

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

And

LONDON BOROUGH OF CAMDEN

Defendant

And

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

Interested Parties

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT

References in bold and in brackets are to page numbers in the trial bundles. All references are to Volume I of the trial bundle unless stated otherwise.

INTRODUCTION

1. The Kings Cross Railway Lands Group (KXRLG) seeks Orders quashing the grant by the Defendant (Camden) of Outline Planning Permission, Listed Building Consent and Conservation Area Consent pursuant to the following nine applications made by the Interested Parties:
 - a. **Planning Permission, Application No. 2004/2307/P** (Outline Application for redevelopment of Railway Lands within Kings Cross Opportunity Area).
 - b. **Listed Building Consent, Application No. 2004/2313/L** (Demolition of the Stanley Building North).
 - c. **Listed Building Consent, Application No. 2004/2314/L** (Demolition of parts of the Great Northern Hotel).

- d. **Listed Building Consent, Application No. 2004/2315/L** (Dismantling and relocation of Gas Holder No 8).
 - e. **Listed Building Consent, Application No. 2004/2316/L** (Demolition of part of the Handyside Canopies and construction of a new road).
 - f. **Conservation Area Consent, Application No. 2004/2317/C** (Demolition of the Culross Buildings).
 - g. **Conservation Area Consent, Application No. 2004/2318/C** (Demolition of Plimsoll Viaduct).
 - h. **Conservation Area Consent, Application No. 2004/2320/C** (Demolition of various unlisted buildings/structures within Kings Cross Central).
 - i. **Conservation Area Consent, Application No. 2004/2321/C** (Demolition of the Western Goods Shed)
2. By the above applications Argent sought authorisation for the comprehensive, mixed-use development of strategically important land around Kings Cross (the Railway Lands), an area which is in acknowledged need of economic and physical regeneration being characterised by considerable deprivation and housing stress. (**70, para 3.1; 218-22; 124, para 1.1.3**)
 3. For present purposes, it is the first, second and sixth of the above applications which are of greatest importance, whereby Argent sought:
 - a. Outline Planning Permission to develop of up to 718,275 sq m of floorspace, comprising:
 - Up to 455,000 sq m of offices.
 - Between 125,000 and 176,000 sq m of residential development (between 1,600 and 2,300 new units).
 - Up to approximately 160,000 sq m of hotels, shopping and community uses combined. (**218; 134-6, paras 1.6.12-17**).
 - b. Listed Building Consent to demolish Stanley Building North. (**219**)
 - e. Conservation Area Consent to demolish the Culross Buildings. (**221**)
 4. Whilst the need for regeneration and re-development of the Railway Lands is widely agreed, including by KXRLG (**40, para 4**), the nature of the scheme by which it is to be achieved is highly contentious given the scale of the development proposed, and given also:
 - a. The extent of the needs to be met, especially in terms of affordable housing; and

- b. The potential effect of re-development on the character and appearance of the Conservation Area within which the Railway Lands are situate, and on important buildings there - including Stanley Building North (a Listed Building) and the Culross Buildings, both early surviving examples of a pioneering form of artisan dwelling built to accommodate railway workers. **(841, Vol II)**
5. KXRLG had, in particular, long campaigned for a scheme of re-development of the Railway Lands which was in important regards notably different from that proposed by Argent, against whose applications they therefore objected on several grounds, including¹ as follows, that:
 - a. The proposed amount of affordable housing was inadequate; and
 - b. The proposed demolition of Stanley Building North and the Culross Buildings was not justified. **(42, para 7)**
6. Despite these objections, and at Meetings held on 8th and 9th March 2006 (the March Meetings), Camden's Development Control Committee (the old Committee) resolved to grant Outline Planning Permission for the proposed development and to approve the other Argent applications for Listed Building and Conservation Area Consent, subject however to various contingencies, including the completion of a Legal Agreement under Section 106 of the Town & Country Planning Act 1990 which was to be referred back to the Committee for final consideration. **(43-4, paras 11-13; 226, para 2.1)**
7. The Section 106 Agreement was not finalised so as to be brought back to the Committee before November 2006 (the November Meeting), however. **(226, para 2.2)** Moreover, in the intervening period matters had moved on in that as a result of the May 2006 Local Government elections, there had been a dramatic change in the membership and political composition of Camden, resulting in a change of political control, with corresponding changes in the composition of the Committee (the new Committee). **(44-5, para 15)**
8. Accordingly, and since the earlier March resolution was only a resolution to grant Planning Permission subject to a Section 106 Agreement which had not been agreed so that no Decision Notices had been issued and no Planning Permission actually granted, KXRLG urged the new Committee at the November Meeting to reconsider afresh the old Committee's provisional and preliminary decisions of principle made at the March Meeting **(187-203)**, including in respect of:
 - a. The amount of affordable housing which was being offered; and

