Neutral Citation Number: [2020] EWHC 2381 (Admin)

CO/4324/2019

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

Royal Courts of Justice
Strand,
London WC2A 2LL
4 September 2020

B e f o r e:

DAVID ELVIN QC

(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN

on the application of

(1) THURLOE LODGE LIMITED
(2) THURLOE LODGE GARAGE LIMITED

Claimants

v

ROYAL BOROUGH OF KENSINGTON AND CHELSEA

Defendant

-and-

AMBERWOOD DRIVE LIMITED

Interested Party

Giles Cannock QC (instructed by Kennedys) appeared on behalf of the Claimant

Jack Parker (instructed by Bi-Borough Legal Services for RBKC) appeared on behalf of the Defendant

Richard Moules (instructed by Dentons UK & Middle East LLP (London)) appeared on behalf of the Interested Party

- -

Hearing date: 8-9 July 2020

- -

Covid-19 Protocol: This judgment was handed down by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 11:00 am on 04/09/2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk

J U D G M E N T

DAVID ELVIN QC (Sitting as a Deputy Judge of the High Court)

Introduction

1. The Claimants ("**the Cs**") bring this judicial review against two decisions made on 18 September 2019 by the Defendant planning authority, the Royal Borough of Kensington and Chelsea ("**RBKC**"). These both related to a private driveway entered from the southern side of Thurloe Place, South Kensington, London ("**the Road**") and granted -

   (1) planning permission ("**the Permission**") for -

   > "Excavation and construction of a below ground parking facility for 2 cars, installation of car turntable, landscaping works, replacement entrance gates and associated works"; and

   (2) listed building consent ("**LBC**") to allow the implementation of the Permission and described the proposals in similar terms.

2. Both the Permission and LBC were granted subject to conditions, some of which I will refer to when dealing with the grounds of challenge.

3. The Cs are, in the case of Thurloe Lodge Limited, the owner of the freehold interest to Thurloe Lodge (17 Thurloe Place) and the long leasehold interest in no.16A Thurloe Place and Thurloe Lodge Garage Limited is the owner of the freehold interest in the Garage, to the rear of 16 Thurloe Place. The application site is a private road, forming a cul-de-sac, with its entrance on the south side of Thurloe Place, South Kensington, across Thurloe Place from the main entrance to the Victoria and Albert Museum.

4. The Interested Party, Amberwood Drive Limited ("**the IP**"), is the freehold owner of the Road and was the applicant for the Permission and LBC. Amberwood House (17a Thurloe Lodge) is in the separate legal ownership of Prime London Holdings 11 Ltd which appears to be a company with the same shareholders and control as the IP.

5. The Road provides communal access to Thurloe Lodge, the Garage, 16A Thurloe Place and Amberwood House. It provides the sole vehicular and pedestrian access to the Cs' Thurloe Lodge and the Garage. Although I am told that there is a private law dispute between the IP and the Cs regarding the extent of the Cs' rights over the Road, although no details have been provided, this is not a matter I need be concerned with since these proceedings concern RBKC'S public law decisions. In reaching those decisions to grant planning permission and LBC, RBKC proceeded in any event on the basis that the Road was available to the Cs.

6. The Road forms part of the Thurloe and Smith's Charity Conservation Area and, as the Report by the Director of Planning and Place to the RBKC Planning Applications Committee for 17 September 2019 ("**the OR**") noted, "is surrounded by both designated and non-designated heritage assets" including adjoining listed buildings and, directly opposite Thurloe Place, the Grade 1 listed Victoria and Albert Museum.

7. The IP applied to RBKC for planning permission on 25 June 2019, having withdrawn a previous application for a scheme which was amended in the light of comments from RBKC and which in its revised form was the application which was successful. The application form was accompanied by a number of documents including plans, a Design and Access Statement ("**DAS**"), a Heritage Impact Assessment, a Noise Assessment and a Transport Assessment.

