

DETAILED GROUNDS OF CLAIM

(references in bold & brackets are to pages numbers in the application bundle)

Introduction

1. This application raises two short but important points of legal and democratic principle as to:
 1. Whether a newly elected Council has the discretion to reconsider, as a matter of its own planning judgment, an outline planning application which the previous Council resolved to grant subject to various contingencies being fulfilled, including the entering into of Section 106 Agreements, when those agreements have not yet been entered into and no Decision Notice issued.
 2. The extent of any obligation upon a Council Officer to return a planning application to the relevant Council committee when a material change in planning circumstances has occurred after that committee has resolved to grant planning permission but before the Decision Notice has been issued, and the circumstances in which such obligation might arise.
2. The above questions arise, moreover, in the context of an outline planning application which is itself of considerable strategic importance, whereby a very considerable development is proposed with a view to securing regeneration of an economically deprived area with acute housing stress, but which is also a Conservation Area containing buildings of architectural and historic interest (including listed buildings), and where the content and nature of the development proposals is highly controversial, raising important issues of planning judgment including as to whether sufficient affordable housing has been proposed to meet policy requirements; whether the proposed demolition of those historic buildings is properly

justified; and whether an adequate Environmental Impact Assessment (EIA) has been undertaken, especially into the cultural and heritage impacts of the proposal.

Factual Background

The Impugned Decisions

3. This is an application for an Order quashing the grant of Planning Permission, Listed Building Consents and Conservation Area Consents by the London Borough of Camden (Camden), pursuant to a decision of Camden's Development Control Committee (the committee) on 16 November 2006 in respect of the following applications (the applications):
 1. **Planning Permission, Application No. 2004/2307/P** (Outline Application for redevelopment of Railway Lands within Kings Cross Opportunity Area)
 2. **Listed Building Consent, Application No. 2004/2313/L** (Demolition of the Stanley Building North)
 3. **Listed Building Consent, Application No. 2004/2314/L** (Demolition of parts of the Great Northern Hotel)
 4. **Listed Building Consent, Application No. 2004/2315/L** (Dismantling and relocation of Gas Holder No 8)
 5. **Listed Building Consent, Application No. 2004/2316/L** (Demolition of part of the Handyside Canopies and construction of a new road)
 6. **Conservation Area Consent, Application No. 2004/2317/C** (Demolition of Culross Buildings)
 7. **Conservation Area Consent, Application No. 2004/2318/C** (Demolition of Plimsoll Viaduct)
 8. **Conservation Area Consent, Application No. 2004/2320/C** (Demolition of various unlisted buildings/structures within Kings Cross Central)

9. Conservation Area Consent, Application No. 2004/2321/C
(Demolition of the Western Goods Shed)

4. The Decision Notices were issued on 22 December 2006 **(90-123)**

The Claimant

5. The Claimant is the Kings Cross Railway Lands Group (KXRLG). KXRLG is an umbrella organisation comprising individuals and groups active in and around Kings Cross in the London Boroughs of Camden and Islington. Its purpose since its foundation almost 20 years ago has been to campaign for the regeneration of the Railway Lands and to ensure that such regeneration benefits local residents and businesses.
6. KXRLG is strongly in support of regeneration in the interests of local, London-wide and larger communities of beneficiaries and has made representations on this basis on every scheme proposed for Kings Cross.
7. KXRLG was incorporated 5 July 2004 as a Company Limited by Guarantee, (reg. 05170241) with a view to moving towards obtaining charitable status. Its registered address is 5 Caledonian Road, London N1 9DX.

The Applications

8. Argent (the developer) made applications for the re-development of two adjacent sites: the "Main Site" (in respect of which the permissions and consents under challenge were made) and the "Triangle Site", the subject of a separate application. A further site, "the Linear Lands" falls within the developer's control and is likely to be subject of a future application for planning permission.

9. The Main Site falls within Camden, as does 40% of the Triangle Site (the remaining 60% falls within London Borough of Islington). This Judicial Review is concerned only with the nine applications relating to the Main Site.

