Committee also received advice from Mr West concerning the timescales for delivery of the King’s Cross scheme. In his introductory comments to the November Committee, the planning officer Robert West referred to the suggestion made in deputations that there was plenty of time for longer consideration of the Argent proposals, but pointed out that “the rest of the King’s Cross world is moving along rather quickly” and that the relationship between the applications before the Committee and other projects (such as the opening of St Pancras Station for the Channel Tunnel rail link and the redevelopment of the Kings Cross station concourse in time for the 2012 Olympics) did not leave LBC with the luxury of much time.

18. Following the above debate, the November Committee resolved:

- (1) Subject to (3) below, and to certain limited amendments, to approve the s. 106 Agreement;
- (2) Subject to (3) below, to endorse the conditions and informatives set out in Appendix 1 and 2 of the Report;
- (3) To give the Director of Culture and Environment delegated power to make minor drafting amendments to the conditions, informatives and the section 106 Agreement;

- (4) That planning permission, conservation area consents and listed building consents be granted.

It will be noted that each of these was voted on separately, i.e. although the application had been referred to the November Committee for consideration of the s. 106 Agreement, Members were specifically asked to consider, as a separate issue, whether planning permission should be issued.

19. In resolving that the permissions and consents should be issued in accordance with the draft decision appended to the November Report, Members agreed that the reason for their decision⁵ was that:

“The proposed development is in accordance with the policy requirements of the adopted London Borough of Camden Unitary Development Plan 2006.”

The Claimant does not challenge this conclusion.

20. On 11th December 2006, Earthrights wrote to Denton Wilde Sapte, arguing that the matter should be put back before the Committee because (1) (so it was alleged) the Committee misunderstood its powers; and (2) there was allegedly a “new material consideration”, namely the fact that PPS3 had been published on 29th November 2006 [284-297].
21. Upon receipt of the Earthrights’ letter, officers (having regard inter alia to legal advice) considered whether the matter should be referred back to the Committee and reached the conclusion that there was no justification for this. Following consideration of the Earthrights’ letters by officers, the Decision Notices were issued on 22nd December 2006. Denton Wilde Sapte replied to Earthrights setting out reasons for not referring the matter to Committee on 28th December 2006 [298-299].

RESPONSE TO GROUND 1

A. *Legal Framework*

22. In CG39 [16-17], reference is made to the decisions in *R. (Burkett) v. Hammersmith & Fulham LBC* [2002] 1 WLR 1593 and *R. (The Garden and Leisure Group Limited) v. North Somerset Council* [2003] EWHC 1605 (Admin). Having regard to those decisions, LBC endorses the proposition that it had a *discretion*, on 16th November 2006, to review afresh the decision which it had taken on 9th March 2006.

⁵ See Final Decision Notice at [121]

23. However (and contrary to the implication in **CG40-45**) it does not follow, merely because it has such a discretion, that a local planning authority which has resolved to grant planning permission but has yet to issue the Decision Notice is required to review the matter entirely afresh before the Decision Notice is issued. If this were the case, then every planning application which an authority had resolved to approve subject to completion of a section 106 agreement would have to be brought back to Committee before the final Decision Notice was issued.
24. Even where, as in this case, an application is brought back before Committee for endorsement of the s. 106 agreement, the Committee is not required to review the entire application afresh. All that is necessary is that the authority is aware that it has such a discretion and does not think it is bound to accept the previous resolution.
25. In deciding whether or not (and if so, how) to exercise that discretion, a local planning authority will inevitably have regard to the fact that, where a decision has been taken after full and proper consideration of the merits of the case, it is not in the interests of good administration that this should be reviewed entirely afresh without some good reason. Hence, where a local planning authority does decide to “change its mind”, it must give reasons for that change: see *R v. Mendip ex parte Fabre* [2000] JPL 810, referred to in **CSk para 25(b)**; *R (o.a.o. Chisnell) v. Richmond-upon-Thames* [2005] EWHC 134 per Newman J at para 20. It is inherent in this requirement that good reasons must exist.
26. Examples of what might be a “good reason” are given by Lord Steyn in *R (Burkett) v. Hammersmith & Fulham* [2002] 1 WLR 1593. Thought not limited to these, they include a material change in circumstances; failure to fulfil conditions; a break down in negotiations for the conclusion of the s. 106; and cases where flaws are brought to the local planning authority’s attention.
27. Moreover where a local planning authority does decide to review a prior resolution to grant permission, the prior resolution cannot be regarded as an irrelevance, or something which the authority could or should ignore. In particular:
 - (1) While it is not disputed that the only decision which is of binding “legal effect” is the formal issue of a Decision Notice, the fact that a resolution to grant does not have the same “legal effect” as the Decision Notice does not mean that it is something that can be disregarded. The statement in *Burkett* (which is relied on in **CSk paras 21, 23 and 25(a)**) that a resolution has “no legal effect” must be viewed in the context in which it was made, namely whether there is an effective permission which a developer can implement. Lord Steyn was not dealing with the approach to be taken by a subsequent decision-maker to a previous resolution.
 - (2) As a matter of general public law, local planning authorities are expected to and required to act consistently. This general principle is particularly

