
OPINION

1.0 INTRODUCTION

1.1 A large number of residents in Kingston on Thames are opposed to a proposed development in the town centre. Twenty organisations and groups, including Historic England, oppose the development.

1.2 The residents have combined to form the “Kingston Residents Alliance” and have asked me to advise them.

2.0 THE PROPOSED DEVELOPMENT

2.1 By letter dated 17th April 2015, Quod, a firm of planning consultants, submitted on behalf of St. George West London Limited (“St. George”) a revised application for planning permission for the “*comprehensive redevelopment of the Old Post Office Site in Kingston on Thames*”. That site forms a triangle bounded by Ashdown Road to the north east, Brook Street to the west and Wheatfield Way to the south east. It is about one hectare in extent. I shall refer to it as the triangle site.

- 2.2 St. George is part of the Berkeley Homes group of companies, a long established and highly respected developer of residential and other types of development, but known mainly for its residential schemes.
- 2.3 The application revised proposals submitted originally on 11th December 2014; the revisions made to that proposal sought to take account of representations made in response to the original application.
- 2.4 There can be no doubt that the nature of the proposal has been determined by the need for housing in the Borough. That is acknowledged both in paragraph 5.2 of the Planning Statement in support of the original application and in paragraph 3.3 of the Addendum to that Statement issued in support of the revised application. Paragraph 5.2 refers to policy 2.15 of the London Plan with its emphasis on accommodating “*housing growth*” in town centres beyond London’s Central Activities Zone. The alterations to that policy introduced by the Further Alterations to the London Plan (“FALP”) are summarised in paragraph 3.3 of the Addendum as promoting “*high density, residential led mixed use redevelopment as well as significant higher density housing*” and as recognising “*the pressing need for additional housing and investment in high density housing in the larger centres*”.
- 2.5 There were two versions of the development the subject of the application, named Scenario A and Scenario B. The first scenario related to all of the land within the triangle, the second excluded the site of Frances House, over which, unlike over the remainder, St. George has no control.

- 2.6 On the site are a number of buildings, two of which, a former Post Office and a former Telephone Exchange, are listed as being of historic or architectural interest (Grade II). All buildings on the site, other than the listed buildings are proposed for demolition. On the site there are no buildings above five stories in height. The existing building footprint on the site occupies no more than 35 percent of site area.
- 2.7 A mix of uses is proposed within the development, namely residential, offices, shops, restaurants and cafes and leisure and community uses. The principal component is residential, comprising 360 units.
- 2.8 To accommodate the amount of development proposed will not only result in a substantial increase in built footprint on the site 80 percent, but there will be nineteen built elements ranging in height from four to six stories (two elements), five to six stories (one element), seven stories (one element), eight stories (one element), eight to nine stories (one element), nine stories (five elements), ten stories (two elements), eleven stories (two elements), twelve stories (one element), twelve to thirteen stories (one element), fifteen stories (one element) and nineteen stories (one element). The tallest elements (the fifteen and nineteen story residential towers) are to be next to each other in the south west corner of the site formed by Brook Street and Wheatfield Way.
- 2.9 The positioning of the built elements is shown on the plan at page 9 of the Design and Access Statement Addendum (the “DASA”) submitted with the revised application. The position and the massing of the twin towers is shown on page 13. On DASA

pages 18 to 21 are the four elevations to the surrounding roads (there being two elevations to Wheatfield Way to reflect the changing alignment of that road).

- 2.10 The amount and massing of the proposed development is reminiscent of city centre developments. An aerial view of its expected appearance is shown on DASA page 26. Depending on how it is measured, in terms of density the scheme is close to or in excess of the upper end of the density range in the London Plan (see paragraph 155 of Officer's Report to Development Control Committee convened to consider the application on 23rd June 2015).

3.0 **KINGSTON UPON THAMES AND ITS SURROUNDINGS**

- 3.1 Kingston on Thames (which I shall refer to henceforth as "Kingston") is one of only four Royal Boroughs in the United Kingdom. The settlement dates from Saxon times. By the twelfth century it was established as a market town. Its bridge over the Thames was built around 1200 and was the first upstream from London Bridge. The original Old town is focused around the Market Place and is recognised as having one of the best preserved examples of a medieval street pattern in the south west of England.

- 3.2 The triangle site is situated between two statutory 'conservation areas', to the west is the Kingston Old Town Conservation Area and to the east is the Fairfield Conservation Area. The latter area extends along the whole of the Wheatfield Way frontage of the triangle site. There are other conservation areas nearby.