¹ It should be noted that the objections selected for illustrative purposes in this Skeleton Argument are two of many other objections raised by KGRLG on environmental and other grounds.

- b. The proposal to demolish the Stanley Building North and the Culross Buildings.
9. The new Committee were given legal advice in both written form **(228-9, paras 3.4.1-8; 435-442)** and oral form **(449-452, 465 & 475)** at the November Meeting as to the extent of its discretion to decide matters of planning judgment differently in November to the way in which the old Committee had decided them in March; and, in the light of that advice, the new Committee decided to “ratify” **(228, para 3.4.7)** the old Committee’s decisions and to grant the Outline Planning Permission and the other Consents.
 10. It is KXRLG’s case that the legal advice given to the new Committee in respect of the extent of its discretion was wrong, or wrongly interpreted by the new Committee, and that the new Committee thereby unduly fettered itself in the exercise of that discretion. **(Ground One)**.
 11. Further, on 29th November 2006 and before the relevant Decision Notices were issued, the Government published new PPS3, the revised national Planning Policy Statement on housing **(309 et seq.)**. Moreover, PPS3 contained a new definition of “*affordable housing*”. **(321)** As a result of the new definition, intermediate housing could now only be regarded for the purposes of Government policy as “*affordable*” if, *inter alia*, it was provided “*below market prices or rents*”.
 12. KXRLG considered that this new definition was materially different to that which Camden had applied when making its decisions at both the March Meeting and the November Meeting, with the consequence that 70 units which Camden had considered to be affordable were no longer to be so considered. Accordingly, and on 11th December 2006, KXRLG’s then solicitors (EarthRights) wrote to Camden’s solicitors (Denton Wilde Sapte) requesting that the Argent applications be referred back to the Committee for re-consideration before the Decision Notices were issued. **(284, 295-7)**
 13. On 22nd December 2006, however, Camden Officers issued the Decision Notices without reverting to Members. **(90-123)** Their reasoning was subsequently given in a letter, dated 28th December 2006, from their solicitors (Denton Wilde Sapte). **(298-9)**
 14. It is KXRLG’s case that in deciding to issue the Decision Notices without referring the new definition of “affordable housing” to Members, Camden Officers unlawfully deprived elected Members of the opportunity to consider whether the changed definition did amount to a material change of circumstance potentially justifying a different decision to that which they had earlier made **(Ground Two)**.

15. This Application not only concerns a proposed development of strategic importance and considerable sensitivity therefore, it also raises two important points of legal and democratic principle:

a. The extent of the discretion vested in a newly elected Council to reconsider, as a matter of its own planning judgment, matters of planning principle raised by an outline planning application which a previously elected Council had resolved to grant, but subject to an unfulfilled contingency so that no Decision Notice had been issued.

b. The extent of the obligation upon a Council Officer to return a planning application to elected members when a material change in planning circumstances had, or may have, occurred after those members had resolved to grant planning permission but before the Decision Notice had been issued.