10. The planning application in respect of the Main Site was for outline planning permission for the development of up to 718, 275 sq m of floorspace comprising up to 455,000 sq m of office space, between 125,000 and 176,000 sq m of residential development (between 1,600 and 2,300 new units) and up to approximately 160,000 sq m of hotels, shopping and community uses combined. The Revised Development Specification (Sept 2005); the Revised Parameter Plans (Sept 2005) and the Illustrative Scheme Plan provide an indication of the proposals **(extracts at 61-89)**.

KXRLG's View of the Applications

11. KXRLG has campaigned for many years for the redevelopment of Kings Cross to contain *inter alia* a greater range of employment uses and opportunities than was proposed by the applications; for more affordable housing and more social rented housing; for greater use of renewable energy and green technologies; and to conserve the more historically significant buildings in the area which the applications proposed to demolish. The proposed scheme fell well short, therefore, of that for which KXRLG campaigned. Accordingly, KXRLG objected to the applications.

Chronology of Camden's Consideration of the Applications

12. The committee first considered the applications on 08 and 09 March 2006. The committee were presented with an Officers' Report (the March OR) comprising some 900 pages summarising the nine applications and the context for the decision (relevant extracts are set out at **124-178**).

13. At its meeting on 08 and 09 March, the committee heard deputations from the developer and from numerous objectors, including several groups who fall under the umbrella of KXRLG.

14. Despite the matters raised by KXRLG and other objectors however, the committee voted to make a provisional resolution to grant approval for the Main Site outline application, subject to conditions (see below). Prior to the substantive vote a member of the Committee moved a resolution that major issues were not being fully discussed due to a lack of time and proposed holding a further meeting for this purpose. That motion was lost albeit by the narrow margin of seven votes to eight. The main site resolution was then carried, also on a close, divided vote the numbers of which are not recorded in the minutes, subject however to the following important contingencies:

1. The referral of the application to the Secretary of State under the terms of the Town & Country Planning (Shopping Direction) (England and Wales) (No.2) 1993 and any direction arising.
2. The referral of the application to the Mayor of London under the terms of the Town & Country Planning (Mayor of London) Order 2000 and any direction arising.
3. The completion of Legal Agreements under Section 106 of the Town & Country Planning Act 1990 (as amended) and other powers securing certain obligations, the heads of which are set out in the March OR.
4. The conditions set out in the March OR.

15. The remaining applications were granted preliminary approval subject to contingencies 1, 2 and 4 above, and subject to the grant of planning permission on the Main Site.
16. So far as contingencies 1 and 2 are concerned, on 17 March 2006 the Mayor of London confirmed that no direction would be issued and, on 11 April 2006, the Government Office for London confirmed there would be no call in. So far as contingency 3 is concerned, the committee further resolved in March 2006 that the necessary Section 106 Agreements would be referred back to the committee for final consideration.
17. The Section 106 Agreements were not finalised so as to be brought back to the committee until November however, by which time the May 2006 Local Government elections had taken place, causing a dramatic change in the membership and political composition of Camden, including a change of political control, and - in result – corresponding changes also in the composition of the committee.
18. In the above circumstances, and since the earlier March resolution was only a resolution to grant planning permission subject to Section 106 Agreements which had not been agreed so that no Decision Notices had been issued and no planning permission actually granted, KXRLG urged the newly elected Council to exercise its continuing discretion in the matter and to reconsider the predecessor Council's provisional decisions, particularly in respect of (1) the amount of affordable housing which was being offered; (2) the proposal to demolish important buildings (namely Stanley and Culross) in a Conservation Area, one of which was listed; and (3) the adequacy of the EIA and the appropriateness of extremely flexible proposals, particularly with regard to the heritage and conservation issues.

