Neutral Citation Number: [2021] EWHC 720 (Admin)

Case No: CO/2256/2020 & CO/2257/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 March 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

LONDON BOROUGH OF HACKNEY	**Claimant/ Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT **(2) AVON GROUP OF COMPANIES** **(3) TRIPLEROSE LIMITED**	**Defendants/ Respondents**

Charles Streeten (instructed by **Hackney Legal and Governance Services**) for the C**laimant/Appellant;**
Zack Simons (instructed by the **Government Legal Department**) for the **First Defendant/Respondent;**
James Findlay QC and Robert Williams (instructed by **Russell Cooke LLP**) for the **Second and Third Defendants/Respondents**

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Hearing date: 9 March 2021

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Approved Judgment

Mrs Justice Lang :

1. The Claimant challenges the decision, dated 26 May 2020, made by an Inspector, appointed by the First Defendant ("the Secretary of State"), in which she allowed an appeal by the Second and Third Defendants ("the developers") against an enforcement notice issued by the Claimant on 27 June 2018, and quashed the enforcement notice.

2. The enforcement notice related to the change of use of land at Unit 2 Ravendale Industrial Estate, Timberwharf Road, London N16 6DB ("the Site") from Class B8 (storage or distribution centre) to Class C3 (dwelling houses) in the Town and Country Planning (Use Classes) Order 1987 ("the Use Classes Order"). The building was converted into 25 self-contained apartments, on the ground and first floors.

3. The Inspector allowed the appeal under section 174(2) of the Town and Country Planning Act 1990 ("TCPA 1990") on two grounds:

   i) on ground (a): planning permission was granted, on the application deemed to have been made under section 177(5) TCPA 1990, for the development already carried out on the first floor of the building; and

   ii) on ground (c): there was no breach of planning control on the ground floor of the building.

4. Applying the guidance given by the court in *R (Wandsworth LBC) v Secretary of State for Transport* [2003] EWHC 622 (Admin), (2004) 1 P & CR 32, per Sullivan J. at [9], and *Oxford City Council v Secretary of State for Communities and Local Government* [2007] 2 P & CR 29, per George Bartlett QC, sitting as a Deputy High Court Judge, at [7] – [15], the Claimant filed a claim under both section 288 TCPA 1990 and an appeal under section 289 TCPA 1990. A Combined Statement of Facts and Grounds was filed.

5. On 6 July 2020, Holgate J. directed that the two claims be consolidated, with the agreement of the parties. Following an oral hearing, David Elvin QC, sitting as a Deputy High Court Judge, granting permission pursuant to sections 288 and 289 TCPA 1990, in an order dated 4 September 2020.

Grounds of challenge

6. The Claimant's grounds of challenge (as amended) were as follows.

7. **Ground 1**. The Inspector erred in law in allowing the appeal on ground (c) in that she:

   i) Found that the change in the use of the ground floor was lawful in reliance on permitted development rights, notwithstanding that she expressly found unlawful building operations had taken place, which prevented reliance on any deemed grant of planning permission under the Town and Country Planning (General Permitted Development) (England) Order 2015 ('the GPDO"), by virtue of Article 3(5)(a): see *RSBS Developments Ltd v Secretary of State* [2020] EWHC 3077 (Admin) ("*RSBS*").

ii) Failed to apply the correct approach to whether or not the development implemented the deemed grant of permission relied on, and in particular failing to consider the extent or significance of any departure from the submitted plans.

iii) Misinterpreted or failed to have regard to the conditions and limitations imposed by paragraphs P.1(d) and W(12)(b) of Part 3 of Schedule 2 to the GPDO.

8. **Ground 2**. The Inspector erred in law in allowing the appeal on ground (a) in that she:

i) Failed to reach a judgment on whether or not the development for which she granted planning permission accorded with the development plan, read as a whole, as required by section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004").

ii) Misinterpreted Policy 3.5 of the London Plan 2016.

iii) Failed to have regard to, or otherwise to address, the outlook of the units in the development, for which she granted planning permission, as required by Policy DM2 of the Hackney Development Management Local Plan (2015) ("the Local Plan").