important in the context of planning where uncertainty and lack of consistency could stymie legitimate development and regeneration proposals and is reflected in planning law at both a legal and policy level. Hence:

- (a) it is well-established that previous decisions are a material consideration because it is desirable as a matter of policy that there should be consistency in both the planning appeal decision and in the decisions of a local planning authority: see *North Wiltshire District Council v. Secretary of State for the Environment* [1992] 3PLR 113 per Mann LJ at 122F-H; *R (Rank) v. East Cambridgeshire District Council* [2003] JPL 454 at paragraph 16, pp 461-462;
 - (b) national guidance, such as that set out in paras 7 and 8 of PPS1, specifically describes the need for certainty and predictability in the planning system.
- (3) In practice, a change in approach without clear planning justification is likely to leave the authority's consequent decision open to appeal, and would (if the authority were found to have acted unreasonably) expose it to an application for the costs of any subsequent appeal;
- (4) Consequently (and contrary to the suggestion in **CG10**) bringing these principles to the attention of the decision-maker does not amount to fettering that decision-maker's discretion. Indeed, if the relevance of a previous decision and the importance of consistency in decision-making are not brought to the decision-maker's attention, this would lead to a failure to have regard to a material consideration.
28. Once it is accepted that a previous decision is a material consideration, the weight to be attached to it is a matter for the decision-maker, having regard (inter alia) to the need for certainty and predictability in the planning system: see the *Tesco Stores* case referred to in **CG25(d)**.
29. These points above are directly relevant to the Claimants arguments in **CSk25**, which amount (in effect) to an assertion that, although a previous decision is a "relevant consideration", it is one to which little or no weight should be attached, simply because (see *Fabre*) an authority is free to "change its mind". However, the arguments in **CSk25** fail to recognise that the important distinction to be drawn between the examples, given by Lord Steyn in *Burkett* (above) of what might be a "good reason" for reaching a different decision, and the situation (as in *Fabre*: **CSk 25(b)**) where an authority simply decides to change its mind. In particular:
- (1) in the case of the *Burkett* examples (material change in circumstances, or a break-down in negotiations over the section 106) no question of conflict with the principles of consistency arises. A different decision is taken because the

situation has changed. That is not inconsistent, it is simply treating each decision on its particular facts at the relevant time;

- (2) in the case of *Fabre*, although there is no dispute that it is lawful for the authority to change its mind (provided reasons are given), a simple *volte face* in identical circumstances does conflict with the principle that public bodies are expected to act consistently, and that it is in the interests of good administration that they should do so. As such, while the *volte face* is permissible, it should not be performed without realising the significance of what is being done. Hence, as Newman J. stated in *R (o.a.o. Chisnell) v. London Borough of Richmond-upon-Thames* [2005] EWHC 134 para 20 (emphasis added):

“The principle of consistency comprises a material consideration to be taken into account in reaching a judgment. Because of the importance to be attached to consistency, a decision-maker should not depart from it without *realising the importance to be attached to it*, and when departure occurs reasons for departure from any previous decision must be given”

These observations were made in the context of a previous decision on a different application. In LBC’s submission, they apply *a fortiori* where the previous decision is in respect of exactly the same application.

30. As explained above (and contrary to the suggestion in **CSk25(j)**) recognising the importance of consistency is not a fetter on discretion: it is the application of normal principles of good administration.