8. The development proposed the creation of two underground car-parking spaces accessed through a form of lift installed in the Road which, when called upon, would rise up as shown on the drawings submitted. When in operation, the stacker would be c. 2.5m high and would be lit. A turntable was also proposed, which was to sit in the middle of the Road before the stacker was reached. The location of the turntable and the stacker was towards the far end of the Road, in front of Thurloe Lodge's main entrance and close to the entrance to the Garage. In the report to committee referred to below, the development was described in these terms –

> "4.1 The application seeks planning permission and listed building consent (the latter under application LB/19/04529) for the excavation and construction of a single storey basement level below the private driveway in order to provide a below ground parking facility for two cars. The plans show that the parking would be accessed through the installation of car lift/stacker and ground level turntable, with associated landscaping works. This includes proposed repaving of the driveway and lighting.
>
> 4.2 The submitted plans and documents set out that that top surface of the car lift will be integrated into the driveway surface and concealed. When activated, it is set out that the lift platform will rise to maximum height of 2.5m to allow access for the vehicle using the lift. The lift will then lower to the required level and automatically the vehicle will then be moved to the required position whilst the top of the lift platform remains closed at driveway level. As such, there would be minimal visible manifestations of the stacker when in a closed position. The stacker construction/mechanism would be fully automated, with an operation time from raising to the open position/car loading/descent/closure of 3 minutes.
>
> 4.3 In addition, planning permission and listed building consent is also sought for replacement entrance gates to Thurloe Place and associated works. The plans show

that the gates would be automated."

9. The Cs objected to the grant of planning permission and submitted a number of written documents which included their own representations, plans to describe the problems considered to exist, and reports on planning, heritage issues, noise and transportation. The main representations by Urban Infill (30 July 2019) set out in detail the Cs' objections, annexed those specialist reports, and summarised the issues in Section 10 (I have omitted some which have no direct relevance to the current proceedings):

> "**10. Summary**
>
> 10.1. The following is a summary of the issues highlighted with the application documents;
>
> ...
>
> 10.1.4. The proposals do not adequately describe the location of buried services and incoming utilities, including public sewer on the site.
>
> ...
>
> 10.1.6. The Heritage Assessment fails to assess the impact on several designated heritage assets, establish criteria to assess the impact of the car-lift, or assess the impact on Thurloe Lodge.
>
> 10.1.7. The technical information for the car lift submitted does not allow sufficient analysis of the impact of this equipment.
>
> 10.1.8. The Noise Impact Assessment is inadequate and gives a misleading impression of the impact on neighbouring residents.
>
> 10.2. The following is a summary of the issues highlighted with the principle of the proposals…
>
> …
>
> 10.2.2. The applicant has no legal right to undertake the proposals to the communal access road. In undertaking the works, the applicant would extinguish the access rights of Thurloe Lodge and on completion would restrict their rights.
>
> 10.2.3. The application should be assessed as more than one storey based on the depth of excavations when accounting for SuDS drainage, lowest part of basement and drainage sumps, meaning that the depth of the basement exceeds the value stated by the applicant.
>
> …
>
> 10.2.5. The proposals will create a modern, above ground intervention which will be unsightly and not in keeping with the surrounding buildings including multiple heritage assets. This is a wholly inappropriate design for the context and will damaged designated heritage assets.

> 10.2.6. The proposals will be in close proximity to Amberwood House, being directly outside of the front entrance, and have a significant negative effect on the amenity of that property and it's heritage value.
>
> 10.2.7. The proposed design, by it's nature and siting, increases the risk of collision with vehicles using Thurloe Lodge and risk to members of the public. This is contrary to obligations of designers under CDM 2015 to design out risk. Measures to mitigate any risk would need to include more 'commercial' solutions, such as alarms, that inappropriate for the domestic context and will increase nuisance and reduce amenity.
>
> 10.2.8. The proposals will adversely affect the free and safe use of the communal access road by pedestrians visiting the site. Furthermore, the application does not make allowance for how pedestrians with impaired mobility, hearing or vision will be able to safely use the communal road.
>
> 10.2.9. The proposed turntable cuts into the pedestrian route across the communal road and will therefore interfere with its free use by members of the public on foot.
>
> 10.2.10. The proposals do not take account of the character of the local streetscape and are detrimental to the historic context of Thurloe Mews.
>
> 10.2.11. The turntable and car-lift will require additional equipment for operation not indicated on the application documents and the duration of use of the equipment will exceed the amounts the applicant states.
>
> 10.2.12. The proposals will create an increase in parking, contrary to local and mayoral policies. In practical terms during use, this could be a significant increase in numbers and could increase the amount of reversing onto the main road.
>
> 10.2.13. The location of the car lift will inhibit the ability of occupants to Thurloe Lodge and emergency vehicles to freely access that property. The proposals do not indicate that emergency services have been consulted over the proposals.
>
> 10.2.14. The car-lift and turntable will lead to a significant increase in noise levels to neighbouring properties, especially Thurloe Lodge. This is without accounting for the simultaneous use of equipment or alarms necessary for safe operation.
>
> 10.2.15. The impact of the construction of the car lift will be significant and last over a period of two years, during which time Thurloe Lodge will have no, or severely restricted, vehicular access to their property despite their legal entitlement…"