9. In an order made by consent on 5 March 2021, the appeal under section 289 TCPA 1990 was allowed on ground 1(i) above. The Statement of Reasons, agreed by the parties, explained the basis for the order as follows:

> "Article 3(5) of the Town and Country Planning (General Permitted Development) (England) Order 2015 states "The permission granted by Schedule 2 does not apply if –(a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful".
>
> In *RSBS* (which was decided on 17 November 2020) Lang J. held at para. 56 that "the phrase "in connection with a building" is broad in its scope and could include permission for a change of use which was in connection with a building." She found that it applied to a change of use under Class O of Part 3 of Schedule 2 to the GPDO because Class O refers to the change of use "of a building". The wording of Class P of Part 3 of Schedule 2 is materially identical and the same reasoning applies.
>
> At para. 57 of *RSBS*, Lang J. expressly endorsed the Inspector's application of the principle that "if the building operations involved in the construction of any part of that building are unlawful, the permitted development rights granted in connection with the existing building do not apply (derived from *Evans* at para. 37) to circumstances in which a building has been physically altered without planning permission following a grant of prior approval for a material change of use.

> On the Inspector's analysis, the developer "carried out unauthorised building operations" before it sought to implement the deemed grant of planning permission pursuant to Class P of Part 3 of Schedule 2 to the GPDO (DL25-27). The effect of that was that PAN2 could not be implemented (see *RSBS* at paras. 53-60). The Inspector's finding that *Evans v Secretary of State* [2014] EWHC 4111 (Admin) "does not support the contention that the carrying out of external works resulted in the permission granted by PAN2 not being implemented" (DL29) is contrary to the judgment in *RSBS* at para. 57.
>
> The First Defendant/ Respondent therefore accepts that the Inspector's interpretation of the *Evans* judgment is materially inconsistent with the treatment of that judgment in the *RSBS* case. In consequence, the 1st Defendant / Respondent accepts that this part (but only this part) of the Inspector's reasoning was unlawful, and so no longer seeks to defend this appeal. The 1st Defendant / Respondent is content for the appeal against the Claimant's enforcement notice to be remitted to another Inspector and re-determined against the correct interpretation of the *Evans* case.
>
> The Second and Third Defendants/ Respondents also accepts that the Inspector's interpretation of the *Evans* judgment is materially inconsistent with the treatment of that judgment in the *RSBS* case. In consequence, the Second and Third Defendants / Respondents accepts that this part (but only this part) of the Inspector's reasoning was unlawful, and so no longer seeks to defend the section 289 appeal. For the avoidance of doubt, it maintains its defence to the section 288 statutory challenge in respect of the grant of planning permission for the use of the first floor of the Site for 15 self-contained flats.
>
> The Claimant/ Appellant maintains that the Inspector erred in all of the ways particularised in its Amended Combined Statement of Facts and Grounds of Claim."

10. The parties agreed that it was not necessary for the other issues in ground 1 to be determined by the Court.

11. Although the Claimant and the Secretary of State were in agreement that, in the light of the consent order, the Inspector's decision ought to be quashed in its entirety and remitted for reconsideration, the developers submitted that the Inspector's decision on ground (a) – the grant of permission for the development on the first floor - ought to be upheld. I shall consider this issue at a later stage in this judgment.

Planning history

12. The two storey building, with its external yard, forms part of the Ravensdale Commercial/Industrial Estate. It was previously in use as a warehouse. Other buildings on the Estate are a mix of residential use and light industrial use.

13. On 28 September 2016, the Council granted prior approval (reference 2016/2941) for a change of use of the first floor of the building from Class B8 to Class C3, as permitted development under Class P of Part 3 of Schedule 2 to the GPDO. The proposed development was a conversion into "15 x 1 bed mezzanine residential units". The parties referred to this prior approval notification as "PAN1". It was subject to four conditions relating to (1) soundproofing; (2) bicycle and refuse storage, landscaping and car parking; (3) a requirement to carry out the development in accordance with the details submitted; and (4) use as Class C3.

14. On 2 February 2017, the Council purported to refuse prior approval (reference 2016/4547) for a change of use of the ground floor of the building from Class B8 to Class C3, to provide "ten studio units". However, since the refusal was not issued until the 57th day following receipt of the valid application, the proposal benefited from deemed consent under the provisions of paragraph W in Part 3 of Schedule 2 to the GPDO. The parties referred to this prior approval notification as "PAN2".