19. On 08 September 2006, Earthrights, the solicitors then acting on KXRLG's behalf, wrote to Camden and made a number of submissions by way of a pre-action letter as to why Camden should reconsider its provisional grant of planning permission **(187-203)**. Earthrights contended, in particular, that Camden were both (1) empowered and (2) in the particular circumstances of the case under a duty to reconsider the preliminary resolutions in the light especially of (a) various legal issues raised and (b) certain new material considerations which had not been considered in March.
20. The Earthrights letter went on, accordingly, to raise points on a range of subjects reflecting the concerns of KXRLG, including levels of affordable housing provision; heritage and conservation; and the over-flexible nature of the proposals and compliance with requirements of an Environmental Impact Assessment.
21. Camden's solicitors, Denton Wilde Sapte (DWS), responded on 29 September 2006 **(204-206)**. DWS stated that the majority of issues would be raised in a further Officers' Report and referred to the committee which would take account of all material considerations before any approval for the final grant of planning permission (paragraph 8). DWS requested confirmation that, in the light of the intention to refer the matter back to committee, the group would not seek judicial review until after that referral process.
22. Earthrights wrote again to Camden on 18 October seeking further clarification **(207-212)**. Earthrights asked, in particular, whether the new committee would be given a further opportunity to fully reconsider affordable housing provision (paragraph 1). DWS replied to the above letter on 06 November 2006, stating that "the committee will be reminded of the broad range of policies relevant to Kings Cross in order to decide

whether there is a departure [from RUDP affordable housing policy] and if so, whether any such departure is material” **(213-216)**.

23. The matters raised by the above correspondence duly came before the new committee on 16 November 2006 when they were asked to approve the Section 106 Agreements.

24. A further Officers’ Report (the November OR) of around 800 pages was prepared in advance of the committee’s meeting on 16 November and various other appendices and documents were served on the day of the meeting (relevant extracts are set out at **217-241**).

25. At the meeting the new committee heard both from the developer and from a number of deputies opposed to the scheme, including KXRLG.

26. One of the matters of greatest concern to members was to clarify the extent of the new committee’s discretion to exercise its own planning judgments on the matters previously considered by the old committee in March.

27. The November OR advised members as follows in this regard **(228)**:

“3.4.2 As a matter of law the Council can 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.

3.4.3 However, save to the extent outlined below, the relevant planning policies and other material considerations to which the Committee must have regard when coming to a decision have not changed significantly since March 2006.

3.4.4 It is the Planning Officers' and leading Counsel's view that the changes in planning circumstances do not justify decisions that are inconsistent with those made on March 9.

3.4.5 A change in approach without clear justification would be open to appeal...

3.4.6 If the committee requests materially different planning obligations from those set out in the Heads of Terms then, depending on the nature of the changes, that may result in a change to the overall scheme that the 9th March 2006 Sub-Committee resolved to approve and there would need to be a reasoned justification for any change. Very considerable thought would need to be given to whether there are changes of circumstances or weight that justify a different approach. Officers' view is that it would be difficult to justify 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.

3.4.7 Officers' recommendation is that, having taken account of the issues raised below, having considered the material provided and made available, and having reviewed the decision of the 9th March Committee, the decision of the March Committee to grant the various permissions should be ratified.

...

3.5.1 ...When ratifying (as recommended) the decision of the 9th March the Committee needs to do so in the context of the present planning policy position and taking into account all material considerations. Clearly, in doing so, the Committee can use the March Committee Report as a starting point, and can then take

account of issues that have changed since that Report was published.”

28. Members sought clarification of the implications of the above advice on several occasions (a full web-cast of the meeting is available in the event that any of the following is contested). In particular:

1. Cllr Somper (Chair) said as follows:

“Part 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 do not justify decisions that are inconsistent with those in March.”

2. Cllr Abrahams, Vice-Chair of the Development Control Committee, said as follows and entered into the following exchange:

*“I’ve got great sympathy for much of what has been said by the deputations, particularly about the affordable housing element of the development... I have to say I am not sure any of the deputations have taken into account the legal advice that the Committee has been given. We cannot tonight behave as if the 9th March never happened and we are coming to this for the very first time. What the legal advice says is **we have 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. And it warns us that if we don't do that, if we reject this package without **very strong justification** we could end up in an enormous public inquiry with the threat of costs against the Council for unreasonable behaviour. So this is an absolutely crucial point and I want members of the public and deputies to understand that for me personally I do have sympathy with the points you have made, but given the nature of the legal advice set out on page 26, I don't feel able to turn down this package and I think many members of the committee will feel similarly about that.*

[Councillor Maya de Souza asks Cllr Abrahams to refer his comments to Stephen Ashworth, legal adviser from DWS]

I have been asked to ask Stephen Ashworth if he is happy with my understanding of the legal advice.