FACTUAL BACKGROUND AND CHRONOLOGY

16. The factual background to this Application is fully set out in the Claimant's *Factual Background and Chronology*.

SUBMISSIONS

Ground One

17. The new Committee were advised by the November Officers' Report that, as a matter of law, it could review the applications afresh and could, if so minded, reach a different conclusion either in principle or in relation to matters of detail covered by condition or the proposed Planning Obligation. **(228, para 3.4.2)**

18. However, this advice was heavily qualified in that new Committee was also advised that:

a. There should be no "change in approach without clear justification." **(228, para 3.4.5)**

b. The relevant planning policies and other material considerations to which the Committee must have regard when coming to a decision had not changed significantly since March 2006. **(228, para 3.4.3)**

c. It was both the Officers' and Leading Counsel's view that "the changes in planning circumstances do not justify decisions that are inconsistent with those made on 9 March 2006." **(228, para 3.4.4)**

d. It was also the Officers' view that it would be "difficult to justify" either a different approach or significant changes to the Planning Obligations "given that the Committee has already resolved to grant consent on the basis of the proposed detailed heads of terms." **(228, para 3.4.6)**

- e. The Officers' recommendation was, accordingly, that the decision of the old Committee in March should "be ratified." (228, para 3.4.8)
19. The above advice gave a very strong steer to the new Committee to decide all matters of planning judgment in November identically to the way in which the old Committee had decided them in March on the basis that there had been no significant change in planning circumstances since then.
20. However, the above advice was astute to avoid answering the following important question as to what might constitute a "clear justification" for the new Committee deciding differently in November to the old Committee in March, in particular:
- a. *Whether such a change of mind could only be justified if material considerations had changed significantly since the old Committee's decision in March; or*
 - b. *Whether the new Committee had an unfettered discretion to revisit those matters provisionally decided by the old Committee in March, so as to be able to decide them differently in November in the exercise of its own planning judgment, even if there had been no intervening change of circumstance.*
20. It is clear, moreover, that the above question would have to be answered in favour of the broader proposition (b) above.
21. In particular, in *R. (Burkett) v. Hammersmith and Fulham LBC* [2002] 1 WLR 1593 Lord Steyn stated as follows at 1606 C-E:
- "Until the actual grant of planning permission the resolution has no legal effect. It is unlawful for the developer to commence any works in reliance on that resolution. And a developer expends money on the project before planning permission is granted at his own risk. The resolution may come to nothing because of a change of circumstances. It may fall to the ground because of conditions which are not fulfilled. It may elapse because negotiations for the conclusion of a Section 106 Agreement break down. After the resolution is adopted, the local authority may come under a duty to reconsider its decision if flaws are brought to its attention: R. v. West Oxfordshire District Council, ex parte CH Pearce Homes Limited (1985) 26 RVR 156. Moreover it is not in doubt that a local authority may in its discretion revoke an outline resolution."*
22. Further, in *R (The Garden and Leisure Group Limited) v North Somerset Council* (2003) EWHC 1605 (Admin) Richards J. held as follows at paragraph 35:
- "A resolution to grant planning permission subject e.g. to the conclusion of a satisfactory section 106 agreement can be described as a decision in principle or a preliminary or provisional decision. It is to be*

distinguished, however, from the actual grant of planning permission; and the resolution can be revoked or varied at any time prior to the grant.”

23. Accordingly, the inchoate resolution of the old Committee at the March Meeting had “no legal effect”, being no more than a preliminary or provisional decision, so that the new Committee was fully empowered “in its discretion” to decide in November to revoke (or vary) it “at any time prior to the grant”, being the date on the Decision Notices were actually issued.
24. Moreover, it cannot be the law that the Committee’s discretion to revoke or vary the old Committee’s decision was fettered so that its exercise could only be justified if there had been an intervening change in circumstance between March and November, and could never be justified upon the simple basis that a changed view had been taken as a matter of planning judgment of the same circumstances.
25. In particular:
 - a. Whilst the old Committee’s decision would clearly be a relevant consideration to be taken into account by the new Committee as part of the planning history – see: *R. (Rank) v. East Cambridgeshire District Council* [2003] JPL 454 - it had no greater status than that, having - per *Burkett* - “no legal effect”.
 - b. So it was that in *R. v. Mendip Council, ex parte Fabre* [2000] JPL 810, Sullivan J. held at 811 and 821-2, that a Local Planning Authority could in law simply “change its mind”, albeit that it may then be under a duty to give the reasons for that change of mind.
 - c. It is obvious that an intervening change in circumstances could be one reason which might justify a change of mind. However, it is equally obvious that a change of mind might also be justified by a Local Planning Authority looking at the same matters afresh and simply coming to a different view of the planning merits as a matter of planning judgment.
 - d. In particular, the breadth of a Local Planning Authority’s discretion in matters of planning judgment is very wide indeed, as emphasised in *Tesco Stores v. Environment Secretary* (1995) 1 WLR 759, by Lord Hoffman as follows at page 780:

‘Provided the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

- e. So it was that in the case of *R (Newsmith Stainless Ltd.) v. Secretary of State for the Environment* [2001] EWHC 74, Sullivan J. stated as follows at paragraphs 7-8:

“... (T)he Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments.... Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.”

