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Case No: CO/4849/2019 & CO/4851/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/05/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

THE MAYOR OF LONDON	**Claimant**
- and -	
(1) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
(2) THE KEEPERS AND GOVERNORS OF THE FREE GRAMMAR SCHOOL OF JOHN LYON (HARROW SCHOOL)	**Second Defendant**
(3) THE LONDON BOROUGH OF HARROW	**Third Defendant**

- -
- -

Mr Douglas Edwards QC and Ms Sarah Sackman (instructed by **Transport for London**) for the **Claimant**
Mr Richard Turney (instructed by **Government Legal Department**) for the **First Defendant**
Mr John Steel QC and Ms Victoria Hutton (instructed by **Sharpe Pritchard**) for the **Second Defendant**
The Third Defendant did not appear and was not represented

Hearing dates: 22nd – 23rd April 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 14:00 on the 12th May 2020

Mr Justice Holgate :

Introduction

1. The Mayor of London ("the Mayor") challenges by statutory review under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") two decisions of the First Defendant, the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") issued on 31 October 2019: (a) allowing the appeal of the Second Defendant ("the School") against a refusal of planning permission by the local planning authority, the London Borough of Harrow ("LBH") on the direction of the Mayor and (b) ordering the Mayor to pay to the School its costs of the inquiry proceedings (pursuant to s.250(5) of the Local Government Act 1972 and ss.78 and 320 pf TCPA 1990). The proposal related to substantial development at Harrow School.

2. The School is located on the slopes and on the crest of the settlement of Harrow-on-the-Hill. The School's estate occupies a substantial part of Harrow Hill, about 122 ha. The School's buildings are set within relatively open areas and landscaped grounds. They comprise buildings from different eras, but in the main the architecture is Victorian and Twentieth Century. The concentration of buildings becomes more dense towards the crest of the hill. A number of listed and non-listed school and other buildings occupy the hill to the north and west of the appeal site.

3. The appeal site, 4.7 ha in area, lies on the eastern side of the hill on its lower slopes. It contains the existing sports building (footprint 1,515 sqm and floorspace 3,095 sqm), a science building, office accommodation, a sports pavilion and grassed areas. The levels drop across the site from west to east, representing a step incline of 1 in 7, and a vertical difference of about 36m.

4. To the east of the appeal site there are outdoor sports facilities. To the south lies Harrow Park, which contains the School's golf course. These areas form part of a Registered Historic Park and Garden and the Harrow Park Conservation Area. To the west, north and north-west of the appeal site lies the Harrow School Conservation Area.

5. In summary, the proposed development comprises the demolition of a number of buildings within the appeal site, including the existing sports building, and the construction of a new sports building (footprint 4,923 sqm and floor area 7,269 sqm on 3 levels) and a new science building (floor area 3,675 sqm on 3 levels), a new landscaping core, new visitor car parking and various alterations to and relocations of facilities.

6. The eastern part of the appeal site and the surrounding open land to the east and south is designated Metropolitan Open Land ("MOL"), to which Green Belt development control policies are applicable. The new sports building is proposed to be cut into the slope of the Hill. It would lie within the MOL. The science building proposed to be located just to the west would lie outside that designation.

7. The only part of the proposal to which the Mayor objected was the sports building.

8. In his report to the Secretary of State the Inspector identified a number of heritage assets affected by the proposal. They comprised listed buildings: St Mary's Church, the Vaughan Library, the Chapel, New Schools, the Butler Building, and the Music

Building; the Harrow School Conservation Area; and the Harrow Park Registered Park and Garden and Conservation Area (IR 69). The only element of the proposal which was said to be harmful to the setting or to the character and appearance of these assets was the proposed sports building.

9. The Inspector identified what he considered to be the main issues in the appeal. It is important to note that he had previously set these out for the parties in his "pre-inquiry note" and repeated them orally at the beginning of the inquiry. He recorded that the main parties agreed that these were "the salient main matters in dispute". The Mayor confirmed that he does not challenge IR 3 which defined the main issues as follows: -

> "(i) Whether the proposed development is inappropriate development in Metropolitan Open Land (MOL) for the purposes of the adopted Development Plan, London Plan, the National Planning Policy Framework, and any other relevant document, and;
>
> (ii) The effect of the proposal on the openness of the MOL, and;
>
> (iii) Whether the proposed development would preserve the setting of nearby designated heritage assets, and preserve or enhance the character or appearance of the Harrow School Conservation Area, and if not whether any public benefits would outweigh any harm, and;
>
> (iv) If the proposal is inappropriate development, whether the harm by reason of inappropriateness, *and any other harm*, is clearly outweighed by other considerations, so as to amount to the very special circumstances required to justify it" (emphasis added).

It is significant that in issue (iv) the Inspector correctly described the planning balance which had to be struck when applying MOL policy.

10. However, a good deal of the Mayor's challenge to the decision on the planning appeal related to a part of his case at the inquiry which had raised a subject falling outside those main issues, namely whether the proposal would cause harm to heritage assets and thereby harm to one of the purposes of the MOL.

11. This judgment is structured in the following way (with paragraph numbers): -

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Planning policies

12. The statutory development plan for the purposes of s.70(2) of TCPA 1990 and s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") comprises the London Plan 2016 ("LP"), the Harrow Core Strategy 2012 ("CS") and the Harrow Development Management Policies DPD 2013 ("DMDPD").

The London Plan 2016

13. By s.38(1) and (2) of PCPA 2004 the development plan for a London Borough includes the "spatial development strategy", produced and published under s.334 of the Greater London Authority Act 1999. The LP is that strategy. The statutory scheme requires the plan to include the Mayor's "policies" for the development and use of land in Greater London and a "reasoned justification" for the strategy. That reasoned justification is relevant to the interpretation of the policy, but is not itself policy. It does not therefore have the force of policy, nor can it "trump policy". Accordingly, as Mr. Edwards QC pointed out for the Mayor, a development proposal cannot be said to fail to accord with the development plan simply because it breached a criterion contained solely in the reasoned justification (R (Cherkley Campaign Limited) v Mole Valley District Council [2014] EWCA Civ 567 at [16]).

14. Policy 7.17 of the LP states: -

"**Strategic**

A. The Mayor strongly supports the current extent of Metropolitan Open Land (MOL), its extension in appropriate circumstances and its protection from development having an adverse impact on the openness of MOL.

Planning decisions

B. The strongest protection should be given to London's Metropolitan Open Land and inappropriate development refused, except in very special circumstances, giving the same level of protection as in the Green Belt. Essential ancillary facilities for appropriate uses will only be acceptable where they maintain the openness of MOL.

LDF preparation

C. Any alterations to the boundary of MOL should be undertaken by Boroughs through the LDF process, in consultation with the Mayor and adjoining authorities.

D. To designate land as MOL boroughs need to establish that the land meets at least one of the following criteria:

   a. it contributes to the physical structure of London by being clearly distinguishable from the built up area

   b. it includes open air facilities, especially for leisure, recreation, sport, the arts and cultural activities, which serve either the whole or significant parts of London

   c. it contains features or landscapes (historic, recreational, biodiversity) of either national or metropolitan value

   d. it forms part of a Green Chain or a link in the network of green infrastructure and meets one of the above criteria."

15. Thus, the strategic policy in 7.17A protects the MOL against development having an adverse impact on its *openness*. Policy 7.17B gives the same level of protection to the MOL as land in the Green Belt, by requiring that "inappropriate development" in the MOL should be refused except in "very special circumstances" ("VSC"). "Inappropriate development" and VSC are both terms of art used in Green Belt policy. They are not defined in the LP. Not surprisingly therefore, paragraph 7.56 of the reasoned justification states that "the policy guidance of paragraphs 79-92 of the NPPF applies *equally* to MOL" (emphasis added). That reference to the 2012 version of the National Planning Policy Framework ("NPPF") now translates to paragraphs 133 to 147 of the 2019 edition (see paragraphs 20 to 22 below).

16. The policy in the London Plan therefore depends upon the NPPF for the definition of inappropriate development (paragraphs 145 to 147 of the 2019 edition) and for development control policy (paragraphs 143 to 144).

17. When designating an area as MOL, policy 7.17D requires that that land should meet at least one of the 4 criteria there set out. These are referred to as "MOL purposes". The policy recognises that land included in the MOL may not serve all of those potential purposes. But the Mayor contends that MOL purposes do not go beyond those 4 criteria. However, paragraph 7.56 makes it plain that Green Belt purposes, as set out in

paragraphs 133-4 of the NPPF are also relevant, although plainly, an area of MOL may not serve all or any of those additional purposes. Whether it does so will depend on the circumstances of each case. Once the relevant MOL/Green Belt purposes served by a particular area of MOL have been identified, harm that a proposal would cause to one of more of those purposes is a material consideration in the application of development control policy for MOL, along with harm by reason of development being inappropriate and any harm to openness, just as it is for Green Belt (Doncaster Metropolitan Borough Council Secretary of State for Environment, Transport and the Regions [2002] JPL 1509 at [67]). I cannot accept the Mayor's suggestion that the purposes of MOL designation are restricted to those set out in policy 7.17D, which would be inconsistent with the local development plan. In any event, Mr. Edwards QC confirmed that the legality of the decision on the planning appeal is not affected by this point.

The Harrow Core Strategy 2012

18. The "overarching policy objectives" of the CS include safeguarding and enhancing MOL (Core Policy 1). Policy CS1F provides that the quantity and quality of MOL should not be eroded by inappropriate uses or insensitive developments.

The Harrow Development Management Policies DPD 2013

19. Policy DM16 is entitled "Maintaining the Openness of the Green Belt and Metropolitan Open Land". Policy DM16D states: -

> "A. The redevelopment or infilling of previously developed sites in the Green Belt and Metropolitan Open Land will be supported where the proposal would not have a greater impact on the openness of the Green Belt and Metropolitan Open Land, and the purposes of including land within it, than the existing development, having regard to:
>
> a. the height of existing buildings on the site;
>
> b. the proportion of the site that is already developed;
>
> c. the footprint, distribution and character of existing buildings on the site; and
>
> d. the relationship of the proposal with any development on the site that is to be retained."

Paragraph 5.7 (which precedes policy DM16) states: -

> "When applying the following policies, the purposes of including land within the relevant designation refers to the purposes set out at paragraph 80 of the National Planning Policy Framework (2012) in respect of the Green Belt, and the criteria set out at Policy 7.17 (D) in respect of Metropolitan Open Land."

The reference to paragraph 80 of the NPPF 2012 should now be treated as referring to paragraph 134 of NPPF 2019. Thus, the DMDPD confirms that, at least within Harrow Borough, "the purposes" of the MOL is to be understood in the same way as I have explained in relation to the LP.

NPPF

20. Paragraphs 133 to 134 address the purposes of Green Belt policy: -

> "133. The government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently

open; the essential characteristics of Green Belts are their openness and their permanence.

134. Green Belt serves 5 purposes:

(a) to check the unrestricted sprawl of large built-up areas;

(b) to prevent neighbouring towns merging into one another;

(c) to assist in safeguarding the countryside from encroachment;

(d) to preserve the setting and special character of historic towns; and

(e) to assist in urban regeneration, by encouraging the recycling of derelict and other urban land."