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

3. After this Cllr. King said as follows:
*"For the record I have to say this is really quite a depressing experience. It is technical decision making and accountability without any real decision making power and that's a shame really when we're dealing with a development which frankly has an awful lot which is exciting about it and will bring a lot of benefits to the borough. **Briefly for the record, if I had been here in March, I think I would have been very***

concerned about the departure from KC4. There's a bit of smokes and mirrors about the presentation here. For the first thousand 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...

4. Cllr. Rea later said as follows:

"I came tonight thinking this is a really tight corset we are going to be squeezed into; there's no way out- our legal advice says so. We will have to vote for it..."

29. It should be noted that Cllr Rea said in March that she did not think the balance in the application was right; that she was concerned there would not be enough housing to allow many large families to be housed; and that ultimately she could not support the proposals.

30. Having so received and understood the advice as to the extent of their discretion to exercise their own planning judgments on the matters previously decided by the old committee, the new committee resolved to grant the various consents sought by the applications.

31. The extent to which members of the new committee considered their discretion in November to be constrained by the decision of the previous committee in March is also apparent from the Minutes of the committee meeting as finally approved on 8 February 2007 (**261-275**), an earlier version having been rejected as including an insufficiently detailed record of the legal advice members had been given (**247-260**). In particular, and as finally approved, the Minutes stated, *inter alia*, as follows (**267-268**):

“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.

...

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.”

32. The members’ understanding of the extent of their discretions to reconsider matters afresh and exercise their own planning judgments on them when passing the above resolutions is further evidenced by a letter in the Camden New Journal from Cllr. Maya de Souza in which she wrote as follows (276-277):

“THE decision to go ahead with the Kings Cross plan was a sad one.

*Myself, and other councillors on the committee, were unhappy about this proposal for a number of reasons including how far short it falls of the 50 per cent affordable housing target; a mere 10 per cent renewable energy provision when Camden's policy sets this as a minimum; a large number of car parking spaces encouraging road travel; demolition of historic buildings; little green public space; and poor integration into the surrounding area which falls in part into Islington. 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. I could not support the plan but considering the advice given to us, I felt it necessary only to abstain.** The manner in which this decision was made is also a cause for concern. A legal view, requested months in advance as to the pending legal challenge, was faxed through only the night before.*

Councillors were swamped at the last minute with bundles of paper and then were left with two hours to consider the application.

Though Roger Madelin of Argent had addressed many councillors on the committee on the sustainability aspects of his plans, we were warned about steering clear of lobbyists and thus we did not have the opportunity to hear all the other arguments in detail and put proper questions to opponents.

This is unsatisfactory – to date my request to the councillors in charge to review procedures have simply been dismissed but I will continue to seek a review of procedures to ensure that members of the Committee are properly prepared to make such big decisions.

CLLR MAYA DE SOUZA

(Green)Town Hall, WC1”

33. Following the committee's resolution of 16 November, and on 1 December, DWS wrote to Earthrights requesting that any further legal issues be raised prior to the issue of decision notices (282-283). Earthrights replied by a letter dated 11 December 2006, stating that the applications should be referred back to committee on the basis *inter alia* that the committee had been wrongly advised on the question of its discretion; and also because of the adoption, subsequent to the committee's meeting, of a new definition of affordable housing in planning policy statement 3 which was a material consideration and necessitated reconsideration (284-297).
34. Camden issued the Decision Notices on 22 December 2006. DWS responded to Earthrights letter on 28 December, rejecting the points made (298-299).