3.3 Apart from the two conservation areas to either side of it, the triangle site has to its west the River Thames; and to the north east, north west and west respectively is a “*unique cluster of the most highly graded landscapes in England namely Richmond Park, Bushy Park and Hampton Court Park*”; that is the description of the surroundings by Historic England (formerly known as “English Heritage”) the Government’s statutory adviser on the historic environment. Hampton Court Palace, the internationally acclaimed sixteenth century royal palace, stands within Hampton Court Park.

3.4 To the south east of the Fairfield Conservation Area is an extensive area of Metropolitan Open Land (“MOL”). There is further MOL along the river to the north west.

4.0 **THE ISSUES OF CONCERN TO THE RESIDENTS OF KINGSTON**

4.1 As explained to me, it is the proposed height of the taller of the twin towers which serves as a focus for the residents of the town. At nineteen stories the tower will be double the height of any existing building in the town. Although it is the nineteen story tower on which the residents’ concern is focused, they are concerned also by the overall massing and density of the whole development proposed on the triangle site. In a leaflet issued by the residents seeking support for their stance, they state that the development is “*too tall, too dense and has significant policy contraventions*”. They fear that the scheme “*will pave the way for developers to walk all over our historic town*”.

4.2 Having examined the plans and illustrations of the proposed development and of the surrounding area, I understand readily the residents's concerns. But I am not a qualified town planner. I am, however, a barrister specialising in town planning law and practice and in related areas. I have over forty years experience in promoting and opposing developments of all kinds including such as that proposed on the triangle site. In order to discharge that role, I have learned to evaluate the technical evidence and professional judgements advanced by those qualified in the various disciplines relevant to devising and assessing such a proposal and to arrive at an overall judgement of the proposal in much the same way as an Inspector does when presiding over a public inquiry into whether permission should be granted for the proposal.

4.3 In the present case, however, I have not been able, in the time available since I was instructed nor with the limited resources made available to me to assess the merits of the proposal, to form an overall judgement; nor have I been instructed to do so. The task allotted to me is to consider the report to the Development Control Committee by the Borough's Head of Planning and Transport in which he recommends that planning permission should be granted and to advise whether that report provides a sound and lawful basis for such a grant.

5.0 **THE REPORT BY THE HEAD OF PLANNING AND TRANSPORT**

5.1 By Section 38(6) of the Planning and Compulsory Purchase Act 2004, applications for planning permission must be determined in accordance with adopted statutory development plan unless material considerations indicate otherwise. Consequently, the recommendation by the Head of Planning in his report that planning permission

should be granted should have been made by reference to that statutory test. At paragraph 113, the Head of Planning refers expressly to that test.

5.2 In the report, the main material considerations are listed between paragraphs 111 and 112. In forming my Opinion I have concentrated on the first two namely: the principle of the proposed development and the impact of it upon the character and heritage of the area.

5.3 In relation to the principle of the development, planning policy is considered. I consider below the manner of that consideration and whether it is satisfactory.

5.4 (i) In paragraphs 135 to 140 of the report, national planning policy is summarised by reference to the National Planning Policy Framework (“NPPF”) published in March 2012 and to the National Planning Practice Guidance published in March 2014.

(ii) At the heart of the NPPF is said to be “*a presumption in favour of sustainable development*”. There are said to be three dimensions to such development namely economic, social and environmental. At paragraph 140 it is stated that in the context of the NPPF permission should be granted because “*it is considered that the benefits of the proposed development in this case significantly outweigh any perceived adverse impacts*”.

(iii) In my opinion, the judgement in paragraph 140 about the sustainability of the proposal is entirely inadequate and indeed unlawful because it fails to apply

the correct test set out in the NPPF between paragraphs 5 and 6 namely “meeting the needs of the present without compromising the ability of future generations to meet their own needs”. The relevance of that test in the present case could not be greater since the proposal is driven by the perception of the present need for regenerating the site and that part of the town centre and by the present need to meet the revised housing targets in the London Plan, but, in meeting those housing targets, the proposal risks compromising the heritage of the town and its surroundings which has grown over eight hundred years and which all agree should be safeguarded for future generations.