10. In addition, there were also emails and letters (e.g. 27 August 2019) written by Kennedys, the Cs' solicitors, and Urban Infill submitted a note to the Council following the publication of the OR and which repeated or added a number of points together with providing illustrative material. I will refer to those additional representations when dealing

with the specific grounds. However, it is apparent even from a brief reading of the objection summary above that many of these issues also comprise the subject matter of the grounds of challenge, especially grounds 3 to 6, and this highlights the need for the court to be wary that the grounds are not merely a means of rerunning the planning objections by other means. The fact that the bases of the objections are so clearly set out and summarised, often several times, makes it inherently improbable (though not impossible) that the planning authority failed to take them into account in reaching its decisions.

11. The OR recommended that the Application should be approved by the Committee at the meeting on 17 September 2019. At the Committee meeting, an Addendum Report was produced ("**the Addendum Report**") which addressed the issue of a proposed control panel, a matter I will deal with in considering Ground 1. At the Committee, the Cs were given 3 minutes to present their oral objection and had produced a speaking note in addition to the Urban Infill Note produced in response to the OR (both of which I shall refer to in due course) and the lengthy written objections already submitted. On 17 September 2019, RBKC resolved to grant the Permission and the LBC and the decision notices were issued the following day.

12. It appears that immediately prior to the hearing, RBKC had discharged some of the conditions including that relating to the control panel under Condition 12 and that the Cs were given the opportunity to make representations beforehand (which is not required under the Development Management Procedure Order). However, for reasons I set out below, I have not taken that into account in reaching my conclusions, nor was I provided with any formal evidence of the decision or requested to admit such.

13. The claim was issued on 4 November 2019. Permission was refused on the papers by Swift J. on 19 December 2019 but granted on renewal by Lang J. on 11 March 2020. Although it was cited, I do not with respect refer to the short permission judgment given by Lang J. given that that it was dealing with issues in the context of the threshold for granting permission and not the final decision I have had to reach following one and a half days of argument and consideration of lengthy bundles of documents and authorities.

Preliminary remarks: bundles

14. I heard the application remotely via video conferencing software with electronic bundles of documents and authorities. Given the problems that were experienced with the e-bundle prior to the hearing, which were resolved at my request before it commenced, it is relevant to note the importance to the court in undertaking its preparation of the case to have a pdf bundle that is readily navigable by the software. The electronic bundles should be

paginated sequentially so that the page numbers shown on the digital bundle correspond with the page count shown by the software and that the bookmarks/tabs used for individual documents actually work so that the documents can be found with ease. Care also needs to be taken with the length of the bundle which in this case, even allowing for the extended arguments over the scope of evidence admissible for the purposes of the exercise of the Court's discretion, was too lengthy (at over 1000 pages) and included many documents that were neither referred to nor relied upon for the purposes of this challenge.