- f. It follows that:

- i. Per *R. (Burkett) v. Hammersmith and Fulham LBC* and *R. (The Garden and Leisure Group Limited) v North Somerset Council*, a Local Planning Authority’s resolution to grant planning permission subject to an unfulfilled contingency (such as the entering into of a Section 106 Agreement) was merely a preliminary or provisional decision, without legal effect, and could be revoked or varied at any time prior to the issuing of the Decision Notice;
 - ii. Per *R. v. Mendip Council, ex parte Fabre*, a Local Planning Authority was, therefore, lawfully entitled simply to “change its mind” on that planning application, albeit that it may have to explain its reasons for so doing;
 - iii. Per *R (Newsmith Stainless Ltd.) v. Secretary of State for the Environment*, when making such a planning decisions a Local Planning Authority was reaching a series of planning judgments and might reasonably come to any one of a broad range of possible views; so that
 - iv. One of the bases upon which a Local Planning Authority might lawfully change its mind was simply that, on re-considering matters, it came to a different but entirely reasonable view on one or more of those matters of planning judgment.
- g. It cannot be the law, therefore, that there is a presumption of consistency in planning decision-making so strong as to allow a Local Planning Authority to change its mind after it has made a preliminary and provisional decision on an application only where there had been a change in circumstances.
- h. In particular, any such presumption:
- i. Would attribute very considerable legal effect indeed to the provisional and preliminary decision when, per *Burkett*, it was to have “no legal effect” ; and
 - ii. Would thereby amount to a very significant fetter on the discretion of a Local Planning Authority reasonably to change its mind on

matters of planning judgment so as to come to a different view within a wide range of reasonable possible views.

- i. This would be so even if it was the same Committee which changed its mind; *a fortiori* is it the case when it is a new Committee.
 - j. Indeed, to hold otherwise would not just fetter the discretion of the new Committee, it would effectively deny that new Committee any discretion to exercise its planning judgment differently to its predecessor.
26. None of the above means that the new Committee was obliged in November to decide matters of planning judgment differently to that in which the old Committee had decided them in March, but it does mean that the new Committee should have been advised that it could lawfully and reasonably do so, even without any intervening change of circumstance.
27. Indeed, the breadth of the discretion vested in the new Committee lawfully and reasonably to have decided matters of planning judgment differently to the old Committee, even without any intervening change of circumstance, can be easily demonstrated by looking at the two illustrative KXRLG's objections considered in this application:
 - a. The objection that insufficient affordable housing had been offered to meet UDP requirements; and
 - b. The objection that the demolition of Stanley Building North and the Culross Buildings was not justified.
28. In particular, and so far as the affordable housing is concerned, it is quite apparent that at the November Meeting, Members of the new Committee were greatly concerned that RUDP Policy KC4 set a target of 50% affordable housing, but that, at most, only 44% was being offered (if all the affordable housing is built (which is not guaranteed) and if the Council's assessment of what constitutes affordable housing is correct (see Ground 2 below). **(453, 456, 458, 461-2, 473-475)**
29. It would appear that Leading Counsel acting on behalf of Camden advised the new Committee that - because the 50% figure was only expressed as a "target" within Policy KC4 - the Committee might lawfully decide that the Policy had been met by a provision of just 44% **(451)**. However, even if this is right (which is not conceded), manifestly Members could also lawfully have decided that:
 - a. The "target" of 50% was *not* met by an offer of just 44%; and, moreover, that
 - b. Missing this target was of real planning significance given the level of housing stress in the area, stated in paragraph 1.1.3 of the March Officers'

Report to be “*some of the highest levels ... in London and the South East.*” (124, para 1.1.3)