- 5.5 (i) Policies for the whole of the Greater London area are set out in the Statutory London Plan, which is the “Spatial Development Strategy for Greater London”. In the Head of Planning’s report relevant policies in the London Plan are listed in the opening section of the report entitled “BASIC INFORMATION”. Included in the list are policies 3.3 and 3.4. Policy 3.3 is headed “Increasing Housing Supply”. Increasing the supply of housing is described in Policy 3.3A as a “*pressing need*” which should be met in particular on brownfield sites by a number of means including “*town centre renewal*” (see Policy 3.3E(b)). Policy 3.3E also states however that meeting the need for housing should be done “*having regard to other policies of this plan*”. Similarly Policy 3.4 which is headed “Optimising Housing Potential” provides that “[t]aking into account local context and character, the design principles in Chapter 7 and public transport capacity, development should optimise housing output for different types of location ... Development proposals which compromise this policy should be resisted.”

- (ii) In my opinion, it was a significant omission by the Head of Planning not to refer to the substance of these policies and to the clear recognition in them that whether to provide for housing need in a particular location must be considered having regard to the need to protect the character of the location.

- 5.6
 - (i) The Borough specific policies relevant to the principle of permitting the proposed development are examined in paragraph 121 to 155 of the Report (save for paragraphs 135 to 140 which relate to the NPPF).

 - (ii) Paragraphs 115 and 120 identify the adopted Core Strategy (adopted in 2012), the Kingston Town Centre Area Action Plan (adopted in 2008), and the Eden Quarter Development Brief Supplementary Planning Document (“SPD”) (adopted in 2015) as the three plans enshrining the relevant policies.

- 5.7
 - (i) The Area Action Plan, being the oldest of the plans, should be considered first. It was adopted prior to the Kingston Unitary Development Plan First Alteration (“UDPFA”) 2005 being succeeded by the Core Strategy 2008. At paragraph 2.15 it is stated that, on adoption, the AAP will succeed all policies for the town centre in the UDPFA.

 - (ii) Paragraph 3.16 of the AAP emphasises the importance of “*protecting and enhancing the historic environment*”. By contrast paragraph 3.26 states that parts of the centre are “*underused or vacant and lack attractions*”. In

paragraph 3.26 the triangle site is identified as part of the “Ashdown Road sites” (shown as being either side of Ashdown Road).

- (iii) Plan 3 in the AAP is entitled “Vision - Key Diagram”; on it the triangle site is shown as part of a larger area, P3, as a “*proposed site/potential redevelopment site*” although the only specific use identified for it was “*primary shopping area extension*” and “*new or improved car park*”. There are two sites (neither of them within the triangle site identified a “*proposed landmark sites*”; one is west of Eden Street and the other in the vicinity of the railway station north of Wood Street.
- (iv) Paragraph 2.18 in the AAP states that Policy STR22 in the UPPFA has been deleted; it was a policy which included a height restriction for new development in the town centre.
- (v) Policy K7 makes provision for new homes in the town centre between 2006 and 2020. Paragraph 5.28 states that all “*proposed sites*” save P14, P15 and P16 “*having potential for housing*” but refers to the amount of housing having to take account of “*massing, townscape and infrastructure considerations*”.
- (vi) Policy K9 is concerned with “*design quality in the town centre*” and requires “*all new development*” to:
 - “*respect and enhance the town centres distinctive character and historic environment*”;

- *“respond to local context, scale and character in terms of historic street patterns, siting, density, massing, height, appearance [etc] ...”*;
- *“safeguard the panoramic and key views”*.

The two opportunity sites either side of Eden Street (P2 and P3 on the Vision Key Diagram) are identified as of *“lesser quality”* where will be promoted *“exemplary quality contemporary architecture ... to provide new landmarks to reinforce identify and improve legibility.”* As stated in sub-paragraph (v) above, the landmark site for this area is shown on the Vision Key Diagram as being on proposal site P3 west of Eden Street rather than on the triangle. That location is emphasised in paragraph 6.11 which states that *““landmark” status does not imply tall buildings”*.

- (vii) At paragraph 12.8 reference is made to Proposal Sites P1 to P5 being within the “Eden Quarter Study Area” for which is being prepared a master plan for *“a retail led mixed use development”*. Policies P2 and P3 expand on that theme and refer to the *“extension of the Primary Shopping Area onto the Ashdown Road sites by the provision of high quality new comparison shopping facilities in an open street format with a mix of shop sizes”* and with *“residential”* being provided above the retail.
- (viii) The development envisaged in the statutorily adopted AAP on the triangle site was retail led and was clearly very different from that now proposed by St.