21. "Inappropriate development" is defined in paragraphs 145 to 147 of the NPPF. There was no dispute that the School's proposal constituted "inappropriate development".

22. Paragraphs 143 to 144 of the NPPF state: -

"143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

23. Paragraphs 184 to 202 of the NPPF set out policies for conserving and enhancing the historic environment in the context of the duties in sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas Act) 1990 ("the Listed Building Act 1990"). Paragraph 193 requires great weight to be given to the conservation of a historic asset when considering the impact of a proposed development on the significance of that asset, whether that harm amounts to total loss of, or substantial harm or less than substantial harm to its significance. Such harm requires "clear and convincing justification" (paragraph 194). Paragraph 196 applies where such harm would be "less than substantial":-

"Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

The Statutory Framework

24. The Town and Country Planning (Mayor of London) Order (SI 2008 No. 580) applied to the School's proposal as "an application of potential strategic importance" (a "PSI Application"). LBH was required to send the application to the Mayor as soon as reasonably practicable after its receipt (Article 4 (1)). The Mayor was required within 6 weeks to provide LBH with a statement setting out whether he considered the

application to comply with the spatial development strategy (i.e. the LP) and his reasons for taking that view (Article 4(2)). That statement is referred to as a "stage 1 report".

25. Under Article 5(1) where a local planning authority is ready to issue its decision on the application, it must send to the Mayor a copy of any representations it has received, a copy of the officer's report on the application and the decision it proposes to take, so that the Mayor can decide whether to intervene under Articles 6 or 7 of the 2008 Order (unless he has previously notified the LPA in writing under Article 5(2) that he does not wish to be consulted under Article 5). This is referred to as "stage 2".

26. Under Article 6 (1) the Mayor may give a direction to the LPA to refuse the application if he considers that to grant permission would be either contrary to the spatial development strategy or prejudicial to its implementation, or otherwise contrary to good strategic planning in Greater London. Article 6 (4) requires that any such direction must also set out the Mayor's reasons for that direction. Under Article 6 (7) the LPA must then refuse the application and include within its decision notice a copy of the direction given by the Mayor. Instead of directing a refusal of the application under Article 7, the Mayor may give to the LPA a direction under section 2A of the TCPA 1990 that he will determine the application in place of the LPA, provided that the requirements set out in Article 7(1) are met.

27. In practice the reasons for the direction are expressed by the Mayor as if they were formal reasons for the refusal of planning permission. Article 35(1)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No 595) requires an LPA giving a decision notice on an application for planning permission to "state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision". It is common ground that in order that the LPA may discharge that requirement, in practice the reason for refusal directed by the Mayor should comply with it. In addition, the direction containing the formal reason for refusal is normally accompanied by an officer's report, referred to as a stage 2 report. That document explains in greater detail the justification for the stance taken by the Mayor and may be referred to in order to elucidate the purpose, scope and meaning of the reason for refusal.

28. A refusal directed by the Mayor gives rise to a right of appeal. The LPA may participate in that appeal, but in practice the main responsibility for justifying the reasons for refusal is borne by the Mayor. The principal parties in an appeal are therefore the appellant developer and the Mayor.

A summary of the process leading to the inquiry

The Harrow School Supplementary Planning Document July 2015

29. In 2015 LBH in partnership with the School developed a Supplementary Planning Document ("SPD"), following consultation with the Mayor and Historic England. LBH adopted the SPD in July 2015. The Inspector found that the School's application had been carefully planned and based upon the SPD (IR 59). He also found that the proposed location within the MOL for the sports building was broadly in keeping with the adopted SPD (IR 62).

Stage 1

30. The School submitted its application for planning permission to LBH on 20 April 2016. The application included a proposal to swap MOL land by subjecting part of the School's estate to MOL polices, resulting in a net gain of MOL land. LBH notified the Mayor of the application on 16 May 2016.

31. On 27 June 2016 the Mayor issued his stage 1 decision. Under the heading "Strategic Issues Summary" the Mayor stated on "land use principle" that "whilst the School redevelopment on MOL is 'inappropriate development', the proposed MOL swap, resulting in a net gain of MOL combined with the pressing academic needs and enhanced community use, are accepted as very special circumstances justifying the proposal…".

32. The document also advised LBH that while the application was generally acceptable in strategic planning terms, it did not fully comply with the LP for the reasons set out in paragraph 86. However, the remedies set out in that paragraph could lead to the application becoming fully compliant with the Plan. LBH was required to refer the application back to the Mayor in the event of deciding that planning permission should be granted.

33. Paragraph 86 of the report advised the School that it should continue to engage with the local community in the production of a plan to demonstrate the extent of the proposed community use of the facilities in a form that could be used by LBH to secure delivery; officers were satisfied that the proposals utilised the natural slope, would appear as an integral feature of the wider school campus and would have "limited impact on its open character as a result", but key details on matters such as window reveals, material samples and the treatment of roofs remained to be addressed; the savings in carbon dioxide emissions were welcomed but certain detailed concerns remained to be addressed. Other matters were said to be capable of being dealt by the imposition of conditions on the grant of any planning permission.

34. Paragraph 59 of the report stated that the proposals for both the science building and the sports building would not have a cumulative visual impact greater than a 2-storey building, given the use of the site's 36 m natural slope and that they would be "built deep into the hill and staggered down the hill". Accordingly, "the impact on the openness of the MOL is very limited". Officers of the Greater London Authority ("the GLA") stated that they were supportive of the proposals and welcomed "the sensitive design approach undertaken which successfully balances site constraints with the need to address relevant" educational standards (paragraph 60).

35. The report contained nothing to suggest that the proposal conflicted with any of the purposes of this part of the MOL, or would cause harm to heritage assets, or would have an adverse effect on the setting of the historic settlement on Harrow Hill.

36. There then followed formal consultations by LBH on the application, which included Historic England (see paragraph 100 below). The School made amendments to its planning application, but Mr. Edwards QC confirmed that these did not involve increasing the scale or bulk of the proposed sports building.

Decision by London Borough of Harrow

37. On 16 November 2016 LBH considered the application at a meeting of their planning committee. It decided to defer the matter to allow (inter alia) the School to consider re-siting the proposed sports building outside the MOL, alternatively to locate the new building on the site of the existing sports hall; to improve the detailed design of the proposal and to develop the terms of the proposed community use agreement in more detail. The application came back before LBH's planning committee on 21 June 2017 and 6 September 2017, as a result of which the committee resolved to approve the application subject to the conclusion of a section 106 legal agreement and, of course, referral to the Mayor.

38. Officers from the GLA then held four workshops with the School's consultants in September and October 2017. This is said to have involved a more detailed exploration with the School's consultants of the feasibility of alternative locations for the sports building. Ultimately the officers concluded that the proposed building could be located on the site of the existing sports hall, which they considered to be preferable to the School's proposal.

Stage 2 decision

39. On 16 January 2018 LBH referred the matter to the Mayor under Article 5 of the 2008 Order. On 29 January 2018 the Mayor issued his direction to LBH that they should refuse planning permission for the proposal, accompanied by his stage 2 report. The single reason given for the direction was as follows: -

> "**i. Inappropriate development on Metropolitan Open Land**
>
> The proposed sports building is inappropriate development within Metropolitan Open Land and causes substantial harm to the openness of the Metropolitan Open Land - by reason of its excessive footprint and its location. The harm to Metropolitan Open Land by reason of the proposed inappropriate development, and the harm to openness, to which substantial weight is attached, is not clearly outweighed by other considerations. Very special circumstances do not exist. The proposed sports building is contrary to London Plan Policy 7.17, Policy G3 of the draft London Plan, Core Policy 1 of the Harrow Core Strategy, Policy DM16 of the Harrow Development Management Policies DPD and the National Planning Policy Framework."

This has been referred to, particularly by the School, as the Mayor's *volte face*.

40. The report's summary of "strategic issues" stated that because the proposed sports building is "inappropriate development within the MOL" it was harmful "by definition". Moreover, the building would cause harm to "the openness of the MOL" by virtue of "its excessive footprint and location". Neither the reason for refusal nor this explanation referred to any objection to the bulk or massing of the sports building. In terms of specific harm to the MOL it is apparent that the report focused on "harm to the openness of the MOL". The report did not suggest that there would be any harm caused to other purposes of the MOL. In particular, it was not suggested that any effect of the proposal on heritage assets would represent harm to MOL purposes.

41. Paragraphs 52 and 53 of the report dealt with impact on the historic environment under the heading "other harm". The report noted that Historic England had identified that the proposal would cause some harm to heritage assets. The report treated this as "less than substantial harm" to heritage assets for the purposes of paragraph 196 of the NPPF. However, the report was satisfied that because of the public benefits of the proposed community use arrangements, this harm did not in itself warrant a reason for refusal. The only other issue raised on this subject was the view of GLA officers that the impact upon the open and green setting of nearby heritage assets could be reduced by relocating the sports building in a more compact form on the existing sports hall site. Mr. Steel QC pointed out on behalf of the School an important paragraph at the end of the Mayor's letter dated 29 January 2018 in which it was stated that he would be minded to withdraw the direction if the School were to revise its application by locating the new sports building on the site of the existing sports hall with a significantly reduced *footprint* to that currently proposed.

42. Paragraphs 29-35 of the report concluded that the net gain in MOL land under the proposed "land swap" would be small because most of the "new" land was subject to various heritage designations in any event and therefore was unlikely to be developable, irrespective of whether it became subject to MOL development control policies.

43. Paragraphs 36-38 of the report placed considerable emphasis on the consideration of alternative sites for the proposed sports building. Paragraph 38 made it clear that the Mayor's objective was not to reduce the overall floorspace within the sports hall, but instead to reduce footprint by inter alia "stacking" the facilities. Paragraph 50 of the report stated that the impact of the proposed sports building on the openness of the MOL was increased by its layout and positioning. It pointed out that existing buildings on the lower slopes of the hill are set out in a linear pattern from east to west and screened by vegetation. By contrast the proposed new building would be located in a predominantly green and open space and would contribute to "unacceptable sprawl of development across a significantly wider area of MOL."

44. On 13 February 2018 LBH issued a decision notice refusing planning permission on the single ground directed by the Mayor.

The appeal process

45. The School appealed against the refusal of permission. On 9 October 2018 the Secretary of State recovered the appeal for his own determination.

46. In his Statement of Case at paragraph 4.16 the Mayor referred to the siting and excessive footprint on the sports building as causing harm to the openness to the MOL. No conflict was indicated with any of the purposes of the MOL, other than the protection of openness. In essence, the Mayor's position on impact on the historic environment was the same as had previously been set out in the stage 2 report.

47. A Statement of Common Ground ("SOCG") was agreed between the Mayor, LBH and the School on 6 March 2019. Section 5 of the document was entitled "matters not in dispute". Paragraph 5.1.6 read: -

> "That the new sports building is 'inappropriate development' on MOL; by definition, inappropriate development is harmful to MOL in line with Development Plan policy and harm to MOL should be afforded substantial weight."