15. In the course of 2016-2018, the developers developed the Site, creating 10 studio flats on the ground floor and 15 mezzanine flats on the first floor. However, they also undertook unauthorised external alterations including the addition of an external staircase to the western elevation, a single storey extension to the western elevation, and the installation of new windows, doors and roof lights. The Inspector found as a fact that these works took place before and during the carrying out of internal works and as part and parcel of the change of use of the property (see paragraph 27 of the Decision Letter ("DL27")). None of these external alterations were shown on the plans which had been submitted with the applications for prior approval and approved by the Claimant. As a result, the Claimant commenced an enforcement investigation against the developers.

16. On 15 September 2017, the developer applied to discharge conditions 1 and 2 of PAN1. On 13 November 2017 the Claimant refused the application on the grounds that PAN1 had not been implemented lawfully.

17. On 1 May 2018, the Council implemented a direction under Article 4 of the GPDO which removed permitted development rights for a change of use of a building from Class B8 to Class C3, under Class P in Part 3, Schedule 2 to the GPDO.

18. The developers made two retrospective applications for planning permission for the external works at the Site (references 2017/4202 and 2017/4205), which were validated on 13 November 2017. On 18 May 2018, the Claimant refused the developers' applications for planning permission.

19. On 27 June 2018, the Claimant issued an Enforcement Notice. The alleged breach of planning control was stated as follows:

> "Without planning permission, the change of use from a warehouse to self-contained flats and associated external alterations, namely the addition of an external staircase to the Western elevation, single storey extension to the Western elevation and the installation of new windows, doors and roof-lights.".

20. The reasons for issuing the notice were that the conversion had "resulted in a substandard form of accommodation by reason of size and dwelling mix and is an inappropriate form of development, which adversely affects the amenity of its occupiers as well as the character, appearance of the host building and the surrounding street scene". As such, the unauthorised development was contrary to the policies identified in the Hackney Core Strategy 2010, the Local Plan, the London Plan, the National Planning Policy Framework (2012) and the Mayor of London Housing Supplementary Planning Guidance 2016.

21. The developers were required to cease the use of the self-contained flats and restore the building to its previous condition, both internally and externally, within ten months from the date the notice took effect (31 July 2018). The steps required by the notice were:

> "• Cease the use of the property as self-contained flats;
>
> • Remove all partitions, doors, facilities, fixtures and equipment that facilitate the unauthorised use of the property as flats;
>
> • Remove all roof-lights and restore the roof in materials to match the roof form before the unauthorised development was carried out;
>
> • Remove all windows and doors inserted on the external facings of the property associated with the unauthorised change of use and restore the property to its design and appearance before the unauthorised development was carried out;
>
> • In fill and restore the north facing elevation using materials to match the appearance of the property before the unauthorised development was carried out;
>
> • Demolish the single storey rear extension and external staircase and make good the western elevation to its appearance before the unauthorised development was carried out;
>
> • Remove all materials, debris, waste and equipment resulting from compliance with the other requirements of the notice from the property and its premises."

22. The developers appealed to the Secretary of State under section 177(2) TCPA 1990 on grounds (a), (c), (f) and (g). An Inspector appointed by the Secretary of State (Mrs H.M. Higenbottam BA (Hons) MRTPI) held an Inquiry and made a Site visit.

23. In her decision issued on 26 May 2020, the Inspector allowed the appeal on ground (c) (in part) and ground (a). In summary, the Inspector:

i) Found that PAN1 had not been "lawfully implemented" because of the failure to comply with Condition 1 of that approval;

ii) Found that PAN2 had been "lawfully implemented" for the reasons set out at DL24-30 and so allowed the appeal on ground (c);

iii) Decided to grant planning permission for the internal and external development on the first floor on ground (a).

Statutory framework

(i) Applications under section 288 TCPA 1990

24. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

25. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

26. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

27. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, at [6], Lindblom LJ set out the principles which should guide the Court in considering a challenge under section 288.

28. In *Hopkins Homes v Secretary of State Communities* [2017] 1 WLR 1865, Lord Carnwath said, at [26], that claimants should "distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not … elide the two".

29. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

30. The Inspector was required to give reasons for her decision. In *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, Lord Brown reviewed the

authorities and gave the following guidance on the nature and extent of an inspector's duty to give reasons:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

(ii) Development

31. By section 57 TCPA 1990, planning permission is required for the carrying out of any development of land. The meaning of "development" is set out in section 55(1) TCPA 1990.