The Grounds of Challenge

Ground One

35. It is clear law that the provisional resolution of 9 March 2006 to grant planning permission subject to various unfulfilled contingencies was inchoate. Accordingly, the new committee retained discretion either to grant or refuse planning permission when the matter returned to them on 16 November 2006. See: *R v West Oxfordshire District Council ex parte Pearce Homes Ltd* (1985) 26 RVR 156, 158 and *R. (Burkett) v. Hammersmith London Borough Council* [2002] 1 WLR 1593).
36. Moreover, it was accepted by DWS in correspondence that the new committee would need to revisit the substantive issues at stake in the light of changes of circumstance and in the light also of shortcomings in its March decision. Assurances were given that the new committee would exercise a fresh discretion over those matters.

37. The new committee were advised by the November OR that there should be no *“change in approach without clear justification”*.

38. The above advice begs the question, as to what might constitute *“clear justification”* for the new committee deciding matters of planning judgment differently in November 2006 to the old committee in March. In particular:

a. *Would a change of mind only be justified if material circumstances had changed since March?*

or

b. *Did the new committee have the discretion to revisit matters of principle so as to be able to decide them differently in exercise of their own planning judgment even if there had been no intervening change of circumstance?*

39. It is equally clear law, moreover, that the above questions must be answered in favour of the second and broader proposition. 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.”

See also: *R (The Garden and Leisure Group Limited) v North Somerset Council (2003) EWHC 1605 (Admin)* in which Mr. Justice Richards held as follows at paragraph 35 of his judgment that:

*“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.**”*

40. Since the inchoate resolution of March 2006 had “*no legal effect*”, so that the committee “*may in its discretion revoke*” it, such resolution cannot in law have so constrained the new committee in November that it was required to decide all matters identically to its predecessor committee in March, especially in respect of important matters of finely balanced judgment in a strategically important but sensitive location, unless there had been an intervening change in circumstances. If it were otherwise, the legal status of the inchoate resolution to grant permission subject to unfulfilled contingencies would, effectively, have been raised to that of a formal grant of outline permission so as to have not just some legal effect, but very considerable legal effect, significantly fettering the new committee’s discretion to revoke.

41. It follows that the new committee in November 2006 retained a full and unfettered discretion to reconsider all or any of the matters decided by the

old committee in March 2006, even if there had been no intervening change in circumstances, with members able to exercise their own planning judgment upon all such matters.

42. This would be the case in law even if the November committee was identically constituted to the March committee. *A fortiori* it is the case in respect of a completely differently constituted committee following intervening Local Government elections.

43. Moreover, the breadth of the new committee's unfettered discretion in these regards is underlined by an earlier House of Lords decision, *Tesco Stores v. Environment Secretary* (1995) 1 WLR 759, in which Lord Hoffman stated as follows at page 780:

*'The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. **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.***

.... If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the Local Planning Authority or the Secretary of State.'

44. The new committee was, accordingly, at liberty not only to revisit all matters afresh, but could in its discretion - and as an exercise of its own planning judgment - attribute whatever weight it considered fit to the relevant considerations which it was obliged to take into account, including *different* weight to that advised by officers or attributed by the old committee in March.
45. Moreover, the relevant considerations which it was obliged to take into account clearly included all of those relevant to the issues raised by KXRLG in its objections to the proposal: whether sufficient affordable housing had been proposed, taking into account applicable Development Plan policies and the guidance contained in PPG3, draft PPS3, and PPS3 as published; whether the demolition of Culross and Stanley was justified in all of the circumstances, taking into account the guidance contained in PPG 15; and whether the proposals were too flexible for the EIA to have been adequate in this regard. All of these issues are matters of planning judgment which the new committee could lawfully have decided either way.
46. To the extent, therefore, that any member in November 2006 thought him or herself in any way bound by the decision of the committee in March, so as only to be able to decide differently if there had been a material change in circumstances since then, that member will have misguided him or herself as to law and unlawfully fettered his or her exercise of discretion.
47. In order to ascertain both the nature 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 following material:

1. The November OR.
2. The oral exchanges during the November meeting, especially given that members sought clarification in these regards.
3. The approved Minutes of the November meeting, especially given that members refused to approve the original Minutes in these regards and required them to be amended.
4. Any subsequent public statement by members as to how that advice was interpreted by them.