48. Paragraph 5.1.7 stated: -

> "In addition to harm through inappropriateness, the new sports building causes harm to the openness of MOL by reason of its siting, footprint and scale and to MOL purposes. In line with Development Plan policy such harm should be afforded substantial weight."

For the first time this paragraph introduced an objection to the sports building in terms of its *scale* as well as its siting and footprint. It also referred for the first time to the building causing harm to "MOL purposes", but without stating what was meant by that. Nothing was said about what purposes were served by this part of the MOL and how they would be harmed by that building. Given that this was the first time that the Mayor had formally raised these matters, he ought to have spelt out in writing exactly what he had in mind. As we shall see, the failure to do this gave rise to a substantial issue at the public inquiry.

49. Mr. Steel QC referred the court to paragraphs 33 and 34 of the School's closing submissions to the inquiry, to show how the School's consultants had sought to clarify the scope of the Mayor's reason for refusal in advance of the inquiry. The School's architect explained that "footprint" is a well understood concept used by planning professionals and does not include scale, height or massing. That accords with my experience of the way in which the term is invariably used in the planning context. Accordingly, the School's team "specifically asked the Mayor why they weren't considering mass, height and footprint". They were told that the Deputy Mayor's direction had been concerned solely with reducing the size of the footprint of the sports building, even though the consequence would be an increase in the height of the building, as evidenced by the reference in the Mayor's stage 2 report to "stacking". Paragraph 34 of the submissions went on to point out that, by contrast, none of the alternative schemes presented upon behalf of the Mayor to the public inquiry involved a reduced footprint or stacking. The Mayor's expert responsible for presenting alternatives confirmed that it had not been part of his brief to ensure that the alternatives secured a reduced footprint. Another expert stated that he could not have supported taller alternatives.

50. The Mayor's stage 2 report and case put to the public inquiry appears to have been muddled, to say the least, about the ambit of his objection to the School's proposal and his stance on how that objection could be overcome. Given the change in the Mayor's position on the application from provisional support to outright opposition, focused solely on an objection to the proposed sports building, and given also the likelihood that the direction would result in an appeal and public inquiry, this lack of clarity was lamentable.

51. The inquiry began on 30 April and lasted some 10 days. The Inspector produced his reports on the appeal and the application for costs on the 22nd July 2019. The Secretary of State issued his decision letters on 31 October 2019.

The decision on the planning appeal

52. In IR 21 the Inspector referred to the closing submissions for the Mayor and for the School. He produced them as a link and stated that he would not replicate them in his report. Plainly, they were before the Secretary of State. At paragraphs 23 and 24 he reproduced the matters in the SOCG which were either agreed or remaining in dispute between the main parties. At IR 41 he noted that it was agreed that the supporting text to policy 7.17 of the LP referred to paragraphs 133-147 of the NPPF 2019. He concluded that the proposal constituted inappropriate development (see IR 43-44).

53. At IR 45-48 the Inspector concluded that although the proposed MOL land swap was a positive benefit of the proposal, it should nonetheless be given only "minimal weight" given that, as the Mayor had stated, pre-existing designations of the land made it unlikely that it would be developed in any event.

54. The Inspector considered the effect of the proposal on the openness of the MOL at IR 49-62. No challenge is made to this part of the report. The Inspector considered that the concept of openness in this case had both a spatial and a visual aspect (IR 50). On the spatial aspect the Inspector concluded at IR 60:-

> "The proposal would result in the erosion of the openness of MOL by the fact that it would represent built form where currently there is very little. The proposal would see the restoration of some MOL openness through the removal of existing sports building and its replacement with tree planting to create a woodland-style walk from Football Lane. It would also secure an area of land – the 'land swap' - which would be subjected to MOL policies as a material consideration until incorporated into an adopted development plan [32, 45]. However, neither of these factors overcome the fundamental point that the proposal would still result in the erosion of MOL openness. This is harm that weighs substantially against the proposal."

55. Turning to visual impact, at IR 55 the inspector said this about the effect of the proposed development:-

> "However, visual impact as a concept is not limited to what something looks like, but inherently relies upon the context in which it is enjoyed. In this respect, views to the ridge line along Harrow-on-the-Hill would still be possible even with the proposed sports building (as can be seen from the various CGIs submitted), no issue is taken with the materials proposed or colour palette, and no specific issues have been raised with regard to the overall shape and form of the proposed building in design terms. What is more, the proposed sports building would be viewed within the context of the main school campus to the north and west, and outdoor sports facilities to the east and south; including the tennis courts, running track, astro-pitches and associated fencing. It would not be seen as an isolated building standing alone in a field."

56. The Inspector set out his overall conclusions on visual impact at IR 61 and 62:-

> "61. However, it is important to note that I do not find that the proposal would have an adverse impact in respect of its visual impact. The footprint is not 'excessive' when one considers that there is a certain level of need that the sports building will

have to provide. This is need that no main party argues is not required to be provided. The alternative concepts, which were suggested by the Mayor in the Proofs of Evidence, literally do not stack up even under the rudimentary assessment – whether in practical terms with the potential loss of trees and/or considerations such as sewers and required ground works, or in detailed consideration against policy requirements; for example, an assessment in heritage impact terms.

> 62. As a result, the only logical conclusion I can come to is that the proposed location within the MOL for the sports building, which is broadly in keeping with the Council's adopted SPD, is acceptable in terms of the reason for refusal. As such, and taking into account the agreed position in respect of the visual appearance of the proposed sports building, I do not consider that the proposal would result in harm to openness, or indeed any other harm, in visual impact terms. However, there would remain harm to openness through its erosion which should be afforded substantial weight."

So, the Inspector concluded that although the proposed sports building would cause harm through erosion of the openness of the MOL, there would be no visual impact.

57. The Inspector dealt with "MOL purposes" at IR 63-68. He concluded that regard should be had to the purposes of Green Belt designation (see IR 65). At IR 66-67 the Inspector concluded: -

> "66. In respect of the five purposes set out in Paragraph 134 of the Framework, the proposal would not result in unrestricted sprawl of a large built up area, it would not result in neighbouring towns merging into one another, it would not encroach into the countryside, and urban regeneration and the recycling of derelict and other urban land is not at issue here.

> 67. The only potential purpose that the proposal may infringe is the purpose *'to preserve the setting and special character of historic towns'*. This was suggested by the Mayor to Mr Paterson (planning witness for the Appellant) to be infringed due to the harm to heritage assets. This specific matter is considered in greater detail in the next section of this Report."

58. In IR 68 the Inspector noted that, for reasons set out in the following section of his report, he concluded that the proposal would not result in any harm to heritage assets including their settings. It therefore followed that the proposal did not conflict with any of the five purposes in paragraph 134 of the NPPF. It was for that reason that he went on to say: -

> "Whilst I acknowledge the position between the main parties contained within the agreed SOCG, after careful consideration of this specific point I can only conclude that the evidence submitted to the Inquiry proposal suggests that this agreed position within the SOCG is incorrect and that the proposal would not deviate from the purposes which MOL serves. I do not, therefore, find that the proposal would result in harm to MOL purposes as suggested in the SOCG."

59. The Inspector addressed the impact of the proposal on heritage assets between IR 69-88. He summarised the positions adopted by the Mayor, the School and Historic England before going on to give his own assessment. He referred to the organic

evolution of the School's buildings dictated by the topography of the site (IR 79) and "the lack of overall architectural formality and unity", the buildings having an "entwined relationship with the town" (IR 80).

60. At IR 83 the Inspector praised the "axial route" which would create "expansive views" from the terrace outside the School's chapel and a view up the hill towards that building. In IR 84-86 the Inspector explained why he did not think that the proposal would adversely impact upon the Registered Park Garden lying to the south of the appeal site.

61. At IR 87-88, drawing the strings together, the Inspector concluded:-

> "87. It is important to note that views and the visual impact are not the only considerations one must take into account when assessing the impact of a proposal on settings and/or significance. In this respect, I have considered factors such as the relationship between the school campus and the hill, the historic evolution and growth of the school and wider community on Harrow-on-the-Hill, the relationship between the built and natural form, and also how the various heritage assets are experienced both currently and as a potential result of the proposal.
>
> 88. Taking all these factors in the round, I find that the proposal would not cause any harm to the historic environment. The proposal would preserve the setting of listed buildings in accordance with statutory duty set out in s66(1) of the PLBCA. It would also conserve heritage assets in a manner appropriate to their significance in policy terms; including the settings of designated heritage assets not covered by s66(1) PLBCA. In this respect, I do not consider that there are any conservation or heritage related reasons as to why permission should be refused."

62. At IR 94-142 there followed a very lengthy section in which the Inspector dealt with the benefits of the proposal which fell to be considered under the rubric of VSC. A summary in a judgment cannot do full justice to those benefits and is no substitute for reading the Inspector's detailed consideration of the subject.

63. At IR 96-101 the Inspector considered educational need. He stated that nobody at the inquiry had disputed the need for the proposed sites and sports buildings. He explained how the existing facilities were unsatisfactory. He concluded that this factor should be given "significant weight". The Inspector addressed community need and uses of the sports building at IR 102-105. The proposal would provide 22,000 hours a year of community use. He described this benefit as "having very substantial weight". IR 107-113 dealt with the provision of 1,300 hours a year of free access to state maintained local schools and a further 400 hours a year at substantially discounted rates to community groups proposed by LBH. The Inspector considered this "to be a manifest benefit which should be afforded significant weight". At IR 114 the Inspector repeated his earlier conclusion that the MOL land swap should be given no more than "minimal weight". At IR 115-119 the Inspector returned to the subject of alternative sites and concluded that "the lack of realistic and feasible alternative locations to deliver the identified sports and science need of Harrow School weighed significantly in favour of proposal." The Inspector addressed compliance with the SPD at IR 120-125. He praised the SPD as a masterplan for the future development of the School over a period of 20 years or more, a clear result of the LPA engaging with the School, the local community and other bodies. He found that the locations proposed for the new science building and new sports building accorded with the SPD and that "the compliance with the Council's

site-specific adopted SPD should be afforded substantial weight". The Inspector dealt with heritage benefits at IR 126-128. They included the "opening up of views of the historic ridge and out over Greater London" and "the demolition of the existing sports buildings with the area returned to open landscaping to enhance the setting of the Grade II listed Music Schools and setting of the conservation area." He concluded that the heritage benefits should be afforded "modest weight in favour of the proposal." At IR 129-132 the Inspector addressed landscaping benefits and concluded they should be given "moderate weight". In IR 133-136 the Inspector considered that the net biodiversity gains of the proposal should be given "substantial weight". For the reasons given in IR 137-140 the Inspector concluded that benefits to pupil safety in relation to highways should be given "no more than moderate weight."

64. In IR 142 the Inspector struck the overall balance for the purposes of MOL policy: -

> "I find that the other considerations in this case clearly outweigh the harm to MOL that I have identified. Looking at the case as a whole, I consider that very special circumstances exist which justify the development."