32. Section 58(1) TCPA 1990 provides that planning permission may be granted by a development order or by a local planning authority determining an application.

33. Section 59 TCPA 1990 empowers the Secretary of State to make a development order granting planning permission by the order itself. The applicable development order in this case is the GPDO 2015.

34. Under section 60(1) TCPA 1990, the Secretary of State may impose conditions or limitations on permitted development rights. In particular, more recent development orders have made the grant of certain permitted development rights subject to the 'prior approval' of the local planning authority.

35. Article 3(1) of the GPDO grants planning permission for the classes of development described in Schedule 2. Part 3 of Schedule 2 is headed 'Changes of Use'. Class P deems planning permission to be granted for development consisting of the change of use of a building and any land within its curtilage from a use falling within Class B8 (storage or distribution centre) to a use falling within Class C3 (dwelling houses) of the

Use Classes Order. Development is not permitted under Class P if "the gross floor space of the existing building exceeds 500 square metres" (P.1(d)).

36. The permission granted pursuant to Class P is subject to a condition requiring the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required as to certain specified matters, including noise impacts.

37. The provisions of paragraph W of Part 3 of Schedule 2 to the GPDO apply in relation to that prior approval application, to the following effect:

i) The application for prior approval must be accompanied by a written description of the proposed development and a site plan indicating the site and showing the proposed development (W(2)(a)-(b)).

ii) The local planning authority may require the developer to submit such information as the authority may reasonably require in order to determine the application (W(9)). It may refuse an application where, in the opinion of the authority (a) the proposed development does not comply with, or (b) the developer has provided insufficient information to enable the authority to establish whether the proposed development complied with any conditions, limitations or restrictions specified in Part 3 as being applicable to the development in question (W(3)).

iii) The development must not begin before: (a) the receipt of a written notice of the local planning authority's determination that prior approval is not required; (b) the receipt of a written notice giving prior approval; or (c) the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused (W(11)).

iv) The development must be carried out: (a) where prior approval is required, in accordance with the details approved by the local planning authority; or (b) where prior approval is not required, or where sub-paragraph 11(c) applied, in accordance with the details provided in the application for prior approval (W(12)).

(iii) Enforcement

38. Where development is carried out without the required planning permission, or where it fails to comply with any condition or limitation subject to which planning permission has been granted, that development constitutes a breach of planning control, as defined by section 171A TCPA 1990.

39. Under section 172 TCPA 1990, a local planning authority may issue an enforcement notice against a breach of planning control where they consider it expedient to do so. An enforcement notice must comply with the requirements of section 173 TCPA 1990.

40. Section 174 TCPA 1990 affords a right of appeal to the Secretary of State against the issue of an enforcement notice, on any of the following grounds:

"(2) An appeal may be brought on any of the following grounds—

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;

(b) that those matters have not occurred;

(c) that those matters (if they occurred) do not constitute a breach of planning control;

(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;

(e) that copies of the enforcement notice were not served as required by section 172;

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed."

41. Section 177 TCPA provides:

"**177.— Grant or modification of planning permission on appeals against enforcement notices.**

(1) On the determination of an appeal under section 174, the Secretary of State may—

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;

(b) discharge any condition or limitation subject to which planning permission was granted;

(c) determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to

> comply with any condition or limitation subject to which planning permission was granted was lawful and, if so, issue a certificate under section 191.

…

(2) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

(3) The planning permission that may be granted under subsection (1) is any planning permission that might be granted on an application under Part III.

(4) Where under subsection (1) the Secretary of State discharges a condition or limitation, he may substitute another condition or limitation for it, whether more or less onerous.

…

(5) Where—

> (a) an appeal against an enforcement notice is brought under section 174, and
>
> (b) the statement under section 174(4) specifies the ground mentioned in section 174(2)(a),

the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control.

…

(6) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(7) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(8) For the purposes of section 69 the Secretary of State's decision shall be treated as having been given by him in dealing with an application for planning permission made to the local planning authority."

Ground 2

42. The ground (a) appeal related to the residential use of Units 11-25 on the first floor and to the associated external works, namely, an external staircase to the western elevation; single-storey extension to the western elevation; and the installation of new windows, doors at first floor level and roof-lights.