30. Likewise, it is quite clear that a new Committee might lawfully have come to a different view to the old Committee as to whether the demolition of Stanley Building North and the Culross Buildings was justified, those buildings being early surviving examples of a pioneering form of modern artisan dwelling for railway workers (841, Vol II) in respect of which the architectural and historic interest is such that Argent:
- a. Have been Ordered not to demolish the same pending determination of this application for judicial review; and
 - b. Have undertaken to the High Court to retain all salvageable items removed from Stanley Building North so that they might be reinstated. (856-860, Vol II)
31. In particular:
- a. National policy on planning and the historic environment, contained within paragraphs 3.16-7 and 4.26-7 of PPG15, provides that:
 - i. Any proposal to demolish a Listed Building must be fully scrutinised before any decision is taken.
 - ii. Such demolition is seldom necessary for good planning.
 - iii. Consent to such demolition should never be given simply because redevelopment is economically more attractive to the developer.
 - iv. The same broad criteria apply in the case of the proposed demolition of any building which makes a positive contribution to its character and appearance of a Conservation Area.
 - v. There was, accordingly, a general presumption in favour of retaining such a building.
 - vi. Consent should not be given for its demolition unless there were detailed plans for its re-development. (326-328)
 - b. Moreover, and so far as the final matter mentioned above is concerned, Appendix 11 to the November Officers’ Report made it clear that there were no detailed plans for the re-development on the site of the relevant buildings: all elevational treatments and other detailed design issues were to be controlled by the conditions and subject to further plans being submitted. (437)
 - c. Finally, Appendix 11 to the November Officers’ Report also stated English Heritage’s view that the issue as to the future of these buildings was one of “balance”. (437) Since the issue was a balanced one, manifestly the new Committee could reasonably have reached a different

view on it to the old Committee, especially in the light of the above policy guidance and in the absence of any detailed plans for their re-development.

32. The new Committee was, accordingly, not only at liberty to revisit both matters afresh in November, but could in its discretion and as an exercise of its own planning judgment reasonably and lawfully have decided them differently to the old Committee in March, attributing more weight to the Policy KC4 target that 50% of the proposed housing be affordable, and more weight also to the importance of retaining valuable buildings, at least until detailed proposals for their replacement were available for consideration.
33. Moreover, the same would be true for all other of the matters of planning judgement in respect of which KXRLG made objections, inviting the new Committee to reconsider them.
34. It follows that the new Committee should have been advised at the November Meeting that they retained a full and unfettered discretion to reconsider all of the matters decided by the old Committee in the March Meeting, even if there had been no intervening change in circumstances, with Members able to exercise their own planning judgment upon such matters. In particular, Members should not have “*felt unduly boxed in by officer’s advice*”. See: *R. v. Vale of Glamorgan District Council, ex parte Adams* [2001] JPL 93 at 101-4, per Richards J.
35. To the extent, therefore, that Members of the new Committee in November either were advised, or thought that they had been advised, that they were only able to decide differently to the old Committee in March if there had been a material change in circumstances since then, those Members will have either been misguided in law or have misguided themselves in law, so as to have unlawfully fettered their discretion.
36. In order to ascertain the nature of the entirety of the advice given to Members by Officers at the November meeting in these regards, and how that advice was interpreted by Members, the Court is to have regard to all of the relevant evidence, including not just the written advice contained within Officer’s November Report as summarised at paragraph 18 above (**228, paras 3.4.3-8**), but:
 - a. The oral exchanges during the November Meeting, whereby Members sought clarification of the Report in these regards.
 - b. The Minutes of the November Meeting, whereby Members approved a record of their deliberations (having previously refused to approve Minutes drafted by Officers as an inaccurate record).
 - c. A subsequent letter to the local press, whereby one Member explained “the strong legal steer” which the new Committee had been given at the November Meeting.