65. The Inspector then expressed his overall conclusions on the planning balance in IR 143-150. The Inspector found that the proposed development would harm the MOL by virtue of being inappropriate development and through "the erosion of openness of the MOL." He gave substantial weight to those factors. On the other hand, he did not consider that there would be harm to openness in terms of visual impact. In addition, the Inspector concluded that the proposal would not result in any other harm, in particular harm to heritage assets. He then concluded that the benefits of the proposal he had identified clearly outweighed the harm to the MOL. At IR 146-150 the Inspector explained why, applying s. 38(6) of PCPA 2004, he considered the proposal to accord with the development plan for the area read as a whole and that there were no material considerations which indicated that a decision should be made otherwise than in accordance with that plan.

66. In his decision letter the Secretary of State agreed with the Inspector's conclusions and with his recommendation that planning permission be granted. At DL 13-15 the Secretary of State considered that the benefits of the proposal amounted to very special circumstances and "that, overall, and *looking at the case as a whole*, these factors amount to VSCs that clearly outweigh the harm to the MOL and are sufficient to justify the development." (emphasis added).

67. At DL 16 the Secretary of State dealt with heritage impacts. He agreed with the Inspector's conclusions at IR 126-128 that the proposal would generate some heritage benefits. However, having considered those matters in relation to the opinion of Historic England (which had been summarised at IR 77) the Secretary of State concluded that the impact of the development by reason of its "location, scale and position within the site would result in less than substantial harm to the setting of the relevant heritage assets". The Secretary of State agreed with the Inspector's conclusion at IR 103 that the proposed agreement providing for community use of the sports building represented a significant public benefit. Then, applying the test in paragraph 196 of the NPPF, he concluded that that benefit outweighed the heritage harm he had identified.

68. The Secretary of State addressed the planning balance and gave his overall conclusions at DL 21-23. He considered that because of the very special circumstances in this case the proposal did not conflict with the development plan as regards the "MOL", but that it did not accord with heritage policies. Nonetheless, because of the significant public benefits outweighing heritage harm, he concluded that the proposal accorded with the development plan when considered as a whole. He then went on to consider whether there were material considerations indicating that the proposal should be determined otherwise than in accordance with the development plan. In DL 22 he considered that the harm to the MOL would be outweighed by the very special circumstances previously identified, "when taken individually and as a whole." He therefore decided that the appeal should be allowed and planning permission granted.

General legal principles for statutory review

69. The general principles upon which the court may be asked to intervene under s. 288 of the TCPA 1990 have been summarised in, for example, Seddon Properties Limited v Secretary of State for the Environment (1981) 42 P & CR 26, 28 and Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at [19]. The basis upon which the court may review the legal adequacy of the reasons given in a decision has been explained more fully in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 and South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953.

The challenge to the decision on the planning appeal

Ground 1

70. The Mayor submits that the Secretary of State acted unfairly by departing from the agreed approach laid down in paragraph 5.1.7 of the SOCG without giving the parties any notice that he had it mind to do this and giving them an opportunity to make representations on the matter. Had the Secretary of State given such notice, the Mayor would have made further representations on the application of MOL policy and submitted further evidence on the subject.

71. Mr. Edwards QC submits that in paragraph 5.1.7 of the SOCG it was agreed (inter alia) that the proposed sports building would cause harm "to MOL purposes" and that such harm should carry "substantial weight." He says that the Mayor's case at the inquiry (including the proofs of evidence submitted about a month after the SOCG) was advanced on the basis of that agreement. The Inspector set out key parts of the SOCG in his report (IR 23, 24 and 38). Mr. Edwards QC submits that the School did not resile from this agreed position during the inquiry and the Inspector did not indicate that he was thinking of taking a different approach.

72. Mr. Ben Wright, a landscape consultant instructed by the Mayor, gave very brief evidence on the harm which the sports building would cause to MOL purposes (see his proof of evidence at paragraph 3.29 and Table 3).

73. The Inspector dealt with harm to MOL purposes at IR 63 to 68. He considered that the only potential purpose that the proposed building might be said to infringe was the preservation of "the setting and special character of historic towns" (referring to paragraph 134(d) of the NPPF – see paragraph 20 above). He pointed out that this point

was put on behalf of the Mayor in cross-examination of the School's planning consultant, Mr. Paterson. Mr. Edwards QC notes that Mr. Wright had identified MOL purposes by reference to Policy 7.17D of LP, and not the NPPF, but he did not seek to raise any legal challenge in relation to that point.

74. Instead, Mr. Edwards QC criticised the Inspector for concluding in IR 68 that, on the evidence before the inquiry, the parties had been "incorrect" to agree in the SOCG that the sports building would cause harm to MOL purposes. That conclusion was based on his finding that the proposal would not cause any harm to heritage assets, including their settings (referring to IR 88).

75. The Secretary of State adopted the Inspector's conclusions in relation to MOL issues set out in IR 40 to 62 (DL 13 to 14), but he did not refer to or adopt the Inspector's conclusions in IR 63 to 68. Instead, he took a different view to the Inspector on heritage impacts, in that he concluded, for the reasons given by Historic England, that the proposal would cause "less than substantial harm" to the setting of the relevant heritage assets (DL 16). The Mayor's complaint is that the Secretary of State did not remedy the unfairness resulting from the Inspector's report by giving the parties an opportunity to address the departure in that report from paragraph 5.1.7 of the SOCG.

Analysis

76. It was common ground that the relevant legal test for determining ground 1 is whether "there has been procedural unfairness which materially prejudiced the [claimant]" (Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] PTSR 1145 at [49]). This reflects the principle previously stated by Lord Denning MR in George v Secretary of State for the Environment (1979) 77 LGR 689 that:-

> "there is no such thing as a 'technical breach of natural justice'… One should not find a breach of natural justice unless there has been substantial prejudice to the applicant as the result of the mistake or error that has been made."

and by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1 WLR 1578, 1595 that:-

> "A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts unless behind it there is something of substance which has been lost by the failure."

This principle accords with the requirement in s.288(5)(b) of the TCPA 1990 that it must be shown that breach of a "relevant requirement", or unfairness, has caused "substantial prejudice" to the claimant (Fairmount Investments Limited v Secretary of State for the Environment [1976] 1 WLR 1255, 1263).

77. Counsel referred to the following authorities which apply those fundamental principles to departures from a SOCG: R (Poole) v Secretary of State for Communities and Local Government [2008] J.P.L. 1774 at [17 to 47]; R (Gates Hydraulics Limited) v Secretary of State for Communities and Local Government [2009] EWHC 2187 (Admin) at [20-30]; and Secretary of State for Communities and Local Government v Engbers [2017] J.P.L. 489 at [6], [39] and [43-4].

78. These cases raised the question whether an Inspector had acted unfairly by dismissing an appeal by reference to a matter which the main parties had agreed in a SOCG *not to be objectionable*. But in my judgment, the same principles are also applicable to a challenge by a local authority or objector where the decision-maker has materially departed from an agreement in, for example, a SOCG or a concession made in evidence, that the appeal proposal would give rise to a particular harm or disbenefit.

79. In Poole Sullivan J (as he then was) held (paragraph 39) that an Inspector is not bound by a SOCG and is entitled to form his own view, so long as the relevant party has a fair opportunity to comment. The emphasis of the modern procedural rules for inquiries is that the parties should focus their evidence on matters in dispute and so unfairness may sometimes arise where an Inspector does not raise during the inquiry an issue which has been agreed. A key consideration is whether the party could reasonably have anticipated that the Inspector might deal with the issue in his decision (Poole paras. 40-41). So, for example, if the matter is raised in third party representations, the main parties are expected to deal with it (notwithstanding the contents of an SOCG or a concession from a main party) unless the Inspector should say otherwise (Hopkins at [62] and Engbers).

80. Likewise, a party may reasonably be expected to deal with an issue which has been agreed in a SOCG where another party has resiled from that agreement at the inquiry. But in that situation, they should be given a reasonable opportunity to deal with it (Hopkins at [62]). That may include granting an adjournment so that they may call an appropriate expert to address the point (see Poole).

81. A further consideration is the degree of importance to the issues in the appeal of the agreed matter from which the Inspector departs (see Poole at paragraph 45).

82. In my judgment ground 1 must be rejected for the following reasons, taken both individually and in combination:-

    (i) Harm to MOL purposes was not relied upon by the Mayor (or otherwise identified) as a substantial matter in the appeal;

    (ii) The School did "resile" from paragraph 5.1.7 of the SOCG in relation to harm to MOL purposes and so the Mayor ought reasonably to have anticipated that the Inspector might depart from the SOCG in that respect;

    (iii) The Mayor has not demonstrated that the unfairness alleged caused substantial prejudice in relation to his case;

    (iv) Any breach by the Inspector of the duty to act fairly did not taint the Secretary of State's decision.

83. First, I accept the submissions of Mr. Turney on behalf of the Secretary of State that the "harm to MOL purposes" point was not developed by the Mayor to any meaningful extent. The subject was not raised in the directed reason for refusal or in the stage 1 or stage 2 reports, or in the Mayor's Statement of Case for the inquiry. It first appeared in paragraph 5.1.7 of the SOCG. The only harm resulting from the sports building which was expressly identified in that paragraph was "harm through inappropriateness" and "harm to the openness of MOL by means of its siting, footprint, and scale." The SOCG

simply referred to harm "to MOL purposes" without more. Certainly, on one reading the harm which was expressly mentioned was sufficient to explain the reference to harm to MOL purposes. The SOCG also stated that "substantial weight" should be given to "such harm", but that was referable to *all* of the harm previously mentioned and not specifically to the "MOL purposes" aspect. This is a significant point because there is no complaint about the way in which the Inspector and the Secretary of State dealt with "harm through inappropriateness" or "harm to the openness of the MOL." On any fair reading of paragraph 5.1.7 of the SOCG, "harm to MOL purposes" was not given any prominence or treated as a point adding anything of substance to the harm that was expressly identified.

84. This is also borne out by the superficial treatment of the subject in the proofs of evidence on behalf of the Mayor. The four page planning assessment given by the planning witness contained sparse references such as harm "to MOL, its openness and purposes." Nothing specific was said about any such purpose or purposes.

85. Paragraph 3.29 of the landscape proof by Mr. Wright paraphrased the purposes stated in Policy 7.17D of the LP. The proof did not suggest that the MOL area to be developed is currently "accessible to the public" (Mr. Wright's paraphrase of 7.17D(b)). Other evidence on MOL purposes focused on "openness" and "green infrastructure", about which no complaint is made. Instead, the scope of this challenge was restricted to heritage value, arising from Mr. Wright's paraphrase of 7.17D(c) as "localities which offer sporting, leisure, heritage and biodiversity value ….". But that attracted only the following brief comments in table 3 of Mr. Wright's proof:-

> "Whilst heritage matters are dealt with in detail in Mr Nigel Barker Mills' proof, I consider that the harm to the traditional settlement pattern, associated within the Harrow School Conservation Area, will reduce the public's appreciation of this culturally significant location within the Borough of Harrow, which perceived from the wider MOL setting of the School's recreation grounds"
>
> "Reduce the prominence of the positive hill top settlement pattern, when perceived from the wider School recreation grounds, from users accessing the surrounding PRoW network within the open recreation ground setting"

86. Even then, these comments must be seen in context. The Mayor's case on heritage assets was that there would be "less than substantial harm", but that was outweighed by public benefits. It was accepted by Mr. Edwards QC that the School's case was that the proposal would not harm heritage assets at all. It is not surprising, therefore, that the only harm explicitly identified in paragraphs 5.1.7 of the SOCG was "harm through inappropriateness" and "harm to openness" and that the reference to "MOL purposes" was not further explained. It has not been shown that harm to MOL purposes was raised as a *substantial* matter in the appeal over and above harm to the MOL through the inappropriateness of development and harm to openness.