43. The Claimant submitted that the Inspector erred in law in allowing the appeal on ground (a) in that she:

i) Failed to reach a judgment on whether or not the development for which she granted planning permission accorded with the development plan, read as a whole, as required by section 38(6) PCPA 2004;

ii) Misinterpreted Policy 3.5 of the London Plan 2016.

iii) Failed to have regard to, or otherwise to address, the outlook of the units in the development, for which she granted planning permission, as required by Policy DM2 of the Local Plan.

44. It is convenient to deal with the Claimant's grounds of challenge to the Inspector's decision in reverse order to the pleaded case.

(iii) Outlook

45. The Inspector found that the Council's objections to the external works were that they facilitated the material change of use of the first floor. There were no objections to the form or use of materials, or adverse amenity effects. On that basis, she identified the main issues at DL34 in the following terms which included outlook *(emphasis added)*:

> "• whether Units 11 to 25 would provide acceptable living conditions for the occupiers and future occupiers with particular reference to layout, **outlook**, room sizes and amenity space;
>
> • whether the mix of dwelling sizes is appropriate; and
>
> • whether there is justification for the loss of employment land."

46. Policy DM2 of the Local Plan is titled "Development and Amenity" and provides as follows (*emphasis added)*:

> "Development proposals should be appropriate to their location and should be designed to ensure that they will not result in significant adverse impacts on the amenity of occupiers and neighbours. The individual and cumulative impacts of development proposals on amenity will be considered in considering their acceptability. The consideration of the merits of development proposals will be balanced against the impact on amenity.

> Amenity considerations include the impacts of developments on:
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> i Visual privacy and overlooking;
>
> ii Overshadowing and **outlook**;
>
> iii Sunlight and daylight, and artificial light, levels;
>
> iv Vibration, noise, fumes and odour, and other forms of pollution;
>
> v Microclimate conditions;
>
> vi Safety of highway users.
>
> Residential development should be well designed and not lead to substandard layouts, unit sizes, room sizes and awkward room shapes and private amenity space."

47. Policy DM1 of the Local Plan, which requires "High Quality Design", provides at paragraph A(vii) that developments must "provide and ensure adequate sunlight, daylight and open aspects". Open aspects is another way of expressing outlook.

48. I accept the Claimant's submission that "outlook" should not be conflated with "daylight/sunlight". Outlook relates to the view that is available *from* a property. Daylight and sunlight are concerned with the light that enters *into* a property. On my reading of Policy DM2, "outlook", which is referred to in sub-paragraph ii, requires separate consideration from daylight and sunlight which are separately referred to in sub-paragraph iii.

49. On my reading of Policy DM2, outlook is a mandatory policy consideration. The developers submitted that outlook was not expressly referred in the proof of evidence of Mr Kirk, Senior Enforcement Officer at Hackney Council, and therefore they suggested it was not in issue. However, the Inspector identified outlook as a "main issue" in DL34, and it is fanciful to suggest that she did so in error. I note that the proof of evidence of Mr Staff, the developers' planning consultant, referred to the favourable daylight and outlook enjoyed by the flats on the south and west sides of the building, which have conventional windows, as well as rooflights, but acknowledged that this "may not be the case" for the flats on the north side of the building, which only have rooflights (paras 10.32, 10.34). None of the counsel before me were instructed to appear at the Inquiry, and so could not assist further on the consideration of outlook at the Inquiry. On the material before me, I consider it is reasonable to infer that outlook was properly in issue because the first floor units on the north side of the building had no conventional windows - they only had rooflights set in very high ceilings - and so the occupiers had no outlook at all.

50. The Inspector considered the living conditions for occupiers in some detail at DL36 to 45, but curiously she did not at any point expressly or impliedly refer to outlook.

51. At DL40 the Inspector said:

> "….All first-floor flats benefit from roof lights and the flats I visited were light and airy. The flats on the south and west side of the building benefit from windows to the living areas with rooflights to the bedrooms on the mezzanine floor. Flats to the north side … have roof lights to living areas and bedroom mezzanine area…."

On my reading, in this passage the Inspector was describing the fenestration and assessing the natural light entering into the flats through the windows. She was not assessing the outlook i.e. the view, if any, from within the flats, looking through the windows.

52. In my judgment, it is reasonable to infer that the Inspector overlooked the issue of outlook. As it had been identified as a "main issue", and it was a mandatory consideration under Policy DM2 of the Local Plan, I consider this was a significant error.