37. In particular, and for the following reasons, it is simply wrong to argue that the Court cannot look at the above material in this case because “the Committee speaks by resolution” (although, of course, item (b) above is a resolution of the Committee):
- a. The ground one challenge not only concerns what the Committee “said” by resolution, but what that Committee was “told” by Officers and other legal advisors, or thought itself to be told.
 - b. It raises, in particular, the following two questions:
 - i. Whether Members were “unduly boxed in” by the advice they received, in the words of Richards J. in *R. v. Vale of Glamorgan District Council, ex parte Adams*; and
 - ii. Whether Members were advised correctly that they had an unfettered discretion to reconsider all matters afresh as part of their own planning judgment (and, if so, whether Members showed that they correctly understood that advice.)
 - c. Unlike the questions raised by the bases of challenge considered in the case of *R. v. Newbury District Council, ex parte Chieveley Parish Council* [1997] JPL 1137, the above questions are largely ones of fact and capable of being determined on the available evidence.
 - d. Moreover, all of the material identified at paragraph 36 above is clearly admissible evidence on the questions, probative both of the legal advice that Members were actually given and how they interpreted that advice.
38. Furthermore, when regard is had to that material it is perfectly clear that the Members were not only “unduly boxed in” by the advice they were given, but that they were *wrongly* advised. See, in particular the following:
- a. **The Oral Exchanges at the November Meeting**
 - i. **Transcript at page 22 (464)**

Cllr Somper: “...however much you regret what happened in March or didn’t happen in March, a lot of that is irreversible.”
 - ii. **Transcript at page 23 (465)**

Cllr Sue Vincent: “Can you clarify for me about what you said about going back over history, because in our Report under 3.4.2, and I am trying to find the page of it now, it does say that we can review afresh, and it goes on to say “as long as we have clear justification”. So could you just clarify that?”

Stephen Ashworth: *The Councillor is quite right. The legal position is as set out in the Report; that it's open to the Committee to consider afresh the applications in front of them. As the report makes clear the advice from Leading Council and [others/officers?] is that there are no circumstances which would justify a [fresh/different] decision."*

iii. Transcript at pages 32-3 (474-5)

Cllr David Abrahams: *"What the legal advice says is we need to follow that Committee's decision in terms of consents given and heads of terms unless we find some very clear justification in some change of circumstances since that time to depart from that resolution. ... Oh yes, I've been asked (by Cllr Maya de Souza) to ask Stephen Ashworth if he is happy with my understanding of the legal advice."*

Stephen Ashworth: *"I think that was a very good and accurate summary of the advice given in the Report."*

iv. Transcript at page 33 (474)

Cllr King: *"My comments are what follows on from Cllr Abrahams there. I have to say this is really quite a depressing experience. It is technical responsibility and accountability without any real decision making power ...Briefly for the record, if I had been here in March I think I would've been very concerned about the departure from KC4. I think there's a bit of smokes and mirrors about the presentation here. For the first thousand units it says there should be 50% affordable, and 35% social housing. But this isn't March. We've been given clear legal advice and those who voted in March are accountable for what they did then, but I am afraid I have to follow the advice and consider whether or not there are any questions arising from the Section 106 granted the Heads of Terms."*

b. The Minutes of the November Meeting

- i. **Cllr Abrahams:** *"Councillor Abrahams stated that he had sympathy with much of what had been said by the deputees, particularly on affordable housing and on community space. However, he was not sure that the deputees had taken into account the legal advice that had been provided to the Committee. The advice was that the Committee could not behave as if the March General Purposes (Development Control) Sub-Committee meetings had never happened and Members needed to follow the Sub-Committee's decisions in terms of consents given and the section 106 Heads of Terms unless Members found very clear justification in some change of circumstances to depart from those decisions."*
(267)

- ii **Cllr King:** *“Councillor King expressed concern that, in his view, Members of the Committee had technical responsibility for the application without any real decision-making power.... He stated that if he had made the original decision, he would have been very concerned about the departure from policy KC4. However, the Committee had been given clear legal advice that he would follow.” (267-8)*

c. Cllr Maya de Souza’s Letter to the Camden New Journal (277)

“Members of the Committee were, however, given a strong legal steer that the issue was simply whether the section 106 agreement was consistent with the heads of terms agreed by the last Committee in March 2006, and that we should only make a different decision if there had been a material change in circumstances since then.”