87. The second flaw in ground 1 is that the Mayor ought reasonably to have anticipated that the Inspector might depart from this part of the SOCG because the School did in fact resile from it during the inquiry. That is plain from the closing submissions made to the Inspector. Paragraph 20 of the Mayor's submissions record that the School's planning consultant, Mr. Paterson, had accepted in cross-examination that the SOCG referred to harm to the purpose in policy 7.17D(c) of the LP, namely harm to a landscape of

national or metropolitan value and to the setting of the hilltop settlement on Harrow Hill. But then paragraph 21 recorded that the same witness resiled from that position. The matter is further explained in paragraphs 73 to 77 of the School's submissions. Mr. Paterson believed that the discussions with GLA officers on the drafting of the SOCG were confined to impact on openness, and that was what paragraph 5.1.7 was dealing with. The School added that even if policy 7.17D(c) of the LP or paragraph 134(d) of the NPPF were thought to be relevant, there would be no harm to heritage matters (paragraphs 75 to 77 of its closing submissions).

88. It is therefore plain that, even if I were to assume that the Mayor's interpretation of paragraph 5.1.7 is correct, the School's case was that there was no relevant harm. It had therefore resiled from what the Mayor's team thought the agreement with the School to be. The Inspector's conclusion that there was no harm to any heritage purpose of this part of the MOL (IR 67-8) fell squarely within the scope of the issue which the School's case at the inquiry had opened up.

89. Having reached this position, it is worth re-emphasising what was said by Lewison LJ in Engbers at [53], referring to Hopkins at [62(4)] :-

> "… the inspector is not required to give the parties regular updates about his thinking. Indeed he may not have reached any conclusion at all on a particular issue before the end of the inquiry. Nor is the inspector required to give advance notice that he proposes to reject one party's evidence in favour of another party. The decision letter is the appropriate place for the inspector to explain why he has reached the factual conclusions that he has."

90. In these circumstances, it was open to the Mayor, if he thought it advisable, to apply to the Inspector during the inquiry to recall witnesses with a view to adding some flesh to the skeletal material on which he had been relying. But no such application was made. The allegation that the Inspector acted unfairly is completely hollow.

91. That last consideration is also relevant to the third flaw in ground 1: the Mayor has failed to demonstrate any substantial prejudice. He contends that if he had known that the Inspector might depart from the SOCG he would have sought to call more evidence and make further submissions. Paragraph 64 of the Mayor's skeleton reveals nothing of substance. It amounts to no more than assertion. I also accept Mr. Turney's submission that the Mayor has failed to set out in any witness statement even the gist of the evidence that he would have called and has been unable to call. This point was raised fairly and squarely in paragraph 44 of the School's Summary Grounds of Defence and has not been refuted. I adopt the approach taken by, for example, Ouseley J in R (Midcounties Co-operative Limited) v Wyre Forest District Council [2009] EWHC 964 (Admin) at [104-116]. Once again, the allegation of unfairness is entirely hollow.

92. Fourth, and in any event, the Secretary of State did not adopt the reasoning of the Inspector which is criticised under ground 1. The Inspector's decision to treat paragraph 5.1.7 of the SOCG as "incorrect" has not impacted on the Secretary of State's reasoning in his decision letter. The allegation against the Secretary of State under ground 2 is that he failed to take into account harm to MOL purposes, in particular by applying his finding that there would be "less than substantial harm" to heritage assets. Plainly, the Secretary of State did not rely upon his Inspector's reasoning that there would be "no

harm" to heritage assets and therefore, for that reason, no harm to MOL purposes. The Mayor's real challenge in this part of the case lies in ground 2 to which ground 1 adds nothing.

93. For these reasons, as I have said both individually and in combination, ground 1 must be rejected.

Ground 2

94. Ground 2 arises from DL 16 which states:-

> "For the reasons given at IR126 - 128, the Secretary of State agrees with the Inspector that the proposal would generate some potential heritage benefits, However, having carefully considered the inspector's reasoning at IR126 - 128 in relation to the opinion of Historic England (IR77), the Secretary of State concludes that the impact of the development by reason of its location, scale and position within the site would result in 'less than substantial' harm to the setting of the relevant heritage assets in conflict with Development Plan policies policy 7.8 of the LDNP, DM6 and DM7 of the Harrow DMDPD. The Secretary of State agrees with the Inspector at IR103 that the proposed use would enable the school to provide its sports facilities to other local schools and clubs, community groups, and individuals at market, low or cost price, or for free for roughly two-thirds of the available user time through the Community Use Agreement. The Secretary of State therefore concludes that, overall, significant public benefits exist to outweigh the harm in line with the heritage test in paragraph 196 of the Framework."

Thus, whereas the Inspector had found that the proposal would cause no harm at all to the identified heritage assets, the Secretary of State disagreed and concluded that there would be "less than substantial harm" to those assets. He then went on to decide that that harm was outweighed by public benefits.

95. The Mayor submits that the Secretary of State, in agreeing with the views of Historic England, was bound also to have found that there would be some harm to the setting and special character of the historic town of Harrow-on-the-Hill, applying paragraph 134(d) of the NPPF and thus harm to a purpose of this part of the MOL (paragraph 68 of the Mayor's skeleton). The complaint is that the Secretary of State did not take into account this harm as "harm to MOL purposes". Mr. Edwards QC confirmed that this ground is not based on any other type of harm to MOL purposes and does not depend upon any issue at the inquiry as to whether MOL purposes are confined to those stated in Policy 7.17D of the LP, or whether they may also include the purposes set out in paragraph 134 of the NPPF. Indeed, the Mayor's argument relies in part upon the proposition put in cross-examination for the Mayor to the School's planning consultant that there would be harm in terms of paragraph 134(d) of the NPPF, which was referred to in the Mayor's closing submissions (paragraph 20) and by the Inspector (IR 67). Those submissions relied upon harm to "the hilltop settlement on Harrow Hill" as harm to the setting and special character of an historic *town*.

Analysis

96. It is necessary to put this complaint into context. The existing and proposed sports building both lie just within the western boundary of the MOL which lies to the south-

east of Harrow Hill. The proposed science building and land to the north west of the sports building, rising up towards the crest where a number of listed buildings are located, lie outside the MOL. As Mr. Steel QC pointed out, in addition to the two Conservation Areas previously mentioned, there is also the Harrow on the Hill Village Conservation Area. There is no evidence that anyone suggested at the inquiry either that the grounds of Harrow School should themselves be treated as a "historic town", or that there would be harm to the Village Conservation Area.

97. Policy 7.17D(c) of the LP refers to historic features contained within the MOL. The historic features to which Mr. Wright referred (see paragraph 85 above), the hilltop settlement pattern associated with the Harrow School Conservation Area, lie outside the MOL. It is therefore understandable that the Inspector turned instead to paragraph 134(d) of the NPPF to consider whether the proposal would harm the MOL in so far as it preserves the setting and special character of a historic town. Even then, the Inspector referred to this as only a "potential purpose" of this area of MOL, after having made it plain that he did not accept that it served any of the other purposes in paragraph 134 of the NPPF (IR 66). I have also noted that the *agreed* list of "main issues" for the appeal (IR 3) did not include harm to MOL purposes.

98. The Mayor's criticism of the way in which the Secretary of State is said to have dealt with harm to this particular Green Belt/MOL purpose depends entirely on the latter's conclusions in the decision letter dealing with harm to heritage assets. The only heritage assets identified by the Inspector were those listed in IR 69, which the Mayor does not criticise. The Secretary of State's decision letter proceeds on the same basis. Although the list included the Harrow School Conservation Area, it did not refer to the Harrow on the Hill Village Conservation Area or to "the hilltop settlement of Harrow Hill."

99. In any event, Mr. Edwards QC accepted that the Secretary of State's decision to disagree with the Inspector's conclusion that there would be no harm at all to heritage assets rested entirely on the views of Historic England. That conclusion did not involve accepting any part of the Mayor's case on MOL purposes. None of the consultation correspondence from Historic England states or even suggests that the proposal would harm the setting or special character of an "historic town".

100. The Mayor's skeleton and submissions relied upon passages drawn from the letter from Historic England dated 27 July 2016 (pp. 750-1 of the trial bundle) which stated:-

> "Harrow School is a sensitive historic site, and the introduction of two large new buildings near to its historic heart will have an impact on the conservation area and the setting of listed buildings, concealing the appropriate landscape setting and drawing the eye from the prominence of the significant row of listed structures. This will cause some harm, which will need to be justified and weighed against the public benefits of the scheme."

And then under "Impact of the Scheme":-

> "This proposal is for a new sports building and science building for Harrow School in response to identified needs and the structural failure of the current sports hall. The tall two-storey sports building and three-storey science block are proposed for the south east of the historic heart of the school complex, set partially into the hillside. The floor plan of the new buildings is very large in comparison with other

> buildings on the school site. Because of the topography of the site they would sit considerably below the listed buildings, but due to their size and location would be prominent in the foreground in views up the hill."

Subsequent correspondence from Historic England commented favourably on certain amendments made to the School's proposals whilst adhering to this assessment of the proposed science and sports buildings. However, at no stage did Historic England refer to any harm to the setting or special character of an historic town.

101. There is therefore no basis for the Mayor's assertion that because of the Secretary of State's agreement with Historic England, he was bound to have found harm to a historic town. Historic England did not suggest that the School, or the Conservation Area based upon the School, should be equated to an "historic town". As Mr. Turney correctly submitted, the conclusion for which the Mayor contends does not flow from the findings made by the Secretary of State on harm to heritage assets. There was no need for him to address harm to MOL purposes, given the way in which the point was put by the Mayor during the inquiry.

102. In paragraph 70c of his skeleton the Mayor plainly states that his complaint under ground 2 is about the flawed reasons actually given by the Secretary of State and not about inadequacy or lack of reasoning. Nevertheless, I have also considered that further aspect for completeness. I do not think that the Secretary of State's reasoning gives rise to any doubt, let alone a substantial doubt, as to whether a public law error has been committed. His reasoning was not legally inadequate.

103. Ground 2 must fail. But the Mayor goes on to rely again on the Secretary of State's conclusion in DL 16 regarding harm to heritage assets in a different way under ground 3.