(ii) Policy 3.5 of the London Plan

53. Policy 3.5 of the London Plan 2016 provides:

> "**Policy 3.5 Quality and Design of Housing Developments**
>
> ….
>
> **Planning decisions and LDF preparation**
>
> ….
>
> C LDFs should incorporate requirements for accessibility and adaptability, minimum space standards including those set out in Table 3.3. and water efficiency. The Mayor will, and Boroughs should, seek to ensure that new developments reflect these standards. The design of all new dwellings should also take account of factors relating to 'arrival' at the building and the 'home as a place of retreat'. New homes should have adequately sized rooms and convenient and efficient room layouts which are functional and fit for purpose …..and should be conceived and developed thought an effective design process."

A footnote after the words "minimum space standards" reads "Technical housing standards – nationally described space standard. DCLG 2015".

54. Table 3.3 is headed "**Minimum space standards for new dwellings (FN: New dwellings in this context includes new build, conversion and change of use)**" The Table classifies dwellings by the number of bedrooms (from 1 to 6), the number of bed spaces (from 1 to 8), and the number of storeys. A 1 bedroom, 1 person, single storey dwelling has a minimum space standard of 39 sq. m. In a note, it states that where the dwelling has a shower room, rather than a bathroom, the floor area may be reduced to 37 sq. m. A 1 bedroom, 2 person, single storey dwelling has a minimum space standard of 50 sq. m..

55. The supporting text states at paragraph 3.36:

> "3.36 The Mayor regards the relative size of all new homes in London to be a key element of this strategic issue and therefore has adopted the Nationally Described Space Standard. Table 3.3 sets out minimum space standards for dwellings of different sizes. This is based on the minimum gross internal floor area (GIA) required for new homes relative to the number of occupants and taking into account commonly required furniture and the spaces needed for different activities and moving around. This means developers should state the number of bedspaces/ occupiers a home is designed to accommodate rather than, say, simply the number of bedrooms. These are minimum standards which developers are encouraged to exceed. When designing homes for more than eight persons/bedspaces, developers should allow approximately 10 sq m per extra beds pace/person. Single person dwellings of less than 37 square metres may be permitted if the development proposal is demonstrated to be of exemplary design and contributes to achievement of other objectives and policies of this Plan."

56. The London Plan 2021 is in similar terms to the 2016 version, save that in the note to Table 3.1 it states "Where a studio/one single bedroom one person dwelling has a shower room instead of a bathroom, the floor area may be reduced from 39 sq. m. to 37 sq. m…"

57. The Inspector referred to Table 3.3 of the London Plan 2016 at DL39 and accepted the developers' submission that "these standards are not applicable to units that do not have a bedroom but are studio units". She noted the specific reference to a "studio/one single bedroom, one person dwelling" in what was then the draft London Plan 2021 and said "[t]his is an emerging policy, to which I give limited weight". Then, at DL40, the Inspector found that the first floor units had a bedroom mezzanine area, and the ground floor units had no walls dividing the sleeping area from the rest of the unit. She concluded:

> "In the light of this I consider these units are not in breach of the minimum space standards of the London Plan, although I accept they are 2 sqm below the minimum for the emerging London Plan."

58. In my judgment, the natural and ordinary meaning of the wording in the policy is that it applies to all dwellings, whether they are studios, flats or houses. The phrase "new dwellings" which is used in Paragraph C and the heading to Table 3.3 and its footnote is not qualified in any way, so as to exclude studios. This is reinforced by the supporting text at paragraph 3.36 which refers to "all new homes" and explains that the sq. m. figure in Table 3.3 is assessed according to the number of occupants, not the number of bedrooms. The number of bedrooms is an initial classification, which is then refined by reference to the number of bed spaces. A bedroom which doubles as a living area is not excluded.

59. The only exceptions are expressly stated e.g. where there is a shower room rather than a bathroom, or where the proposal is of exemplary design and contributes to the achievement of other objectives and policies in the London Plan.

60. This interpretation accords with the approach in the DCLG Technical Housing Standards – nationally described space standard (March 2015), which relates internal space "to the number of bed spaces" and from which the London Plan is expressly drawn.