- 39. Members were not just “given a strong legal steer” (in the words of Cllr Maya de Souza) so as to be “unduly boxed in” (in the words of Richards J.) therefore, they were steered in entirely the wrong direction. In particular, the new Committee was expressly advised that it needed to follow the preliminary resolution of the old Committee in March unless they found *“some very clear justification in some change of circumstances since that time to depart from that resolution” (474-5)* That is simply wrong in law.
- 40. In consequence, and in deciding as it did at the November Meeting, the new Committee was misdirected in law as to the unfettered breadth of its discretion to exercise its own planning judgement on matters which had previously been decided by the old Committee, and thereby unlawfully fettered itself in the exercise of that discretion.
- 41. Moreover, if the Court does find that there was illegality in the new Committee’s discretionary decision-making as above, the Court should exercise its own discretion to grant relief by quashing those decisions and remitting them back to the Committee for re-determination. In particular, it cannot be assumed that the Committee will simply decide in the same way on important matters of planning judgment so that granting relief would not make any difference. See: *Pam Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291.
- 42. Indeed if, as the evidence very clearly suggests, Members did not appreciate the full extent of their discretion when making those decisions, remitting them for re-determination will give those Members the opportunity to consider the potential exercise of that discretion for the first time.

Ground Two

43. Just as the Committee retained a discretion to reconsider the applications in November, so it retained its discretion to do so *after* the November Meeting and *before* issuing the decision Notices on 22nd December 2006.
44. It is KXRLG's case that a highly material change of circumstance occurred in that intervening period regarding national planning policy and the amount of affordable housing which was being offered by Argent, an issue in respect of which the Committee had already expressed considerable concern. **(461-462 & 473-475)**
45. In particular, on 29th November 2006 the Government had published new PPS3 containing a definition of "intermediate affordable housing" which was different to that in old PPG3, in result of which intermediate housing could now only be regarded for the purposes of Government policy as affordable if it was provided "*below* market prices or rents." **(321)**
46. It is important to note, therefore, that what might be termed "low cost market intermediate housing", being cheap housing but *at*, rather than *below*, market prices or rent, does not fall within the PPS3 definition of "intermediate affordable housing."
47. Moreover, the new definition of intermediate affordable housing in PPS3 is significantly different to that which Camden had applied in both the March Officers' Report and the Section 106 Agreement.
48. So far as the March Officers' Report is concerned, paragraph 7.6.37 made it clear **(267)**, that both paragraph 3.3.9 of Camden's Affordable Housing SPG **(325)** and paragraph 2.16 of Camden's RUDP defined affordable housing by reference to households spending no more than three times their gross annual income (if buying) or no more than 30% of their net income if renting, and not by reference to it also being offered "below market rents or prices."
49. Further, and so far as the Section 106 Agreement is concerned, although affordable housing is defined therein to include "Intermediate housing which is Affordable Housing ... which is made available at a discount from Market Housing to households who would not otherwise have been able to afford adequate homes on the open market..." **(552)**, the Agreement does not contain any requirement or mechanism to ensure that relevant units are offered at a price which is below their *own* market rent or price.
50. In particular, offering such housing at a discount from "Market Housing", which is specifically defined in the Section 106 Agreement to mean "Residential Units within the Development (excluding Student Accommodation) which are *not* Affordable Housing units" **(553)**, means only that the intermediate housing will be offered at a lower price than these other, unaffordable, units. It does not mean