Ground 3

104. The VSC balance which had to be applied under MOL policy required the Secretary of State to weigh against VSC not only harm to the MOL but also any other harm that would result from the proposal. Mr. Edwards QC points out that the Secretary of State found that the proposal would cause "less than substantial harm" to heritage assets, based on the view of Historic England (DL 16). The Secretary of State decided under the balancing exercise required by paragraph 196 of the NPPF, that that harm was outweighed by the public benefits of the proposal, specifically those identified in IR 103. Mr. Edwards QC rightly submits that that conclusion did not mean that there was no "heritage harm", simply that there was no justification to dismiss the appeal by treating that harm as a freestanding reason for refusal. The Mayor's complaint is that the Secretary of State failed to put that harm into the VSC balance, as required by paragraph 144 of the NPPF (and see also Redhill Aerodrome Limited v Secretary of State for Communities and Local Government [2015] PTSR 274). He therefore failed to take into account that material consideration in the application of MOL policy.

105. Two issues arise from the parties' submissions on ground 3:-

    (i) Did the Secretary of State fail to take into account harm to heritage assets as "other harm" in the overall VSC balance? If the answer is no, then ground 3 fails;

(ii) If the answer is yes, should the Court refuse to quash the decision on the planning appeal on the basis that it is inevitable that the Secretary of State's decision would have been the same absent that error?

106. Mr. Edwards QC said that the Mayor relied upon "heritage harm" as "other harm" for the purposes of the VSC balance in paragraph 39 of his closing submissions to the inquiry. He submits that it was necessary to balance the totality of the harm resulting from the proposal against its benefits or other VSC, to see whether the latter clearly outweighed the former, and that it can be seen from the terms and the structure of the decision letter that the Secretary of State did not do this.

107. The Secretary of State dealt with MOL policy at DL 13-15. In DL 13 he agreed with the Inspector's conclusions that the proposal involved inappropriate development in the MOL which by definition was harmful, as well as harm to openness through the erosion of the MOL, but he found that there would be no harm to openness in terms of visual impact. Mr. Edwards QC points out that DL 13 does not contain any express language referring to heritage harm. In DL 14 the Secretary of State agreed with the Inspector that only minimal weight should be given to the MOL land swap. In DL 15 the Secretary of State accepted the Inspector's conclusions on each VSC and the weight to be given to them, and decided that "overall, and looking at the case as a whole, these factors amount to VSCs that clearly outweigh the harm to the MOL and are sufficient to justify the development." Mr. Edwards QC relies on the absence of any explicit reference to the phrase "other harm" and upon the fact that harm to heritage assets was only dealt with subsequently in DL 16 (quoted in paragraph 94 above).

108. Mr. Edwards QC also submits that the alleged failure to take into account heritage harm as "other harm" in the VSC balance struck in DL 15 was not remedied by what was said under the heading "Planning balance and overall conclusion" in DL 21 to 23:-

> "21. The Secretary of State considers that, given the VSCs applying in this case, the appeal scheme is not in conflict with the development plan in respect of MOL, but that it is not in accordance with the heritage policies of the development plan. Nevertheless, the Secretary of State concludes that, in view of the significant public benefits outweighing the harm in line with the heritage test in paragraph 196 of the Framework, the proposal accords with the adopted development plan when considered as a whole. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in accordance with the development plan.
>
> 22. The Secretary of State also concludes that, although the proposed sports building would constitute inappropriate development within MOL and would harm openness through the erosion of the MOL, this harm is outweighed by the VSCs identified above which, when taken individually and as a whole, outweigh the harm identified.
>
> 23. Overall, the Secretary of State considers that there are no material considerations which indicate that the proposals should be determined other than in accordance with the development plan."

Analysis

109. The courts should respect the expertise of specialist inspectors, and indeed those taking decisions within the Department, and start at least with the presumption that they will have understood policies in the development plan and NPPF correctly. They have primary responsibility for the resolution of disputes over the application of policy, and the courts should be cautious to avoid undue intervention in policy judgments within their areas of specialist competence (Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 407 at [25]).

110. These principles drawn from Hopkins are particularly relevant to the application of the Secretary of State's own policy in paragraph 144 of the NPPF. It was after all the Secretary of State who successfully appealed in Redhill to establish the correct interpretation of this policy upon which the Mayor relies.

111. In addition an analogy may be drawn with the decision of the Court of Appeal in Mordue v Secretary of State of Communities and Local Government [2016] 1 WLR 2682 dealing with the application of policies now to be found in paragraphs 189 to 196 of the NPPF. An explicit reference by a decision-maker to one of that group of policies is sufficient to show that he has taken them all into account (so far as relevant) "absent some positive contrary indication in other parts of the text of his reasons" [26-28] (and see also R (Palmer) Herefordshire Council [2017] 1 WLR 411 at [7]).

112. In this case the VSC test, including its reference to "other harm", was correctly set out in IR 3. The Secretary of State must have had regard to the whole of that report, including IR 3. In DL 15 the words "outweigh the harm to the MOL" should not be taken as indicating that "other harm" was disregarded at that point. I also note that in the same sentence the Secretary of State made it plain that he was "looking at the case as a whole". There is no positive indication in the decision letter that he left "other harm", namely heritage harm, out of account. The drafting of the decision letter is no more to be criticised in this respect than sections 5 and 6 of the SOCG, which did not explicitly refer to heritage harm as "other harm" for the purposes of the VSC balance. No doubt the parties regarded the point as being so obvious that it did not need to be mentioned in that important document. This case exemplifies the need for the Claimant, as well as the court, to read the decision letter in "a reasonably flexible way", bearing in mind also that it is addressed to the parties who are well aware of all the issues involved and the arguments deployed at the inquiry (Seddon Properties and Bloor).

113. Mr. Edwards QC drew attention to paragraph 22 in the Inspector's Report ("CR") on the School's application for a costs order against the Mayor, in which the Inspector expressed the view that heritage harm outweighed by public benefits resulted in there being no heritage harm under the "other harm" limb of paragraph 144 of the NPPF (CR 22). I agree with Mr. Edwards QC that that was incorrect (see Redhill). But that error should not be read across to the decision on the planning appeal. First, that reasoning was gratuitous in relation to the Inspector's report on the planning appeal, because the Inspector found that there would be no harm to heritage assets and "as such, this factor has no weight against the grant of planning permission" (IR 144). Second, the Secretary of State's decision on the appeal involved disagreeing with the Inspector's view that there would be no such harm. Third, there is nothing in the decision to allow the appeal which indicates that he relied upon CR 22 from the report on the application for costs.

114. As Mr. Turney and Mr. Steel QC rightly submitted, the Mayor's criticism really turns on the structure of the decision letter on the planning appeal, in particular that the assessment of heritage impacts in DL 16 followed the VSC balancing exercise in DL 15 and therefore should be treated as having formed no part of the latter. In my judgment the correct approach is to consider whether as a matter of substance, not form, the VSC test was applied taking into account "other harm", that is heritage harm (see e.g. City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459-60; East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88 at [50]; Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government [2020] EWHC 518 (Admin) at [106 to 110]).

115. Furthermore, reliance upon the structure of the decision letter does not assist the Mayor's case. It treats DL 13 to 15, in particular DL 15, as if they were contained in a hermetically sealed compartment which involved disregarding or excluding other reasoning contained in the same document. It wrongly treats the paragraphs in the decision letter as if they describe the sequence of steps which the Secretary of State actually took in order to reach his decision and therefore heritage harm in DL 16 was disregarded in DL 15. DL 13 to 16 do not contain any language to that effect.

116. Indeed, the suggestion is contradicted by other paragraphs which follow DL 15. In DL 17 the Secretary of State addressed protected species and biodiversity gains to which he gave substantial weight. In DL 18 he dealt with landscaping and road safety improvements (both under the heading "highway matters") to which he gave moderate weight. These benefits were also weighed in DL 15 as part of the VSC exercise. There is no reason to think that the benefits in DL 17 and 18 were taken into account in DL 15, but the intervening heritage harm in DL 16 was not. It is plain that these paragraphs overlap. They set out reasoning which represents part of an overall, not a compartmentalised, thought process.

117. It is plain that the decision-maker "assembled" (per Lord Clyde in City of Edinburgh Council), or took into account, all the relevant considerations and as a matter of form expressed separate conclusions under a list of separate policy headings and also s. 38(6) (see eg. the discussion in Gladman). The simple explanation for heritage matters being dealt with separately in DL 16 is that in this case that was necessary for the Secretary of State to discharge his obligations under ss.66(1) and 72(1) of the Listed Building Act 1990 through the application of paragraph 196 of the NPPF (Mordue). If he had not done so, there might well have been a different ground of challenge. But the sequencing of DL 15 and DL 16 does not permit any inference to be drawn that heritage harm was disregarded in DL 15.

118. In any event, by the time the Secretary of State came to consider the planning balance and his overall conclusion in DL 21 to 23, he had already expressed his conclusions on heritage harm in DL 16. There is no conceivable reason to think that he would have left that matter out of account in DL 21 to 23. That would be unrealistic. Indeed, heritage harm was expressly mentioned.

119. Mr. Edwards QC submitted that in DL 21 to 23 the Secretary of State was only applying s.38(6) of PCPA 2004. But that exercise involved not only the application of MOL policy but also conflict with the heritage policies in the development plan. Everything was weighed in the balance. DL 22 mentioned the only types of harm to the MOL which

the Secretary of State had accepted (conclusions which cannot be impugned). But it is impossible to infer that, in striking the overall VSC balance in DL 22, he left out of account or excluded the heritage harm referred to in DL 21. That artificial way of reading DL 22 is wholly unwarranted.

120. Furthermore, the fact that in this case the Secretary of State disagreed with his Inspector by finding that there would have been some harm to heritage assets is a powerful, additional reason as to why it is unrealistic to think that he either forgot about that harm, or misdirected himself by deliberately excluding it, in the VSC balancing exercise under MOL policy.

121. Although Mr. Edwards QC did not put the Mayor's case this way, I would add for completeness that I do not think that the Secretary of State's reasoning gives rise to any doubt, let alone a substantial doubt, as to whether a public law error has been committed. His reasoning was not legally inadequate.

122. For all these reasons ground 3 must fail and there is strictly no need for me to consider the second issue.

123. However, for completeness I will summarise my reasons why, even if I had taken the view that the Secretary of State failed to have regard to heritage harm when applying MOL policy, I agree with the First and Second Defendants that it is inevitable that he would still have granted planning permission absent that error, that is by taking heritage harm into account in the VSC balance (Simplex GE (Holdings) Limited v Secretary of State for the Environment [2017] PTSR 1041).

124. The burden lies on the SSCLG to show that if the legal error identified had not occurred the decision to refuse planning permission would inevitably have been the same. In Smith v North Eastern Derbyshire Primary Care Trust [2006] 1 WLR 3315 at [10] the Court of Appeal held that:-

> "the Court must not stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

125. Similarly in SSCLG v South Gloucestershire Council [2016] EWCA Civ 74 Lindblom LJ held (at paragraph 25):-

> "If the court is to exercise its discretion not to grant relief where unlawfulness has been found, it must be satisfied that the decision-maker would necessarily have reached the same decision but for the legal error. That is, of course, a stringent test. It is not enough for the court to be persuaded that the decision probably would have been the same but for the decision-maker's error, or very likely would have been the same, or almost certainly would have been the same. It must be persuaded that the decision necessarily would have been the same. The authorities are clear on that proposition. It is consistent, as I see it, with perhaps the most elementary principle of planning law, that the exercise of planning judgment is a matter for the decision-maker and not for the court (see the classic statement to this effect in the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780E-H)."