George which is residential led. In his report at paragraph 129, the Head of Planning merely recites Policy P3 without commenting on the difference. In my opinion, given that the AAP was adopted by Council members following public consultation, the failure to draw attention to that difference is a serious omission in the report by Head of Planning. Particularly serious in my opinion is the failure to remind members that, in the AAP, they have envisaged that the “*landmark*” site will be west of Eden Street.

- 5.8 (i) The Core Strategy adopted in April 2012 as part of the Local Development Framework for the Borough endorses the AAP. Paragraph 5.12 states that “*[t]he strategy for delivering the objective for Kingston Town Centre is detailed in the Town Centre Area Action Plan ...*”. It followed that the Core Strategy endorsed a retail led rather than a residential led development of the triangle site.
- (ii) Policy CS10 identifies Kingston Town Centre as one of a number of “*preferred locations for new housing*”.
- 5.9 (i) The Eden Quarter Development Brief SPD is not part of the statutory development plan. It was adopted by the Council in March 2015, subsequent therefore to the submission of the original St George application in December 2014. It was not prepared by the Borough’s officers but by external consultants GVA (Planning Consultants) and Allies and Morrison Urban Practitioners.

(ii) The triangle site (referred to in the SPD as “*the Old Post Office Site*”) is considered on page 48 of the document. Included in it are five “*objectives*” including as the fourth “*to form a new urban block with active frontages on all sides knitting the urban fabric back together*”. The south west corner is identified as “*an appropriate location for a residential tower*” which “*would form a strong landmark when arriving in Kingston from the south ...*”.

5.10 In my opinion, the paragraphs in the Officer’s Report relating to the “*principle of the proposed development*” do not establish that such a development accords with policy. The most that can be said is that statutory policy for the site supports the principle of some development on it, but that is very different from whether it supports a development of the massing and density proposed and erection of a landmark nineteen storey residential tower in the south west corner.

5.11 Accordingly, in my opinion, a grant of permission in reliance on the Head of Planning’s report would be susceptible to judicial review as a decision based on a material error namely that the principle of developing the site in the manner proposed was in accordance with the statutory development plan.

5.12 (i) The second material consideration identified in the Head of Planning’s report is “*Impact on Character and Heritage of the Area*”. It is examined in paragraphs 174 to 212 of the report.

(ii) At the heart of this issue are the facts that the triangle site is in a town with an historic medieval core; that on the site itself are two listed buildings; that in

the vicinity of the site are a large number of listed buildings; that close to the site on either side are two conservation areas; that further conservation area lie to the north and to the south; and that close by is the River Thames and a cluster of the most highly graded landscapes in England; that tracts of Metropolitan Open Land lie to the north west and south east.

- (iii) The site and its surroundings therefore are therefore a rich tapestry of “*heritage assets*” as defined in the glossary to the NPPF (“*a building, monument, site, place, area of landscape identified as having a degree of significance meriting consideration in planning decisions*”). In the same glossary the “*setting of a heritage asset*” is defined as “[*t*]he surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.”
- (iv) There are specific statutory provisions governing the approach a decision maker must follow when considering the impact of a proposed development upon heritage assets:
- In relation to listed buildings, the material parts of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (“P(LBCA)A 1990”) provides that “[*i*]n considering whether to grant planning permission for development which affects a listed building or its

setting, the local planning authority ... shall have special regard to the desirability of preserving the building or its setting ...”.

- In relation to conservation areas, section 72(1) of the LB(CA)A 1990 provides that *“[i]n the exercise, with respect to any buildings or other land in a conservation area, of any functions [under the Town and Country Planning Act 1990], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of the area.”*

- (v) Plainly, Section 66 applies in the present case, as the Head of Planning acknowledged in paragraph 174 of his report. Section 72 however does not apply since the proposed development adjoins but is not within a conservation area.

- (vi) (a) In the NPPF however, paragraph 129 provides that:

“Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) ... They should take this assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset’s conservation and any aspect of the proposal”.

- (b) Furthermore, paragraph 132 of the NPPF provides that:

“When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset’s conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or

destruction of the heritage asset or development within its setting”.

- (c) Paragraph 132 provides also that “*substantial harm ... to a Grade II listed building, park or garden should be exceptional*” and “*substantial harm to ... grade I and II* listed buildings, grade I and II* registered parks and gardens ... should be wholly exceptional*”. Where however development will lead to “*less than substantial harm to the significance of a designated heritage asset, the harm should be weighed against the public benefits of the proposal ...*”.