B. Application

31. Applying these principles to the Claimant’s detailed grounds, the Defendant makes the following submissions.
32. As a preliminary point, it is significant that, despite being specifically asked by Dentons to raise any points of concern [1/206] at no stage prior to the November Meeting did the Claimant ask LBC to review the March Decision afresh simply because it had a discretion to reach a different conclusion. The requests made by Earthrights Solicitors in their letters of 8th September and 18th October 2006 were all made either on the basis of expressly alleged defects or flaws in the advice given to the March Committee, or on the basis of alleged changes in circumstance such as the adoption of the RUDP [1/187-203 and 207-212].
33. Hence, for example (and contrary to the approach now urged in **CSk30-31**) Earthrights did not ask LBC to revisit the “Heritage and Conservation Issues” on the basis that the November Committee might decide to strike a different balance (**CSk 31(c)**). Rather, the point which Earthrights made was that permission to demolish the listed buildings was apparently being granted without any mechanism

to secure the regeneration benefits of the development which were said to justify the demolition.

34. The specific matters raised by Earthrights were all dealt with in the November Report, and the Claimant makes no criticism of that advice. It was not until Earthrights' letter of 11th December 2006 that any point was taken that the November Committee could simply have disagreed with the March Committee.
35. The Claimant's challenge is therefore premised on a complaint that the November Committee failed to do something which the Claimant never asked it to do. In circumstances where:
 - (1) the March Decision was a full and detailed consideration of the merits of the applications;
 - (2) the November Committee was under no duty to review afresh the March Decision;⁶
 - (3) it was not in the interests of good administration that the November Committee should review afresh the March Decision without good reason;
 - (4) the only possible "good reasons" which Earthrights had raised before the November Meeting were all dealt with in detailed correspondence and in the November Report in a manner which has not been criticised;

it is difficult to see what force there could be in the complaint (even if it were true) that the November Committee had failed to consider the applications afresh.

36. In any event, the complaint is misconceived, for the following reasons.
37. **First**, there can be no mistake that the Members were expressly told that they could reach a different decision. The November Report specifically advised members that, as a matter of law the Council could "review the applications afresh and, if so minded, reach a different conclusion either in principle or in relation to the conditions and planning obligations that are proposed"⁷, but that "a change in approach without clear justification would be open to appeal"⁸.
38. The Claimant alleges that this advice was "heavily qualified" and that this gave a "very strong steer to the Committee to decide all matters of planning judgement in November identically to the way in which the old Committee had decided them in March": **CSk18-19**. However each of the points raised in **CSk18(a) to (e)** were

⁶ although it did, in fact, specifically address its mind as to whether the proposals complied with the RUDP, as demonstrated by the November resolution

⁷ Para 3.4.2 [228]

⁸ Para 3.4.5

either no more than statements or summaries of the factual situation or non-binding officer advice on what would (in officers' view) constitute a reasonable and consistent approach in the circumstances. It was legitimate for officers to give the Committee such a "steer", so long as the Committee was aware it was not bound to follow that advice and had discretion to review the matter entirely afresh. In particular:

- (1) The statement that there "should be no change in approach without clear justification" (**CSk18(a)**) was entirely correct. Given the importance of consistency in planning, members would have needed a clear reason (or "justification") for reaching a different conclusion, and would have needed to give it;
 - (2) The advice (at **CSk18(b)**) that the relevant planning policies and other material considerations had not materially changed was necessary, since (had there been such a change) this would have been an obvious "justification" for reaching a different decision. It was therefore necessary for officers to advise whether this possible "justification" had any application;
 - (3) The advice (at **CSk189(c), (d) and (e)**) that officers and Leading Counsel did not consider that the changes in circumstances warranted a different decision, and that officers thought it was difficult to justify a different approach and therefore recommended approval was entirely appropriate. It is the task of officers not only to report applications to Committee, but also to give their professional view on the proper decision.
39. The advice given was entirely consistent with the Claimant's view of the law, and the Claimant has never contended that the advice given in the November Report was wrong (indeed, Earthrights have previously accepted that the legal advice was correct [**1/286**]).
40. **Second**, even when looking at the matter afresh, the primary question for the November Committee was whether the applications before them were in accordance with the development plan: see s. 38(6) Planning & Compulsory Purchase Act 2004. On this issue, the November Committee was specifically told that, although the March Report had advised that "there was no material departure from the development plan", members would "need to consider whether they agree with this conclusion": see the November Report paras 3.5.38-39 [**233**]. The November Committee was fully advised of the changes which had taken place since March (the adoption of the RUDP) and the significance of those changes. The November Committee concluded that the applications were in accordance with the RUDP [**121**].
41. The Claimant does not challenge this conclusion, or the advice on which it was based.