15. The Administrative Court has issued, and revised, guidance during the Covid-19 pandemic which includes guidance on electronic bundles. See **Protocol Regarding Remote Hearings** (26 March 2020, updated 31 March 2020) at paras. 24-26 ("bundles should contain only documents and authorities that are essential to the remote hearing") and **Administrative Court office guide – COVID-19 measures (updated 8 June 2020)**. Although it is specifically guidance in respect of bundles required for applications for urgent/immediate consideration, there are requirements as to what is needed to enable ease of use by the Court which appear to me to be of general application:

> "**B. Electronic Bundles**
>
> In all cases where the application is filed by a legal representative the electronic bundle must be prepared as follows and be suitable for use with all of Adobe Acrobat Reader and PDF Expert and PDF Xchange Editor. The document:
> …
>
> (b) must be numbered in ascending order regardless of whether multiple documents have been combined together (the original page numbers of the document will be ignored and just the bundle page number will be referred to)
>
> (c) Index pages and authorities must be numbered as part of the single PDF document (they are not to be skipped; they are part of the single PDF and must be numbered).
>
> (d) The default display view size of all pages must always be 100%.
>
> (e) Texts on all pages must be selectable to facilitate comments and highlights to be imposed on the texts
>
> (f) The bookmarks must be labelled indicating what document they are referring to (it is best to have the same name or title as the actual document) and also display the relevant page numbers.
>
> (g) The resolution on the electronic bundle must be reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another.
>
> (h) The index page must be hyperlinked to the pages or documents it refers to."

16. The bundle in this case did not comply with (b), (c) and (h).

17. It is also useful to repeat informal advice given by Holgate J., the Planning Liaison Judge, on 8 April 2020 early during the lockdown due to the Covid-19 pandemic (together with reminders to consider the formal court guidance) printed in the Planning Encyclopedia's April 2020 Bulletin:

> "1. To help remote hearings go smoothly and not take up more time than normal, the judges need to be able to make best use of pre-reading time (typically on the Monday of the week in which the hearing takes place). For that we would welcome succinct skeletons cross-referenced to key passages in the bundle and accompanied by an agreed, focused list of essential reading (e.g. pages and paras).
>
> 2. Bundles need to be limited to material which really is essential for the legal argument on both sides. By way of example, we do not normally need to be given the whole of the NPPF, or a development plan, or (where relevant) proofs of evidence or closing submissions at an inquiry. The inclusion of peripheral material make navigability more difficult. The requirement in the Protocol for a core bundle is crucial. In many cases a really well-chosen, agreed core bundle (or what [Lord] Carnwath once called a micro bundle) may be all that is really needed.
>
> 3. Bundles of authorities should be confined to essential material and need not duplicate decisions in the ICLR casebook.
>
> 4. It is essential that a bundle has a good index, a single set of numerical, continuous pagination and hyperlinks. Sophisticated pagination does not work.
>
> 5. If parties follow the protocols this will also help judges when they come to prepare reserved judgments.
>
> 6. The need for the court to make best use of its resources in the interests of all users is now all the more critical. Parties and their advisers are expected to keep under the review the merits of their cases and grounds of challenge. Points which do not have worthwhile merit really should be abandoned as far in advance of the hearing as possible and the time estimate reduced if appropriate. If a Defendant considers that there should be a submission to judgment then the other parties and the court should be notified at the earliest opportunity. Co-Defendants and Interested Parties should then quickly indicate whether they consider that the decision should nonetheless be defended. A claimant who wishes to withdraw a claim should likewise do so well in advance of the hearing. If this good practice (which is already set out in the Administrative Court Guide) is followed, then it is more likely that the court will be able to redeploy judicial resources to other cases and avoid waiting times increasing unduly. If there is a dispute on costs which the parties cannot resolve, then generally that may be decided by the court on brief paper submissions applying well-established principles."

18. Whilst I am grateful to the Cs' solicitors for resolving the difficulties with the bundle, this involved a complete repagination of the bundle and the insertion of working bookmark

links, which necessitated the submissions of revised skeletons with the new pagination. Nonetheless, this hindered a large part of the time allocated for my pre-reading for the case and I should not have had to direct these amendments in the first place. I have therefore thought it appropriate to deal with such administrative requirements here in the hope that others will avoid similar errors.

19. The authorities bundle also included, unnecessarily, a number of authorities that are readily available in the ICLR's *Leading Planning Cases* which undermines the purpose of that volume, as set out by Holgate J. above and in the Foreword:

> "This book gathers together the key cases which are referred to frequently in the Planning Court. Arrangements have been made so that judges hearing cases in the Planning Court will normally have access to the book, so that these cases will not need to be copied into bundles of authorities. Use of this book will also ensure that the court has cited to it the preferred reports of these cases, in accordance with *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780."