- (vii) (a) In the London Plan, Policy 7.4 provides that planning decisions in respect of buildings “*should provide a high quality design response that (a) has regard to the pattern and grain of the existing spaces and streets in orientation, scale, proportion and mass ... (c) is human in scale, ensuring buildings create a positive relationship with street level activity and people feel comfortable with their surroundings ... (e) is informed by the surrounding historic environment*”.

- (b) Policy 7.7 in the London Plan is a specific policy relating to the “*location and design of tall and large buildings*”. Policy 7.7A provides that “*tall and large buildings should be part of a plan-led approach*”. Policy 7.7D states that tall buildings “*should not impact on local or strategic views adversely*”. Policy 7.7E states that “*impact of tall buildings proposed in sensitive locations should be given particular consideration. Such areas might include conservation*

areas, listed buildings and their settings, registered historic parks and gardens, scheduled monuments ... the edge of ... Metropolitan Open Land, World Heritage sites Paragraph 7.25 recognises that *“tall and large buildings can form part of a strategic approach to meeting the regeneration and economic goals laid out in the London Plan ... they can also have a significant detrimental impact on local character ...”*. In paragraph 7.26 it is stated that *“tall and large buildings should always be of the highest architectural quality”*.

(viii) Policy CS8 in the Core Strategy states that:

“[t]all buildings may be appropriate in the Borough’s town centre; however, some parts of those areas will be inappropriate or too sensitive for such buildings. Relevant SPD’s will provide further guidance on this matter and the Council will determine applications for such development on the basis of the criteria in the English Heritage/CABE Guidance on Tall Buildings (July 2007) and the London Plan”.

(ix) As observed already in this Opinion, the AAP does not identify the triangle site as the location for a landmark building. It expressly proposes such a building on the opposite side of Eden Street.

(x) Also as observed already, it is only very recently, in the Eden Quarter Development Brief SPD, that a tall building has been proposed on the triangle site (see SPD Figure 8) although the text only states that it *“could be an appropriate location for a residential tower”*. The height is identified only as *“9+ storeys”*. On Figure 8, two further locations for buildings of such a height

are identified, namely west of Eden Street and on the corner of Fairfield north and Fairfield West.

- (xi) Historic England (formerly known as English Heritage) has written a long letter, dated 13th May 2015, objecting to the proposed development. In relation to the existing three storey listed buildings on the site, it expressed the opinion that they “*would be dwarfed by the 13, 10 and 9 storey elements that would surround them*”. In the letter, great concern is expressed also about the impact of the taller elements of the proposed development (including the 19 storey residential tower) on the settings of surrounding heritage assets.
- (xii) The guidance by English Heritage (prior to its change of name) together with CABI on proposals for tall buildings endorses a “*development plan-led approach to tall buildings*” enabling “*areas appropriate*” for them to be identified in the LDF as well as their “*spatial, scale and quality requirements*”.
- (xiii) In *Barnwell Manor Wind Energy Limited v. East Northamptonshire District Council and Others* [2014] EWCA Civ. 137, the Court of Appeal has clarified the law relating to the duty on decision makers imposed by P(LRCA) Act 1990 section 66, in particular in relation to the requirement that there should be paid “*special regard to the desirability of preserving the building or its setting*”. The Court held that the section required “*considerable importance and weight*” should be attached to the desirability of preserving the setting of listed buildings and that the possibility of such harm could not be treated as

merely a countervailing material consideration meriting no greater weight than any other such consideration.

- (xiv) In his report, the Head of Planning does not refer members to the emphasis in policy on the provision of tall buildings being development plan led nor to the *Barnwell Manor* case; nor does he apply the approach dictated by the Court. Indeed in paragraph 183, he acknowledges expressly that “*there is a significant change in scale between the Telephone Exchange building and the buildings adjacent to it which causes some harm*” but he states that “*given the town centre location and the heights proposed in the Eden Quarter Brief, it is inevitable that these buildings will be surrounded by taller buildings. Any perceived harm caused by the new development needs to be balanced against the sensitive restoration of the two “at risk” Listed Buildings and subsequently bringing the two buildings into active and appropriate use*”. In my opinion, that approach is wrong in law and any decision taken in reliance on it would be unlawful.

6.0 CONCLUSION

- 6.1 In my opinion the report by the Head of Planning does not properly inform members of the policies relating to the principle of permitting the proposed development nor of the law relating to the account that should be taken of the acknowledged harm to the

setting of the listed buildings. Accordingly, a decision to grant permission in reliance on the report would be susceptible to judicial review.

MATTHEW HORTON Q.C.

22 June 2015

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