48. Moreover, in the light of the exchanges, statements, Minutes and letter set out in paragraphs 28-32 above, it is clear that members either were advised by their solicitor at the meeting of 16 November 2006 or, alternatively, understood themselves to be so advised, that they had to follow the preliminary resolution of 09 March 2006 unless they found very clear or very strong justification to depart from that resolution ***in a change of circumstances*** since March.

49. For the reasons elaborated upon in paragraphs 35-46 above, however, that advice, or the manner in which it was understood and interpreted by members, was wrong. In particular, whilst the new committee were obliged in law to take into account the March 2006 decision and entitled to decide in exactly the same way on all matters of planning judgment, they were also entitled in law to revisit the earlier decision in their discretion and to decide differently as a matter of their own planning judgment. However, the members were wrongly advised, or so interpreted the advice they received, that they would only be justified in deciding differently to the March 2006 decision if there had been a material change in circumstances since then..

50. In consequence, and in deciding as it did on 16 November 2006, the new committee both:

1. Misdirected itself in law as to the extent of its discretion to exercise its own planning judgement on matters which had previously been decided by the old committee; and
2. Unlawfully fettered itself in the exercise of that discretion.

Ground Two

51. For all of the above reasons it is not incumbent on KXRLG to demonstrate that there had been a material change in planning circumstances after the March 2006 decision for this application to succeed; still less a change in circumstances which provided “*very strong justification*” for reaching a different decision, as members were advised. It suffices that the committee in November were prevented from considering afresh and as a matter of their own planning judgment the *same* planning circumstances.

52. As a matter of fact, however, the correspondence on behalf of Camden and the November OR both accept that there were material changes of circumstances on which the council needed to exercise a fresh judgment, albeit that the November OR expresses the view that none “*justified*” a different decision.

53. Furthermore, a highly material change of circumstance occurred *after* the committee made its resolution on 16 November 2006 but *before* the Decision Notices were issued on 22 December 2006 regarding the policy relating to the amount of affordable housing which was being offered, an issue in respect of which the committee had expressed considerable concern. Earthrights brought this matter to the attention of Council Officers by their letter dated 11 December 2006 (**284-297**). Officers refused to bring the matter to the attention of the committee, however.

54. In particular, on 29th November 2006, the Government published new PPS3, containing therein a new definition of “*affordable housing*” to that which had been in old PPG3, as a result of which 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*”. **(321)**.

55. This new definition of “*affordable housing*” in PPS3 was significantly different in respect of intermediate housing to that which Camden had applied both in the March OR and in the Section 106 Agreements. In particular, paragraph 3.3.9 of Camden’s Affordable Housing SPG **(325)** 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, as was expressly stated at paragraph 7.6.37 of the March OR **(169)**, and not by reference to it also being offered “*below market rents or prices*” .

56. Accordingly, whereas under the Camden definition of “*affordable housing*” the Officer could state at paragraph 7.6.36 of the March OR that “*all of the proposed 250 intermediate homes would be affordable*” **(169)**, in result of the above change by PPS3, some 70 of those units could no longer be so considered.

57. Moreover, whilst the new definition was contained within the *draft* PPS3, the March OR made no reference to that definition, stating as follows (at paragraph 2.2.5) in respect *draft* PPS3 **(142)**:

“In December 2005, the ODPM published a draft PPS3 for consultation. Once adopted, this will replace PPG3 and Circular 06/98. Draft PPS3 re-iterates many of the themes in PPG3,

focusing on providing for a mix of housing (including affordable) to create sustainable communities and deliver mixed communities.”

58. The November OR did not make any reference to the new definition of “*affordable housing*” either, stating (at paragraph 3.5.13) that no relevant new Planning Policy Statements had been published since March (**230**).