Grounds of challenge

20. Excluding the first pleaded ground of challenge, which is no longer pursued, the grounds pursued before me on behalf of the Cs by Mr Giles Cannock QC can be summarised as follows:

(1) The LPA failed to take into account a material consideration, namely the impact of the control panel for the car stacker and/or turntable and thereby failed to consider the actual impact of the proposal on inter alia relevant Listed Buildings, the Conservation Area, the residential amenity of Thurloe Lodge and the impact on rights of way (and therefore the statutory tests in ss. 16, 66 and 72 Planning (Listed Buildings and Conservation Areas) Act 1990);

(2) In identifying that a decisive issue was compliance with Local Plan Policy CL7 (Basements), and that the proposals complied with that policy, RBKC misinterpreted and misapplied Policy CL 7, which does not apply to a freestanding car park on a communal roadway which stands (when open) as a significant above-ground structure. In approaching the issue in this way, the OR seriously misled the Committee;

(3) With regard to noise impact, the OR significantly misled the Committee in concluding, without reference to the Cs' own noise assessment, that the noise impact is acceptable, that in doing so the OR failed to address the matters raised by that noise assessment (which were a material consideration) and failed to provide adequate reasons why the noise impact was considered acceptable, despite the

contrary assessment undertaken for the Cs;

(4) There were a number of material considerations (e.g. visual impact of the lift when rising and when open, disruption to the access to Thurloe Lodge and the works being carried out there, safety and buried services and utilities), with regard to the impact of the proposals on the residential amenity of Thurloe Lodge which the OR failed to take into account and in respect of which, in any event, it did not provide adequate reasons;

(5) The assessment of impact on heritage assets is defective for a number of reasons –

(a) There is no identification and assessment of the significance of heritage assets that may be affected contrary to the advice in para. 190 of the NPPF (2019);

(b) It failed to take account of the impact (alone and cumulatively with other impacts) of the lift when raised above ground. The limited visual impact of the car lift when underground was not a reason to conclude that the car lift would preserve the settings or any features of special architectural or historic interest of listed buildings or conservation areas when it is raised above ground;

(c) It failed to identify whether Thurloe Lodge was considered to be a non-designated heritage asset ("**NDHA**") within para. 197 of the NPPF or consider the impact of the proposals on the setting or significance of Thurloe Lodge as a NDHA;

(6) With respect to the application of car-parking policy, the OR accepted that the proposal would result in the addition of 2 new underground spaces erred in fact that it would lead to an increase in car parking spaces and so misled the Committee. In any event, the OR failed to explain adequately how the proposal would result in 2 fewer parking spaces.

21. It is right to note that the grounds are set out in considerable detail both in the Claim and the Cs' skeleton arguments and I have summarised by reference to what appeared to me to be the key issues from the written and oral submissions.

22. It is also relevant to record that Mr Cannock accepted that under none of the grounds was he making a submission that any planning judgment reached by RBKC was perverse or irrational.

23. The Cs also take issue with the evidence filed on behalf of both RBKC and IP which seeks to go through a number of matters for the purposes of supporting submissions with respect to the application of s. 31(2A)-(2C) of the Senior Courts Act 1981 which are said to be ex

post facto evidence that goes beyond the boundaries of what is admissible in the light of the Court of Appeal's judgment in ***R (Plan B Earth Ltd.) v Secretary of State for Transport*** [2020] EWCA Civ 214 at [267]-[273].

24. Mr Jack Parker (for RBKC) and Mr Richard Moules (for the IP) both made submissions that I should reject the challenge, on the merits and in any event applying s. 31(2A) to (2C) of the Senior Court Act 1981 and submitting that it would have been "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

25. However, in seeking to deploy arguments in reliance on s. 31(2A)-(2C) the IP has submitted additional evidence including noise and heritage evidence, which seek to raise issues of technical and expert judgment which go too far in assuming the court's willingness and ability to adjudicate on what are matters of planning and related expert judgments, and are for the decision of the planning authority and not the court. I note that they are made in response to the claim and were not deployed by the IP before the Committee to counter the representations by the Cs. It seems to me clear that, having regard to the Court of Appeal's guidance in ***Plan B***, they are not admissible to enable the Court to apply those powers since they require the Court to embark upon an exercise of judgment which is quintessentially one for the planning decision-maker. The proper time for the IP to have advanced this material was to rebut the Cs' representations before the planning authority reached its decision. No explanation has been advanced by the IP for not doing so.