42. **Third**, it is clear both from the November Report and from members' comments that the Committee were fully aware that they were entitled to depart from the 9th March resolution. It was noted by some that this would be justified by a change in circumstances: see e.g. the observations of Cllr Somper [19] and Cllr Abrahams [20]. The matters (such as the adoption in June 2006 of the Revised Unitary Development Plan) which were alleged in Earthrights' letter of 8th September 2006 to be such changes in circumstances were all dealt with in the November Report and considered by the Committee. The Claimant makes no criticism of the Committee's substantive decision on these issues.
43. **Fourth**, the November Report also dealt with the additional complaints in Earthrights' letter, concerning those respects in which it was alleged that the March Report had been mistaken. As noted above, the Claimant does not challenge the adequacy of the Report in this respect. Moreover, it is apparent from the debate which occurred that members felt able to raise and consider those issues for themselves. Hence (for example):
- (1) One of the concerns raised by Earthrights was that the March Report had been wrong in advising that there was no material departure from the development plan, when the level of affordable housing provided did not meet the 50% target in Policy KC4 [190]. As set out in para 9(3) above, this was an issue on which Cllr Abrahams sought specific guidance, and was advised that

“it is for the committee to decide as to whether that target is achieved and if you don't hit 50% you can still be in accordance with the Development Plan.”

This exchange is particularly important in view of the criticisms advanced in **CSk paras 28-29**. Contrary to the suggestion in those paragraphs, Members were clearly advised that, although failure to meet the “target” of 50% did not mean that the proposal was necessarily contrary to the Development Plan, it was for them to decide on the significance of any “shortfall” when measured against the 50% figure. Moreover, as appears from the questions asked by Cllr Vincent at [1/473-474] it is clear that the Committee specifically engaged itself with extent and significance of the shortfall.
 - (2) Earthrights' contention that the affordable housing figures ignored the fact that 74 of the units were replacements for those already in place [191], which was dealt with in the Annex on Affordable Housing Policy at Appendix 11 of the November Report⁹, was the subject of specific comment by Cllr Robinson [461];
 - (3) The November Committee had available to it all the information (including Section 9 of the March Report) necessary to revisit the principle of demolishing the listed buildings (**CSk30-31**). However, Earthrights had not asked it to do this.

⁹ The point was also dealt with in paras 7.5.2 and 7.6.4 of the March Report [163]

44. **Fifth**, notwithstanding the above it is important to recognise that, on 9th March 2006, the Defendant had resolved that outline planning permission be granted subject to completion of a satisfactory s. 106 Agreement, and accordingly that the primary reason why the applications were brought back to Committee on 16th November 2006 was for consideration of that Agreement. The March Decision was taken after full and detailed consideration of the applications, and of the extent to which they were in accordance with the adopted and emerging development plans. The conclusion was that the proposals were in accordance with the development plan. The March Decision was at the time intended to be, and was legally capable of being, a full and final decision on the underlying merits of the applications, subject only to the four contingencies listed in the resolution [183].
45. Accordingly (for the reasons set out in paras 23-30 above), officers were entitled to advise and members were entitled to accept that the Committee should not lightly depart from the earlier decision. While the Committee was legally entitled to “change its mind”, it had to realise the importance attached to the need for consistency. As Cllr Abrahams correctly observed the November Committee could not “behave as if the 9th March had never happened”: see **CG 28.2 and 31 [19-21]**. Elementary principles of public law would have required the Committee to have a clear justification for departing from the 9th March resolution
46. **Sixth**, whether viewed in isolation or (more properly) in the context of the Report and the debate as a whole, the quotations relied upon in **CG28 and 31** do not support the contention that members misunderstood the advice which was set out in the Report. In particular:
- (1) at para 28.1 of the Claimant’s Grounds, Cllr Somper accurately summarises Part 3.4 of the Officers’ Report;
 - (2) at para 28.2 of the Claimant’s Grounds, the quotation from Cllr Abrahams is also a perfectly correct summary of the advice, which discloses no error of law. It would have been entirely wrong for the Committee to ignore the decision of 9th March 2006, and if the Committee decided not to follow it without clear justification, there was every likelihood that the Defendant would end up at a long and involved public inquiry;
 - (3) at para 28.3 of the Claimant’s Grounds, the quotation from Cllr King merely reflects the fact that, although he might¹⁰ have reached a different conclusion to the rest of the Committee had he been present in March, that was not the framework within which the present decision was being taken, and that – approaching the matter in November - he did not feel he should depart from the Officers’ advice. That is entirely consistent with both the November Officers’ advice, and the approach in paras 24-29 above;