Nonetheless, the Court of Appeal held that the judge in that case should have exercised his discretion against quashing the decision by reference to findings made by the Inspector which were untainted by the legal error.

126. The court's decision must be based upon the decision-maker's findings and, even then, only in so far as they remain unaffected by the relevant legal error, to see whether it is inevitable that the decision would have been the same, absent that error.

127. In this case the error of law assumed to have occurred is that the Secretary of State failed to take heritage harm into account solely when carrying out the balancing exercise required by MOL policy, but not that he failed to take that harm into account altogether. The court is able to see clearly from the decision letter the Secretary of State's findings on that matter, in the context of all the material before him.

128. The present situation is dissimilar from those cases where the decision-maker took an immaterial consideration into account and it is necessary for the court to determine (1) whether any parts of the reasoning given by the decision-maker can be treated as untainted by the error and, if so, (2) whether, solely by reference to those parts, the decision would inevitably have been the same. Here Mr. Edwards QC accepts that no part of the decision letter falls to be disregarded because of the assumed legal error. In particular, having regard to the way in which this decision letter was expressed, there is no reason for the court to completely disregard the way in which the MOL balance was actually struck by the decision-maker. The benefits of the proposal were assessed as "clearly outweighing" all the harm it would give rise to other than the heritage harm identified by the Secretary of State. The very narrow question for the court in this particular case is whether the inclusion of that one additional factor could have made a difference, because it might have been decided that those same benefits did not clearly outweigh the overall harm including heritage harm.

129. There is no challenge to the Secretary of State's identification of the extent of the harm to heritage assets, or his decision to treat this as "less than substantial harm", based upon the views of Historic England (see above).

130. There is no challenge to the application by the Secretary of State of either ss.66(1) and 72(1) of the Listed Building Act 1990 or NPPF policy on heritage assets. It therefore follows that the Secretary of State was satisfied that there was a clear and convincing justification for the harm he identified (paragraph 194 of the NPPF). More importantly, he attached "great weight" to the conservation of the heritage assets (paragraph 193 of the NPPF) and gave special regard to the desirability of preserving the setting of the listed buildings and the character and appearances of the Conservation Areas affected. This was a "tilted balance", or a balanced weighted by those conservation objectives, against the grant of planning permission (R (Leckhampton Green Land Action Group Limited) v Tewkesbury Borough Council [2017] Env. L.R. 28 at [49]).

131. Nevertheless, the Secretary of State decided that just one of the benefits of the proposal identified by the Inspector in IR 96 to 141, namely the community use of the sports building (IR 103), was sufficient by itself to outweigh the titled balance favouring the protection of heritage assets against harm. That is in line with the way in which the Mayor too approached his decision to direct refusal and the appeal. He accepted that the harm did not give rise to a freestanding reason for refusal.

132. The other benefits or positive features of the proposal have been summarised in paragraph 63 above. They included two factors given substantial weight, three benefits given significant weight and three benefits given moderate or modest weight. They included the lack of realistic and feasible alternatives upon which the educational need and all the associated benefits could be met. Weighed together with the "very substantial weight" given to the community use agreement, these were sufficient to clearly outweigh the "substantial weight" given to the "inappropriateness" of the sports building in the MOL and the harm to openness through its erosion of the MOL.

133. In these circumstances, I am satisfied from the way in which the Secretary of State determined the weight to be given to all the relevant factors and how the VSC balance should be struck, that even with the addition of heritage harm to that balance the decision on the planning appeal would inevitably have been the same. The wide array of very substantial, substantial, significant and moderate benefits would, on the Secretary of States findings, have clearly outweighed the overall harm identified. It must also be borne in mind that the Secretary of State concluded that there would be no harm to the openness of the MOL in terms of visual impact, which must have taken into account (inter alia) IR 55 (see paragraph 55 above).

134. For the reasons given in paragraphs 109 to 122 above ground 3 must be rejected. If it had been necessary to do so, I would have rejected ground 3 for the alternative reasons given in paragraphs 123 to 133 above.

Conclusion on the challenge to the decision on the planning appeal

135. For these reasons the challenge to the Secretary of State's decision on the planning appeal must be dismissed. Not even the attractively presented submissions of Mr. Edwards QC can disguise the excessively legalistic and ultimately unsound nature of the Mayor's grounds of challenge.

The decision on the application for costs

136. Planning Practice Guidance ("PPG") sets out the principles applied by the Secretary of State and the Planning Inspectorate in deciding whether and how to exercise the power to order the costs of a planning appeal to be paid by one party to another. Paragraph 030 states that costs may be awarded where (1) where a party has behaved unreasonably and (2) that behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. These criteria have essentially remained unchanged since the policy laid down in Circular 73/65 and subsequently in Circular 2/87. The PPG gives examples of unreasonable behaviour, both procedural and substantive, the latter relating to issues involving the merits of the appeal. One example of unreasonable behaviour on the part of an LPA is a failure to produce evidence to substantiate each reason for refusal on appeal (paragraph 049).

137. Paragraph 032 states that:-

> "an application for costs will need to clearly demonstrate how any alleged unreasonable behaviour has resulted in unnecessary or wasted expense. This could be the expense of the entire appeal or other proceeding or only for part of the process."

Where the unreasonable behaviour relates to a failure by the LPA to substantiate only one of several issues raised, a partial award of costs may be made limited to costs incurred in dealing with that one issue. In other words, it has been the consistent practice under the Secretary of State's policy on costs that the twin tests identified above determine whether any award of costs is made and, if so, whether it relates to the entire costs of the appeal process or the costs of an identified stage or issue in that process.

138. Paragraph 035 of the PPG requires an application for costs in respect of an inquiry or hearing to be made to the Inspector before he or she closes the inquiry or hearing. The objective is obvious and sensible, namely to enable the decision or recommendation on costs to be made by the person in the best position to evaluate whether there has been unreasonable behaviour and, if so, its effect on the appeal process. To have that assessment made by someone who has had no involvement in the process is inefficient, and in some circumstances could be disproportionately expensive.

139. In CR 4 the Inspector summarised the four main grounds on which the School sought costs against the Mayor:-

> "(i) The Mayor's Stage 2 decision and reason for refusal was unreasonable in light of the Mayor's Stage 1 Report;
>
> (ii) The Mayor's decision failed to follow established caselaw, gave unreasonable reasons for reducing weight to the extension of MOL and failed to take into account and give due weight to the accordance of the scheme with the adopted Harrow SPD 2015;
>
> (iii) The Mayor did not substantiate its reason for refusal and has pursued a different case at appeal;
>
> (iv) The proposal ought clearly to have been permitted given the material considerations which include undisputed educational and boarding school need, undisputed community need, the community use agreement, the MOL extension, and the SPD and various policies encouraging the development of school and sports facilities."

140. In CR 5 the Inspector summarised the Mayor's response resisting the application:-

> "(i) The Applicant has misunderstood the two-stage process provided for under the Town and Country Planning (Mayor of London) Order 2008, the first part being a statement and the second part being an actual 'decision';
>
> (ii) The Mayor contends they did follow established caselaw, that it was permissible to explore alternate potential locations for the proposal, and that the Applicant has mis-represented some of the oral evidence given at the Inquiry;
>
> (iii) It was clear that the reason for refusal related to footprint and location; and that 'footprint' means more than footprint. The Mayor has made clear that they have not advanced impact on the significance of heritage assets as a freestanding reason for refusal as this lies under the context of 'other harm'. Landscape and visual impacts are elements relevant to openness. Lastly, matters of weight are rightly matters of exercise planning judgement which lie with the relevant decision-maker.

(iv) The Mayor exercised his powers to consider the proposal in light of the various considerations and came to the conclusion that the harm arising was not outweighed by very special circumstances. As such, he was permitted to direct the refusal of permission as it did not comply with planning policy and material considerations did not outweigh these."

141. The Inspector then dealt in turn with each of the four main grounds for seeking costs. He found aspects of unreasonable behaviour under each of grounds (i) (CR 7 to 11), (ii) (CR 12 to 17) and (iii) (CR 18 to 30).

142. However, he rejected the School's ground (iv), which was based on paragraph 049 of the PPG:-

> "preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and any other national considerations"

His reason for doing so was expressed in CR 31:-

> "The last ground weaves into concerns expressed by the Applicant on the first three grounds. The Applicant is incorrect to assert that permission should have been forthcoming. The Mayor's case was presented in a professional manner that sought to articulate its concerns. Even though I consider that there are serious flaws in elements of the reason for refusal, which have led to greater emphasis on matters that were straightforward – for example footprint versus scale/bulk/mass – this does not detract from the point that the Mayor refused permission and then explained why he felt it was unacceptable. This is a reasonable position for the Mayor to have held. I do not find that the Mayor was unreasonable on this ground."

143. The Inspector's conclusions were set out in CR 32 to 35:-

> "32. The application was for full costs. I have found some areas where I consider that the behaviour of the Mayor was unreasonable and that in some cases this has resulted in unnecessary or wasted expense on the part of the Applicant. This does not necessarily extend across all four grounds put forward.
>
> 33. Nevertheless, their occurrence is of a frequency and spread across the appeal that when taken as a whole I find that there is a strong likelihood that either the appeal may not have needed to have taken place and/or matters would have narrowed further so that any remaining issues could have been dealt with otherwise than by means of an Inquiry.
>
> 34. In particular, I am extremely concerned by the lack of detailed analysis and/or reference to heritage matters within the reason for refusal; especially given the statutory requirements. Had this been carried out in an appropriate manner this may well have altered the cases presented, and/or altered the various planning balances involved resulting in a different outcome.
>
> 35. Overall, I conclude that the Mayor did act unreasonably which caused unnecessary and wasted expense, and that this was to an extent that the full costs of the appeal process should be awarded to the Applicant."

144. Accordingly, this was not a case where the Inspector found that one specific instance of unreasonable behaviour had caused an appeal to be brought which should not have been necessary. Instead, he treated the failures collectively as having unnecessarily caused the School to incur the costs of at least the public inquiry.

145. In his decision letter the Secretary of State accepted the Inspector's conclusions at CR 32 to 35. In DL 6 he made an order that the Mayor should pay to the School:-

> "its costs of the inquiry proceedings *limited solely to the unnecessary or wasted expense incurred in the appeal process*, such costs to be taxed in default of agreement as to the amount thereof." (emphasis added)

The challenge to the costs decision

146. The Mayor advances three grounds of challenge to the costs decision, the legal merits of which are not in any way affected by the outcome of the challenge to the decision on the planning appeal.

Ground 3

147. Under ground 3 the Mayor challenges the Inspector's conclusions on ground (i) of the costs application. The Inspector decided that it was not until the stage 2 report that a number of fundamental concerns were identified, which, had they been raised at an earlier stage, could have been addressed by the School. The Inspector suggested that if that had happened, the inquiry *might* have been shorter or not needed at all (CR 8 to 11).