26. It is one thing to produce evidence to assist in demonstrating to the court that the ground of challenge would be highly unlikely to lead to a different decision e.g. on the basis of objective information, or material that does not require the Court to reach a view on matters of expert judgment, but it is quite another thing to expect the court to assume the mantle of the planning-decision maker and adjudicate on disputed matters of expert evidence (especially on material not put before the planning authority). If that were to be permissible, it would be necessary for all parties to file evidence on such matters, as happened here, and for the Court to assume the role of planning decision-maker for which it has consistently said it is not suited. As the Court of Appeal explained in ***Plan B*** at [273]:

> "Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example

> in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales L.J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] 1 All E.R. 142, at paragraph 89)."

27. Whilst there may be aspects of the case which I can consider under the provisions of s. 31(2A)(-(2C) I will only do so if I can fairly determine the issues without entering that "forbidden territory" and bearing in mind that the threshold remains a high one.

28. I am grateful to all counsel for their helpful submissions.

The Court's approach to challenges to planning authority decisions

29. This ground has been thoroughly traversed by the Courts in recent years. With respect to the approach to considering challenges to local authority planning decisions I refer in particular to Lady Hale in ***R (Morge) v Hampshire County Council*** [2011] PTSR 337 at [36]; Lindblom LJ in ***Mansell v Tonbridge and Malling BC*** [2019] PTSR 1452 at [41]-[42] and [63]; and Hickinbottom J in ***R (Midcounties Co-op Ltd) v Forest of Dean DC*** [2015] JPL 288 at [5]. The principles were summarised by Lindblom LJ in ***Mansell*** at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R v Selby District Council, Ex p Oxton Farms* [2017] PTSR 1103: see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (Siraj) v Kirklees Metropolitan Borough Council* [2011] JPL 571, para 19, and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire* Council [2012] EWHC 3708 (Admin) at [15].
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 33, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. Unless there is evidence to suggest

> otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 41, para 7. The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R (Loader) v Rother District Council* [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43. There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439. But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

30. So far as concerns the specific issue of requirements for officers' advice to members on planning issues in addition to the authorities referred to above, and their reasons, I also refer to Sullivan J in ***R v Mendip District Council ex parte Fabre*** [2017] PTSR 1112, 1120, Andrews J. in ***Pagham Parish Council v Arun District Council*** [2019] EWHC 1721 (Admin). On reasons, see Lord Carnwath in ***R (CPRE Kent) v Dover DC*** [2018] 1 WLR 108 at [31]-[42]; Lord Brown in ***South Bucks District Council v Porter (No. 2)*** [2004] 1 WLR 1953 at [36] and Sir Thomas Bingham MR in ***Clarke Homes v Secretary of State*** [2017] PTSR 1081 at 1089.

31. In the light of a number of the submissions made, it is again necessary to underline the inappropriateness of taking a legalistic approach to officer's reports in these planning cases and acknowledging the legitimate scope of planning decision-making. As Lindblom LJ explained (not for the first time) in ***Mansell*** at [41]:

> "The Planning Court—and this court too—must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to

> an adjudication made by a court: see para 50 of my judgment in the *East Staffordshire* case. The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but—at local level—to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and—on appeal—to the Secretary of State and his inspectors. They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy". But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker's own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain—because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right: see para 22 of my judgment in the *East Staffordshire* case [2018] PTSR 88 . That of course may not always be so. One thing, however, is certain, and ought to be stressed. Planning officers and inspectors are entitled to expect that both national and local planning policy is as simply and clearly stated as it can be, and also—however well or badly a policy is expressed—that the court's interpretation of it will be straightforward, without undue or elaborate exposition. Equally, they are entitled to expect—in every case—good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt."