¹⁰ The quotation goes no further than to suggest that he would have been concerned.

- (4) As noted in para 10 above, the quotation (at **CG28.4**) from Cllr Rea¹¹ is taken out of context. It is apparent from the wider quotation that Cllr Rea's decision was made, not on the basis that she felt legally constrained by the decision of March 6th, but on the basis that the answers provided by Argent at the meeting had assuaged some of her key concerns;
 - (5) The extent to which it was generally understood by all present at the meeting that members could reach a different conclusion is reflected in Mr Edwards' comments (para 13 above). Those contemporaneous observations directly contradict what the Claimant now says was understood by those present.
47. In the case of all of the above quotations, it must be remembered:
- (1) that these were a lay person's rendering of the position;
 - (2) that these were impromptu responses given during the course of a very long and extensive consideration and debate in which individual members will inevitably have used slightly different language to express similar concepts; and crucially
 - (3) that they were all made in the context of the Report which members had been given in advance of the meeting, and of specific (and repeated) references back to the advice in that Report (see paras 9(1), (3) and (4) above).
48. **Seventh**, the Claimant's suggestion (at **CSk 34-38**) that Members were "unduly boxed in" by the belief that they could only reach a difference conclusion if there had been a change in circumstances is not justified:
- (1) the November Report did not suggest that it was only a change in circumstances that could lead to reconsideration: paragraphs 3.4.2 and 3.4.5 were entirely general in this respect. Para 3.4.6 (dealing with the terms of the Section 106 Agreement) indicated that either a change in circumstances or weight could justify a different approach [**228**];
 - (2) at no stage was it suggested that there was any "presumption" that the November Committee should follow the March Decision (cf. **CSk 25(g)-(h)**);
 - (3) when officers advised that the relevant planning policies and legislation had not changed since March 2006, and that they and Leading Counsel did not consider that these changes justified decisions that were inconsistent with that reached in March 2006 (see paras 3.4.3-3.4.4 and 3.5.2-3.5.3 of the November Report) they were merely commenting on what (given the importance of consistency) might have been the most obvious reason for reaching a different conclusion. They were plainly not suggesting that this was the only basis on which a different decision could be reached;

¹¹ Claimant's Grounds, para 26

- (4) it was for this reason that the November Report specifically told members (emphasis added) that they would “need to consider whether they agree[d]” with the advice in the March Report that there was no material departure from the development plan”: see the November Report paras 3.5.38-39 [233];
- (5) on the issue of compliance with RUDP Policy KC4, members were told [1/451 (second paragraph, emphasis added) that

“it is for the committee to decide as to whether that target is achieved and if you don’t hit 50% you can still be in accordance with the Development Plan.”

It is clear from the comments of Mr Edwards (para 16 above) that this advice was properly understood;

- (6) the comments of Cllr Somper that a lot of what happened in March was “irreversible” (CSk38(a)(i)) was correct. The November Committee could not rewrite history. The March Committee had resolved to grant planning permission, and that was an important part of the history which could not be ignored;
- (7) that Cllr Vincent (whose question is quoted in CSk38(a)(ii)) fully understood that she was entitled to reach her own conclusion is evident from the questions she went on to ask about whether the affordable housing met the RUDP target: [1/473-4];
- (8) the only Councillor at the meeting who specifically linked the justification for reaching a different conclusion to a change of circumstances was Cllr Abrahams (CSk38(a)(iii) and (b)(i)). Those observations have to be seen in the context of the discussion as a whole. In stating that the March decision needed to be followed unless there had been a material change of circumstances Cllr Abrahams was simply acknowledging the fact (see 3.4.5 of the November Report) that if the Committee acted without good reason in reversing the March Decision, an appeal was likely with an award of costs. There is no error of law in that approach;
- (9) Cllr King’s comments (CSk38(a)(iv) and (b)(ii)) demonstrate nothing more than that he accepted advice which had been properly given;
- (10) Notwithstanding her comments (quoted in CSk 38(c)) Cllr de Souza did not, in fact, vote in favour of the proposals, but abstained.