- that the intermediate housing will be offered at a price below its *own* market value so as to be “affordable” in accordance with the new PPS3 definition.
51. This is material in respect of the following two categories of intermediate housing for which provision is made in the Section 106 Agreement:
- a. 30 Shared Ownership Units to be held on a part-owned, part rented basis.
 - b. 40 Shared Equity Units to be sold within a scheme whereby purchasers can buy an initial share of at least 60% of the equity, with the right to staircase up to 100% of the equity after five years. **(572)**
52. In particular, whereas under the Camden definition of affordable housing, Officers could state at paragraph 7.6.36 of the March Officers’ Report that “all of the proposed 250 intermediate homes would be affordable”, it was now arguable that - as a result of the above change in the PPS3 definition - some 70 of those units could no longer be so considered.
53. Members had never been alerted to this possibility, however. In particular:
- a. Whilst the new definition was contained within the *draft* PPS3, the March Officers’ Report made no reference to that definition or its potential impact.
 - b. Likewise, the November Officers’ Report made no reference to the new definition of “affordable housing.” The terms of the section 106 agreement were finalised after the March meeting and were specifically brought back to Committee for consideration in November, but no reference was made in the Officer’s Report to the fact that the final definitions of affordable housing adopted by the section 106 agreement were incompatible with the definition of affordable housing in draft PPS 3.
54. EarthRights, the solicitors then acting on KXRLG’s behalf, brought this matter to the attention of Camden’s Officers by their letter dated 11th December 2006 **(284, 295-7)** and invited Officers to bring the matter back to the Committee for re-consideration before the Decision Notices were issued. The Officers refused to do so, however, and proceeded instead to issue the Decision Notices under delegated powers.
55. Accordingly, and despite the obvious concern of Members in respect of the issue of affordable housing **(461-462 & 473-475)**, the potential additional shortfall of some 70 additional units, when assessed against new PPS3, was never brought to their attention by Officers.
56. In the case of *R (Erine Kides) v. South Cambridgeshire District Council* [2002] EWCA Civ 1370, it was stated as follows by Parker LJ:

“125. ... where the delegated officer who was about to sign the decision notice becomes aware ... of a new material consideration, Section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to Committee for reconsideration in the light of the new consideration. If it fails to do so, the authority will be in breach of its statutory duty.

126. In practical terms, therefore, when since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a “material consideration” for the purposes of Section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances, the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor (b) that it has considered it with the application in mind and (c) that on a reconsideration the authority would reach (not might reach) the same decision.”

See also: *R (Carlton-Conway) v Harrow LBC* [2002] EWCA Civ 927, where Pill L.J. held that

“Public policy requires, in my judgment, that the planning officer should be circumspect in exercising powers delegated in the terms that they were in this case. Where there are real issues as to the meaning of planning policies and as to their application to the facts of the case, reference to the appropriate Committee is required.”

See also: *R v West Oxfordshire District Council, Ex p C H Pearce Homes Ltd* (1985) 26 RVR 156:

“After the resolution is adopted the local authority may come under a duty to reconsider its decision if flaws are brought to its attention.”

57. In the present case, however, none of the factors set out in the *Kides* case which might have enabled the Officer safely to proceed to issue the Decision Notice was present. In particular:
- a. Although the Officer was aware of the new factor, the Committee was not.
 - b. Moreover, the Officer could not reasonably have concluded, especially in the light of the concerns expressed by Members about affordable housing, that there was no possibility that the Committee would have reached a

different decision had it known that there was now a potential shortfall of 70 additional affordable units.

58. Despite this, and despite the public policy concerns as expressed in the *Carlton-Conway* case, Officers proceeded to issue the Decision Notices without returning the matter to Committee.
59. Moreover:
- a. The question as to whether the new PPS3 definition of intermediate affordable housing was a material consideration was one of law, not a discretionary judgment for the Officer to make; and
 - b. As a matter of law, the new definition of intermediate affordable housing was plainly material, given:
 - i. The importance of providing sufficient affordable housing in an area stated in paragraph 1.1.3 of the March Officers' Report to be characterised by "*some of the highest levels of housing stress... in London and the South East*" (124);
 - ii. The assertion in paragraph 3.5.1 of the November Officers' Report that the Committee needed to make its decisions "*in the context of the present planning policy position and taking into account all material considerations*", including those that changed since the Officers' Report was published. (229); and
 - iii. The exceptional length of the permission granted by Conditions (1) and (4), whereby housing developments may not be delivered for up to twenty years. (91)
60. In the premises:
- a.. The Officer erred in law and acted *ultra vires* in failing to bring the new consideration to the attention of the Committee before issuing the Decision Notices; and
 - b. The Committee failed to take into account a relevant consideration prior to the issuing by Camden of those Decision Notices.
61. Finally, and as submitted in respect of Ground One, if the Court does find illegality in these regards, it should exercise its discretion to grant relief by quashing the decisions and remitting them back to the Committee for re-determination in accordance with *Pam Smith v North East Derbyshire Primary Care Trust*.

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