32. I will refer to authorities in more detail as necessary.

Discussion

Ground 1: the control panel

33. The Cs submit that RBKC failed to take into account a material consideration, namely the impact of the control panel for the car stacker and/or turntable and thereby failed to consider the actual impact of the proposal on a number of important interests including nearby listed buildings, the conservation area, the residential amenity of Thurloe Lodge and the impact on rights of way (and therefore the statutory tests in ss. 16, 66 and 72 Planning (Listed Buildings and Conservation Areas) Act 1990).

34. This issue arises, Mr Cannock submitted, because the original application and plans did not make clear that an above ground control panel would need to be installed, to one side of the site of the car stacker. He drew attention to the application plans which, he said, did not show or specify a control panel. In respect of a small rectangle shown on one plan, Mr Cannock suggested this was wholly inadequate and might be thought to represent a drain

cover or similar.

35. The DAS described the proposals for the operation of the stacker in Section 5.4 as follows:

> "**5.4 Stacker Operation**
>
> The stacker construction/mechanism will be fully automated to minimise time in operation and to maximise safety. Operation time from raising to the open position/car loading/descent/closure is 3 minutes.
>
> The automatic parking mechanism will be controlled from Amberwood House as well as from the driveway. When the lift is in the raised position, and when in operation, automatic safety barriers will be in place to the lift opening. The below ground maintenance platform will be fully protected from the car bay positions.
>
> The turntable located within the driveway will be recessed into the driveway surface and be fully integrated. The operation of the turntable is separate to the car lift and can be operated from both Thurloe Lodge and Amberwood House.
>
> The automatic entry gate positioned off Thurloe Place allowing for no. 2 parked cars with the driveway clear of the car lift for manoeuvring of vehicles associated with the operation of the car lift."

36. RBKC officers originally considered that the control panel was not included and wrote in the OR as item 7 in Section 8:

> "It is understood that the car stacker will be operated from Amberwood House and the driveway. Should external control panels be required for operation, these may require planning permission at a later date. The proposals. When in a closed position, for the majority of the time, there would be minimal visible manifestations of the stacker and the proposals would preserve the character and appearance of the conservation area."

37. However, it is clear that they were corrected by the IP's consultants, DP9, and this was noted in the Addendum Report:

> "Since the publication of the report, the Agent has also contacted Officer's to advise an above ground control panel would be necessary for the turntable. This was noted the objections. This is shown as a small rectangle on drawing number CL01 Rev.B.
>
> As such, **revise** condition 12 to include:
>
> **(b) details of the proposed control panel on the private driveway shown on CL01 RevB**."

38. I see no reason to criticise this. It was stated in the DAS (above) that the mechanism for

both the stacker and the turntable would be controlled both from inside Amberwood House and from the Road and the clarification reported in the Addendum Report was consistent with that explanation (although it only referred to the control panel for the turntable).

39. In these circumstances, I can see no sound reason why the rectangle shown on plan CL01 Rev.B could not, once attention had been drawn to it, be regarded as indicative of the location for the control panel or why its details could not reasonably be subject to condition 12(b) for the submission of details. Once the presence and the location of the control panel was identified on the plan, as it was, it was a matter for members to take into account in assessing impact which I have no reason to doubt that they did.

40. I have not taken into account material submitted in these proceedings which was not before members at the time of their decision.

41. Ground 1 fails.

Ground 2: Local Plan Policy CL7

42. Policy CL7 is a policy introduced by RBKC to manage the impacts caused by a proliferation of basements, particularly as extensions to dwellings, and sets out a series of criteria to be applied for basement developments to be considered acceptable.

43. The OR clearly considered the application of CL7 to be one of the key issues in determining the application. See OR para. 6.3(i) which characterises it as one of the four "decisive issues" for the application and the subsequent assessment at paras. 6.3-6.5:

> "**Basement**
>
> 6.3 The proposed basement would be a single storey in compliance with policy CL7. For the purposes of the assessment of the planning application, the open space of the site is the driveway on which the proposed car stacker would be located. The proposed basement would extend up approximately 44.5% of the open area of the site, in accordance with part (a) of policy CL7. The submitted plans show that only 0.48m of topsoil would be provided above the proposed basement. However, in this context where the car stacker would be located above a private, tarmaced driveway, and given that the replacement landscaping for the driveway would be constructed to incorporate permeable paving and slot drainage channels, this would represent an improvement over the existing situation and the proposals are acceptable. Recommended condition 2 would ensure that the landscaping works are carried out in accordance with the details shown on the landscaping plan. Recommended condition 11 would secure the provision of a suitable pumped device within the basement in order to protect against sewer flooding.