49. Moreover, even if (which is not accepted) one or more of the quotations which are relied on by the Claimant are not, or not entirely, an accurate statement of the law, that is not a basis for impugning the decision of the Committee as a whole:

- (1) The comments of an individual Councillor in the course of debate do not represent the state of mind of the Committee as a whole. The mere fact that someone has, in the course of debate, put forward an improper ground is not a basis for setting aside the decision of the wider body: see *R v. London County Council ex p. London and Provincial Electrical Theatres Ltd* [1915] 2 KB 446 at 490.
 - (2) In any decision taken by committee, it is likely that individual members will express their reasons differently. In those circumstances, what is important is not the views of the individual members, but the decision of the Committee as a whole. That is a matter which can only be discerned from the formal resolution. In the present case, by virtue of Art. 22(1) of the Town and Country Planning (General Development Procedure) Order 1995, the Defendant was under a duty to give reasons for granting permission. The Committee resolved to approve the officers' recommendation that planning permission be granted because "The proposed development is in accordance with the policy requirements of the adopted London Borough of Camden UDP". That was the reason for the Defendant's decision, and the Claimant does not challenge it.
50. Finally, the Claimant places frequent emphasis on the change in political control at the Council, and the fact that it was a "new" Committee: see **CSk7, 15**. However:
- (1) A Planning Committee makes its decision in the name of the authority, not in the name of the controlling party of that authority;
 - (2) While there may be cases where the policy objectives of a political party are relevant to the determination of a particular planning application, most applications are not of this nature. Even where they are, application of a "party whip" is not appropriate, and members are expected to approach applications with an open mind: see *R v. Local Commissioner for Local Government ex p. Liverpool CC* [2001] 1 All ER 462 at paras 29, 30 and 59;
 - (3) once it is recognised that even the "old Committee" had a discretion to "change its mind", it is irrelevant that the composition of the Committee had changed.
51. For the foregoing reasons, Ground 1 is without merit. The November Committee was plainly aware that it could reach a different conclusion on the applications, but decided that it should not do so for reasons which were entirely correct.

RESPONSE TO GROUND 2

52. Under this ground, the Claimant complains that the Defendant’s officers should have reported the applications back to Committee because, in the period between the Committee meeting on 16th November 2006 and the Decision Notices dated 22nd December 2006, the Secretary of State issued PPS3. At the core of this ground is the Claimant’s assertion that PPS3 was a “new material consideration” to which para 125 of Parker LJ’s judgment in *R (Kides) v. South Cambridgeshire District Council* [2002] 4 PLR 66 applies. This is not the case.
53. In particular, while the final PPS3 was only issued on 29th November 2006, a Consultation Draft had been issued in December 2005. The draft PPS3 was expressly referred to in the Report to the Committee meeting on 8th-9th March 2006: see paras 2.2.4-2.2.5 [1/142]. The Claimant does not contend that PPS3 as a whole required the application to be reported back to Committee, merely that the definition of “affordable housing” required this.
54. However, at **CG57**, the Claimant accepts that the definition of “affordable housing” which is set out in the final PPS3 was also contained within the draft PPS3. The Claimant does not allege that there was any material difference between the draft and the final PPS3 in this respect, and there is none. In the circumstances, the definition of “affordable housing” in PPS3 was not a “new” consideration which had only emerged post 16th November 2006, para 125 of the judgment in *Kides* was not engaged, and there was no need for the applications to be reported back to Committee to take it into account.
55. In any event (and contrary to **CG56**) the affordable housing which was being offered by Argent, as defined in the section 106 Agreement which was before the Committee on 16th November did meet the PPS3 definition of “affordable housing”:
- (1) Although para 56 of the Claimant’s Grounds does not explain which 70 units it believes could not be regarded as “affordable”, it is assumed that these are the 30 “shared ownership” and 40 “shared-equity” units referred to in Earthrights’ letter of 11th December 2006. The Claimant’s contention is (apparently) therefore that these units are not “affordable”;
 - (2) Annex B to PPS3 [1/321-323] defines affordable housing as follows:

“Affordable housing includes social rented and intermediate housing, provided to specified eligible households whose needs are not met by the market. Affordable housing should:

 - meet the needs of eligible households including availability at a cost low enough for them to afford, determined with regard to local incomes and local house prices.
 - include provision for the home to remain at an affordable price for future eligible households, or if these restrictions are lifted, for the subsidy to be recycled for alternative affordable housing provision.”

- (3) Intermediate housing is defined in the PPS as:

“Housing at prices or rents above those of social rent, but below market prices or rents and which meet the criteria set out above. These can include shared equity products (eg HomeBuy), other low cost homes for sale and intermediate rent”

- (4) In March 2006 the Committee was recommended to accept the affordable housing element of the proposals, subject to satisfactory completion of the relevant s. 106 obligations. Heads of Terms for the s. 106 obligation were put before the Committee, which included the following reference [1/388]:

“Affordable housing to be defined as non-market housing provided to those households whose needs are not met by market housing. Affordable housing is:

- (a) Social Rented ...
- (b) Intermediate housing which is Affordable Housing but not Social Rented and which is available at a discount from market housing to households who would not otherwise have been able to afford adequate housing on the open market, including Shared Equity, Shared Ownership, KeyWorker Sub-Market Rented, Homebuy and Right to Buy Homebuy and other forms of Intermediate Tenure as may be substituted subject to it being demonstrated that the housing is similarly affordable”

- (5) The section 106 Agreement which was considered by the Committee in November 2006 defined “affordable housing” as [1/425]:

“Low cost housing provided to those households who cannot afford to occupy homes available in the open market comprising Social Rented Housing and Intermediate Housing”

where “Intermediate Housing” was defined as [1/428]

“Affordable housing which is not Social Rented Housing and which is made available at a discount from Market Housing to households who would not otherwise have been able to afford adequate housing on the open market.”

- (6) It is clear from the above that the shared equity products being provided as part of the development are “affordable housing” within the definition of PPS3, in that like the rest of the affordable housing being provided they are to be made available to those who cannot afford to buy homes available in the open market, and at a discount from market housing.

56. At **Csk 49-51** the Claimant argues to the contrary. It suggests that the section 106 Agreement contains no requirement that relevant units are offered at a price below their *own* market price, and says that all that is in fact required is that the intermediate housing is offered at a price below that of *other* units. It is submitted this is unsustainable, for the following reasons;

- (1) The section 106 Agreement requires that the relevant housing to be offered “at a *discount* [our emphasis] from Market Housing”. The use of the word “discount”

connotes a price *reduced* from what it would otherwise have been, as opposed to a price that is less than that being charged for some other type of product-eg a bigger, better, house.

- (2) Insofar as intermediate housing is defined as housing “which is made available...to households who would not otherwise have been able to afford adequate homes on the open market”, the section 106 Agreement clearly contemplates (a) that what will be provided is “adequate homes”; (b) that these will be available to households-ie that these households will be able to afford them; and (c) that these households would not have been able to afford adequate homes on the open market. It is impossible to see how this could be achieved if the “adequate homes” were not made “available” at a price which was below the open market price for such homes.

57. For the foregoing reasons, Ground 2 is without merit.

CONCLUSIONS

58. In the circumstances, the Claimant's application for permission to seek judicial review should be refused and/or the substantive application should be dismissed.

TIMOTHY CORNER Q.C.

PAUL BROWN

21st May 2007

**4-5 Gray's Inn Square
Gray's Inn
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CO/1185/07

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

BETWEEN

**THE QUEEN
On the application of
KINGS CROSS RAILWAY LANDS
GROUP**

- v -

LONDON BOROUGH OF CAMDEN

- And -

- (1) ARGENT (KINGS CROSS)
LIMITED**
- (2) LONDON & CONTINENTAL
RAILWAYS LIMITED**
- (3) EXEL PLC**

**SKELETON ARGUMENT ON BEHALF
OF THE FIRST DEFENDANT**