148. The Inspector based that conclusion on two aspects. He identified the first, by way of example, as the Mayor's putting forward of alternative locations for the sports building very late in the day. At CR 12 to 17 the Inspector robustly criticised the Mayor's case on this topic under ground (ii) of the application for costs, holding (inter alia) that the alternatives put forward had been unrealistic. In effect, he decided that that part of the Mayor's case had not been substantiated. Mr. Edwards QC very properly accepted that CR 12 to 17 could not be impugned. But he correctly submitted that if that had been the only finding adverse to the Mayor, it could only have led to a partial award of costs. There was no finding by the Inspector that the Mayor's case was dependent on the existence of a suitable alternative.

149. The second aspect is to be found in CR 10. The Inspector criticised the Mayor's *volte face* from the School's scheme being broadly supported at stage 1 to it being completely unacceptable at stage 2. He recognised that a decision-maker could come to a different view from that of his officers, but the grounds for doing so would have to be substantiated. That reasoning could only have referred to ground (iii) of the costs application where the Inspector concluded that the Mayor had acted unreasonably by failing to substantiate the objections upon which he relied. The Inspector's conclusions on ground (iii) of the costs application are challenged by the Mayor under his grounds 1 and 2.

150. The upshot is that ground 3 of the costs challenge only has any legal effect if the court should accept either ground 1 or 2 as a basis for impugning the Inspector's reasoning on ground (iii) of the costs application.

Ground 1

151. Broadly speaking, the Inspector's reasoning on ground (iii) of the costs application fell into 3 parts. CR 24 addressed landscape and visual impact, where the Inspector concluded that the Mayor had not acted unreasonably. CR 18 to 23 and 28 to 30 addressed heritage issues where the Inspector found that the Mayor did act unreasonably. That is challenged by ground 1. In CR 25 to 27 and 30 the Inspector addressed the failure by the Mayor to refer to the height, bulk, scale or mass of the sports building in the directed reason for refusal at stage 2. That is the target of the Mayor's ground 2.

152. In relation to heritage matters the Inspector criticised the Mayor's behaviour as unreasonable because:-

    (i) He failed to apply s.66(1) of the Listed Building Act 1990 (CR 18 and 20);

    (ii) If he had applied the statutory duty and the balance under paragraph 196 of the NPPF "there would have been other options available to the decision-maker" (CR 21);

    (iii) There was a lack of clarity and reasoning on any "residual harm" and so unnecessary expense was incurred "by having to address heritage matters at the inquiry" (CR 23);

    (iv) Heritage matters were not identified in the reasons for refusal and it was unclear what matters the School needed to address, thus causing unnecessary expense (CR 29-30).

153. Notwithstanding the submissions advanced by the Secretary of State and the School, these conclusions are legally flawed. First, as Mr. Edwards QC submitted, it is clear from the material before the court that the Mayor did address himself to section 66(1) of the Listed Building Act 1990 and paragraph 196 of the NPPF from at least the stage 2 Report onwards. Indeed, the Inspector's criticism is contradicted by his conclusions in the main report at IR 72 and 78. In the same vein, the Mayor relied (in part) upon the views of Historic England. So did the Secretary of State in deciding that the sports building would result in "less than substantial harm", before going on to agree with the Mayor that that particular harm was outweighed by public benefit. I do not see any rational basis in the Report as to why that behaviour could be criticised as unreasonable. The Mayor made it plain that he was not advancing heritage matters as a freestanding reason for refusal, but as "other harm" under MOL policy (paragraphs 52 and 53 of the Stage 2 Report). That was a permissible approach applying <u>Redhill</u> (see above). Both the Mayor's Stage 2 Report and his closing submissions contradict CR 19, where the Inspector, having recognised that the "other harm" approach was permissible, then went on to assert that it had not been followed by the Mayor.

154. Understandably, the Inspector did not suggest that what he considered to be the unreasonable pursuit of heritage issues, had in itself resulted in the need for the School to appeal. That would have been untenable. Indeed, all the Inspector was able to conclude in this part of his Report was that the School had had to incur costs unnecessarily in having to address heritage matters at the inquiry (CR 23 and 29-30). As with ground 2, this leads to the important issue as to how the Inspector's findings

under ground (iii) of the costs application sit with his findings in DL 31 under ground (iv) (see below).

155. I uphold ground 1 to the extent indicated above. Those flaws vitiate the conclusions in CR 23 and 30 in relation to heritage matters.

Ground 2

156. In CR 25 to 27 and 30 the Inspector criticised the Mayor for raising concerns about the bulk, height and massing of the sports building which fell outside the scope of the reference to "footprint and location" in the reason for refusal. Bearing in mind the history of the application and appeal process which I have summarised (not least paragraph 49 above), I see no merit in the criticisms made by Mr. Edwards QC of the Inspector's findings on this aspect. The Inspector's conclusion that the Mayor's position on this aspect was unclear in the reason for refusal and that this amounted to unreasonable behaviour is unassailable.

157. However, the Inspector did not make any finding that this aspect itself caused the School to incur unnecessary costs, whether the costs of the whole appeal process or just the costs of the inquiry. That would have been untenable. The Inspector simply stated that this caused unnecessary and wasted expense. He failed to apply the guidance in the PPG by explaining what the nature of that expense was. That error can only be ignored if it is saved by the "wrapping up" conclusion in CR 33, but that cannot be considered without first addressing CR 31.

Paragraphs 31 and 33 of the Inspector's report on costs

158. The position we have reached so far is that the Inspector's reasoning could only have justified awards of costs in relation to alternative locations for the development, heritage matters and the raising of height, bulk and massing as an objection raised outside the reason for refusal.

159. At this point there is a yawning gap in the Inspector's reasoning. Even when all those three matters are combined together, that could not justify treating all the costs of the inquiry or the appeal process as wasted, which is what the Inspector purported to do at CR 35 and 36, and with which the Secretary of State agreed at DL 4 to 5. A substantial part of the appeal was concerned with the VSC balance which had to be struck under MOL policy. That involved assessing the extent of the harm to the MOL (along with any other harm) and whether the weight to be attached to the benefits of the proposal clearly outweighed that harm. The Inspector made no findings criticising the Mayor's case on that aspect which, of course, was central to his reason for refusal.

160. This analysis is confirmed by CR 31 (see paragraph 142 above). Here the Inspector rejected the School's contention that the Mayor had unreasonably prevented development which should clearly have been permitted. The Inspector found that the School was wrong to assert that permission should have been forthcoming. On that basis, it is impossible to see how an appeal could have been avoided. Then, the Inspector found that although there were serious flaws in "*elements* of the reason for refusal" (emphasis added), that did not detract from the point that the Mayor had explained why the development was unacceptable based on the reason for refusal, adding that that was "a reasonable position for the Mayor to have held." In effect, the Inspector found that

the Mayor had produced sufficient material to substantiate his reason for refusal, certainly in relation to the view he took on the harm to the MOL as against the benefits of the proposal. The conclusions in CR 33, 35 and 36 are therefore flawed. There is an internal contradiction and also legal errors in the report which are fundamental to the recommendation that a "full award" of costs be made and the Secretary of State's decision to accept that conclusion.

Conclusions on the challenge to the costs decision

161. It was faintly suggested by the Secretary of State and by the School that the decision on costs should nonetheless upheld applying the principle in Simplex. That is untenable. The flaws are so fundamental that it is impossible for the Court to say that the decision would inevitably have been the same if those errors had not been made. Indeed, in my judgment the untainted parts of the reasoning, in so far as they can be separated out, could only have justified a partial award in relation to alternative sites.

162. The legal consequence is that the decision on costs must be quashed. The Court has no power under s.288 of TCPA 1990 to revise or amend the order made in DL 6 so that it relates just to the issue of alternative sites. The decision needs to be retaken, preferably by a different decision-making team. The above reasons are sufficient to dispose of CO/4851/2019.

163. However, to assist in promoting future good practice, I should make some observations on the terms in which the costs order was made (see paragraph 145 above). In doing so, I wish to make it clear that my decision to allow the claim in CO/4851/2019 does not rely in any way upon the following paragraphs.

164. The order purported to give effect to the recommendation that a full award of costs be made by ordering the Mayor to pay the School's costs of the inquiry proceedings, but then "limited" its effect to "the unnecessary or wasted expense incurred in the appeal process." I have never come across such wording in an order of this kind and it has not been suggested that it has been used in any other full award of costs. It appears to be common ground that the addition of this wording departs from the standard text used for a full award. It imports into the order one of the two tests laid down in the PPG for the Secretary of State to decide two essential questions: (1) whether it is appropriate to make a costs order and (2) if so, the ambit of the order.

165. A paying party and a receiving party are both entitled to a decision from the Secretary of State on what he considers the nature of the wasted costs to be. Here the Inspector's conclusion accepted by the Secretary of State was that the unnecessary and wasted expenditure was the appeal process, which justified the making of a full award of costs. However, the insertion of the additional wording into the formal order requiring the costs of the inquiry to be paid implies that something less than that might turn out to be justified and payable. In the present case this additional wording is most unfortunate because it gives the impression that the decision-maker was uncertain as to how far the Inspector's reasoning went in identifying wasted or unnecessary expenditure.

166. Mr. Turney accepts that the additional wording refers to one of the two threshold tests for the making of an order, but he says on instructions that it was not intended to qualify the scope of this award of costs. It therefore follows that that wording served no useful

purpose and should not have been included in the order because it could lead to unnecessary confusion.

167. Furthermore, having been shown a specimen example, I do not see why the wording would need to be inserted into an order for a partial award of costs. I would therefore suggest that this additional text be omitted in future from orders for costs, unless a good reason can be given for its inclusion in a specific case.

168. Costs judges are well used to resolving issues on the quantification of costs applying the rules in the CPR (such as CPR 44.4) and to follow any direction by the trial judge on costs which should be disallowed. But here the effect of the additional wording, taken at face value, was to pass responsibility from the Secretary of State to a Costs Judge to determine what expenses, or types of expenses were "wasted or unnecessary" as the result of the Mayor's unreasonable behaviour on the merits of the proposal. If this style of drafting were to be repeated, it could give rise to a new form of satellite litigation far removed from the decision-makers on a planning appeal who are in the best position to decide, and ought to decide, that issue for themselves. It is contrary to the general approach taken in the PPG to ensure that, so far as possible, awards of costs are determined by the appropriate decision-makers.

Conclusions

169. I would like to express my gratitude for the way in which this case was presented and argued by Counsel and Solicitors on all sides and for the help which the court received. There was a good deal of co-operation in the production of electronic bundles, within a short space of time, to ensure that these complied with the various protocols and guidance on remote hearings. I would mention, by way of example, the core bundle which, although it comprised only 262 pages, provided virtually all the material needed for dealing with substantial challenges to two decisions of the Secretary of State following a lengthy public inquiry.

170. For the reasons set out above;-

(i) The claim in CO/4849/2019 is dismissed. There is no basis for the Court to intervene in relation to the decision on the planning appeal;

(ii) The claim in CO/4851/2019 is allowed and the Secretary of State's decision to order the Mayor to pay the School's costs is quashed.