61. I do not consider that the 2021 London Plan (in draft before the Inspector) represents a change in policy. The Table is identical to the Table in the 2016 Plan. Its main relevance in the appeal was that the footnote confirmed beyond doubt that studios are included in the 1 bedroom category.

62. This interpretation gives effect to the declared purpose of the policy, namely, to ensure that all new homes have adequate space. The Inspector's interpretation would remove the smallest dwellings (studios) from the protection afforded by the London Plan to ensure minimum space standards.

63. In my judgment, the Inspector made a significant error in her interpretation and application of the London Plan 2016. The first floor units were correctly described in the prior approval application as "15 x 1 bed mezzanine residential units" (DL17). Under Table 3.3, they should have been classified as dwellings with 1 bedroom and 1 bedspace. The fact that the design was open plan, so that there was no wall separating the upper bed area from the lower living area did not take these units outside the scope of the London Plan. As they were fitted with a shower, not a bath, the minimum space standard was 37 sq. m..

64. The units did not meet the minimum size requirement as they were only 35 sq. m. in size. Mr Kirk emphasised in his evidence that these are <u>minimum</u> standards; they comprise not mere desiderata, but requirements, which local authorities are encouraged to exceed (para 3.36 of the supporting text to the London Plan).

The Inspector's conclusions on amenity and living conditions

65. The Inspector heard evidence from some tenants who considered the units to be of "high quality and suitable for their needs". The Inspector, having had the benefit of a site visit, agreed with this assessment (DL38). In the exercise of her planning judgment, she concluded at DL45 that the first floor units provided acceptable amenities and living conditions for existing and future residents.

66. Contrary to the developers' submission, I am not satisfied that an Inspector who properly took into account the lack of outlook on the north side of the building and the failure to meet minimum space requirements under the London Plan would necessarily have reached the same judgment on amenity and living conditions (see *Simplex GE Holdings Ltd v Secretary of State for the Environment Secretary* [2017] PTSR 1041, per Purchas LJ, at 1060E).

(i) The development plan

67. It was common ground between the parties that an appeal brought under section 174(2)(a) TCPA 1990, to which section 177 TCPA 1990 applies, is a deemed application for planning permission which is expressly subject to a duty to have regard to the development plan and other material considerations (subsection 177(2)) and is subject to the duty section 38(6) PCPA 2004.

68. Section 38(6) PCPA 2004 provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

69. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted….
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the

> development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment (1995) 71 P. & C.R. 175*, 186:
>
> > "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."
>
> Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.
>
> …..
>
> In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

70. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].

71. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath confirmed, at [8] and [21], that the development plan has "primacy" and there is a statutory "presumption" in its favour.

72. The duty under section 38(6) PCPA 2004 can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the development accords with the development plan as a whole (*Corbett v Cornwall Council* [2020] EWCA Civ 508 per Lindblom LJ at [26] – [30] and the cases there cited). This is "an essential part of the decision making process" (*Tiviot Way Investments Ltd* [2015] EWHC 2489 (Admin) per Patterson J. at [27]).

73. In this case, the Inspector found conflict with some policies, namely:

    i) Policy 22 of the Core Strategy, relating to density/ transport accessibility (DL56);

    ii) Policy DM14 of the Local Plan, relating to the loss of employment land (DL54).

74. The Inspector found accordance with other policies, namely:

    i) Policy 3.5 of the London Plan 2016 relating to space standards (DL39);

    ii) Policy DM1 of the Local Plan, relating to design quality (DL42-45);

    iii) Policy DM2 of the Local Plan, amenity (DL42-45);

    iv) Policy DM22 of the Local Plan, relating to a mix of dwelling sizes (DL46).

75. Thus the Inspector identified the relevant policies and applied them to the development. Inexplicably, the Inspector then failed to determine whether or not the development accorded with the development plan, read as a whole, and so she omitted an essential step, as required by the authorities referred to at paragraphs 69 and 72 of my judgment. I do not consider that this step can be implied, even on a benevolent reading of the decision letter.

76. However, in my view it is clear that the Inspector would have found that the proposal accorded with the development plan as a whole, if she had remembered to address that issue. Her findings on design (Policy DM1) and amenity (Policy DM2) were strongly in favour of the proposal. She found conflict with only two policies, and in each case she found no unacceptable harm. In the absence of any other error, I would have been minded to find that the decision ought not to be quashed because, applying the principle in *Simplex*, if the Inspector had considered whether the proposal accorded with the development plan as a whole, her decision would necessarily have been the same. However, there were two other significant errors in the decision, in relation to outlook in Policy DM2 and the space standards in the London Plan. Those matters could affect the overall planning balance and therefore, the *Simplex* principle does not apply. I have no doubt that this decision requires re-consideration in the light of my judgment.