59. Moreover, and as already noted, when, by their letter dated 11 December 2006, Earthrights raised the matter with Officers (**284-297**), the new PPS3 having now been formally published, those Officers still refused to bring it to the attention of the committee, and proceeded instead to issue the Decision Notices under delegated powers.

60. Accordingly, and despite the obvious concern of members in respect of the issue of affordable housing, the potential additional shortfall of some 70 additional units when assessed against new PPS3 was never brought to their attention by Officers.

61. In the case of *R (on the application of Erine Kides) v. South Cambridgeshire District Council* [2002] EWCA Civ 1370, it was stated as follows by Lord Justice Parker:

“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.”

62. 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 were present. In particular, although *he* was aware of the new factor, the *committee* was not. Moreover, the Officer could not reasonably have concluded, especially in the light of the concerns expressed about affordable housing, and the narrow margin of the March decision, that there was no possibility that the committee would have

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

63. 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.

64. Moreover, the question as to whether the new PPS3 definition of “*affordable housing*” was a material factor was one of law, not a discretionary judgment for the Officer to make. Further, and as a matter of law, that new definition of “*affordable housing*” was plainly material, especially given:

1. The importance of providing sufficient affordable housing in an area stated in paragraph 1.1.3 of the March OR to be characterised by “*some of the highest levels of housing stress... in London and the South East.*”
2. The assertion in paragraph 3.51 of the November OR that the committee “*needs*” to make its decisions “*in the context of the present planning policy position and taking into account all material considerations.*”
3. The exceptional length of the permission granted by Conditions (1) and (4) fixing the policy to be applied in relation to housing developments that may not be delivered for up to twenty years.

65. In the premises:

1. 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

2. The committee failed to take into account a relevant consideration prior to issuing the Decision Notices.

Time for Challenge

66. Time for the purposes of judicial review runs from the date of the issue of the notices of the grant of planning permission and parallel consents (i.e. from 22 December 2006). See: *Burkett v Hammersmith L.B.C.* [2002] 1 WLR 1593.

The Application for a Protective Costs Order

67. The two issues raised by this application are both of general public importance which the public interest requires to be resolved, concerning: (1) the extent to which newly elected members of a Local Planning Authority are vested with a continuing discretion to exercise their own planning judgments on a planning application which previously elected members resolved to approve, but subject to unfulfilled contingencies so that no Decision Notice has been issued; and (2) the extent of any duty imposed on Council Officers to put before elected members material changes in circumstance which have arisen after members resolved to grant planning permission but before any Decision Notice has been issued.

68. Moreover, the above two issues arise in the context of a planning application, the strategic importance of which Camden Officer's have said – in paragraph 1.1.3 of the March OR – “cannot be understated” (124).

69. Further, the matters of substantive concern upon which any continuing discretion – if it is vested – might be exercised are fundamental to such a strategically important application, concerning *inter alia* the quantum of affordable housing to be provided in an area of considerable housing

stress; and whether the demolition of important buildings, including a listed building, in a Conservation Area is justified.

70. The Claimant, KXRLG, has no private interest in the outcome of the case, being an umbrella organisation whose purpose, since its foundation almost 20 years ago, has been to campaign for the appropriate regeneration of the land comprised within the proposed development, the subject of this application, and has, since 5th July 2004 been incorporated a Company Limited by Guarantee with a view to securing charitable status.

70. The financial resources of KXRLG are very limited and at the present time the balance of funds available to the organisation stands at around £200. It may be possible to raise further funds and KXRLG intend to do so. However, given the levels of deprivation in the area it will be difficult to raise significant funds. Taking into account funds which they might hope to raise in support of the legal action KXRLG are seeking a Protective Costs Order limiting their exposure to £10,000. Moreover, and given the likely costs of this application, it is very likely that they will be unable to pursue this application if no Protective Costs Order is made.

72. In the circumstances it is fair and just to make a Protective Costs Order in this case in order to enable the above issues of general public importance to be resolved in the public interest.

John Hobson QC
Paul Stinchcombe
Alex Goodman