77. Accordingly, I allow the application for statutory review under section 288 TCPA 1990 and quash the Inspector's decision. The appeal under ground (a) should be considered by a different Inspector, who will be able to approach it with a fresh mind.

The effect of allowing the appeal under section 289 TCPA 1990

78. Although this point has become academic in view of my decision to quash the Inspector's decision on ground 2, I deal with it now in case my judgment is appealed.

79. With the agreement of all the parties, by order of 5 March 2021, the appeal under section 289 TCPA 1990 (ground 1) was remitted to the Secretary of State for re-consideration.

80. The Secretary of State did not accept that the Inspector erred as alleged in ground 2. But even assuming that the Claimant's challenge under ground 2 was dismissed, he submitted that the proper course was for the Inspector's decision to be quashed in its entirety, and for the appeal to be remitted for reconsideration by another Inspector, for the following reasons:

    i) The Inspector's decision was a determination of a single appeal against a single enforcement notice in relation to a single building.

    ii) The decision was to allow the appeal as a whole under section 176(3)(b) TCPA 1990.

    iii) The nature of the error identified under ground 1 vitiated the decision as a whole because, when the Inspector considered the ground (a) appeal, she did so on the erroneous basis that the residential use was lawful on the ground floor of the building. For that reason the Inspector did not consider the implications of granting permission for residential use on the first floor in circumstances where the ground floor could only be used for its pre-existing warehouse use under Class B8 (with permitted development rights for business use under Class B1). If the Inspector had addressed ground (a) on the basis that the only lawful use of the ground floor was Class B8, her analysis and her conclusion could have been materially different.

81. The Claimant agreed with the Secretary of State and pointed to the developers' Closing Submissions which stated that "a split use of the building, residential above and B8 below, is manifestly impractical and not sought by LBH" (paragraph 52). The practical difficulties were explained in more detail in the developers' Supplemental Appeal Statement which stated:

> "**2.5** The following is set out without prejudice to the Appeal Statement, (the ability of the warehouse to continue to operate as residential either pursuant to Ground A, if Ground C is dismissed, or pursuant to Ground C).
>
> **2.6** Should the Inspector find that the use of only the first floor /mezzanine or the ground floor is acceptable as being lawfully residential (under Ground C), permission should be granted for the remnant of the buildings as the same. It is argued that with the internal works undertaken to the building, particularly the partitioning in place, insulation etc. the 'mixed use' of the building (i.e. C3 and B8) would not be practical. Please note the photographs below which are included in the Appeal Statement.

…

> **2.6** For B8 use, much of the floor area requires significant height to enable the stacking and storage of materials and goods. Clearly, with a reduced internal height, the use of the ground floor for example would be significantly constrained. Additionally, the activity within such an area would not be readily compatible with residential use above insofar as noise and disturbance. Additionally, there would also be possible conflict between the residential use and pedestrian movements and those associated with a B8 use.
>
> **2.7** Similarly, such B8 activity above residential use would be equally harmful, if not more so in terms of compatibility, noise and disturbance and the logistics of moving goods from upper floors to the commercial yard below.
>
> **2.8** For these reasons, and without prejudice to the arguments set out under Grounds A and C in the Appeal Statement, a 'split decision' on the lawful use of either the lower or upper floors of the building would not allow the two uses to function at a practical level in a compatible manner for those reasons set out above."

82. The developers submitted that the submissions in its supplemental appeal statement were not relied upon by the Inspector. She considered the appeal under ground (c) and ground (a) separately, according to the relevant statutory provisions applicable to each grounds of appeal. She correctly identified that each floor had been the subject of a separate prior approval notice. Furthermore, the application under section 288 TCPA 1990 and the appeal under section 289 TCPA 1990 were separate claims.

83. I have considered the developers' submissions with care, but I am satisfied that the Secretary of State and the Claimant are correct in their submission that the outcome of the section 289 TCPA 1990 appeal vitiates the entire decision, for the reasons set out above.