> 6.4 The application has been submitted alongside an acceptable construction method statement. This document demonstrates that structural stability in the surrounding area would be safeguarded. Condition 4 is recommended to ensure that the works are supervised by a suitably qualified engineer. The application also satisfactorily details how noise, dust and vibration will be adequately controlled throughout the duration of the works.
>
> 6.5 A draft Construction Traffic Management Plan (CTMP) has been submitted with the application. The principle of the draft CTMP is acceptable; however, some amendments are required to the final CTMP. The document refers to deliveries and vehicle movements being carried out in accordance with the CTMP approved for planning permission ref. PP/13/01526. As this is a separate application, the final CTMP should explicitly state how construction traffic and deliveries will be managed for this proposal. Furthermore, further details of consultation and co-ordination with surrounding developments, including the adjoining Thurloe Lodge are required, as is greater clarity, avoiding words such as 'on occasion' to ensure that the document is enforceable. Subject to these amendments, the development can be constructed without causing an unacceptable impact on the highway. Condition 3 is recommended to secure an acceptable final CTMP prior to commencement of the development."

44. The Cs had objected to the proposals, at least initially, on 22 July 2019 on the basis of the sensitivity of the location and in particular "by the installation of a car lift, the regular operation of which would be an alien feature in the historic environment". It was not suggested at that stage that CL7 was not applicable and while that is not decisive of the proper meaning or application of the policy it is notable that the issue gained greater significance in these proceedings than it had done before members.

45. The OR also dealt with a specific objection in para. 32 at point 18 that the proposals would be in excess of a single storey and should provide for 1m of topsoil above top which the officer's response was:

> "At a maximum depth of 3.85m, the basement would constitute a single storey only. It is noted that 1m of topsoil is not provided; however, the driveway would be constructed to incorporate permeable paving and slot drainage channels and would represent a significant improvement over the existing situation."

46. Mr Cannock's submissions before me were in essence:

    (1) RBKC was wrong to consider that the basements policy CL7, on its true construction, applied to this type of development which was at least partly above ground;

    (2) It was not possible for the Court to say, in accordance with s. 31(2A)-(2C) that it

> was highly likely that the decision would have been the same even had RBKC agreed that CL7 was not applicable since the matrix of policies and considerations applicable would require the exercise of planning judgment afresh.

47. The approach to CL7 cannot be undertaken on a basis which ignores the purpose of the policy which is made very clear by the language of the policy itself and the supporting text. The issue is not that basements are per se objectionable but that, particularly in a densely developed area such as the Royal Borough, they give rise to a number of significant concerns with regard to amenity, access and structural issues. These were pointed out by Lang J., dealing with a challenge to the adoption of the first development plan version of the basements policy in 2015, in the context of a 2009 SPD (where the reference was to "subterranean extensions), in ***Zipporah Lisle-Mainwaring v Royal Borough of Kensington and Chelsea*** [2015] EWHC 2105 (Admin) at [93] and [109]:

> "93. … In my judgment it is unarguable that the Defendant's sole, or even primary, policy objective was to ensure the standard and quality of basement design and construction. From the outset, it is apparent that the impact of widespread basement construction on residents was a major concern which the Defendant was seeking to address by, among other things, limiting basement development, and imposing additional requirements on developers. I will refer to it as "the disputed objective", as I have concluded that it was a genuine objective, not as the Claimants submit, a "false" one."

> "109. … it was clear from the draft reasoned justification and policy text in its first publication in December 2012 that it was a primary policy objective to mitigate the harmful impacts of basement construction on residents by limiting it, as well as imposing additional requirements on developers. The SEA/SA referred to a list of objectives and made express reference to limiting basement construction. It was also a policy objective to ensure that basement construction and design was of a high standard and quality. This reflected requirements in the NPPF, the London Plan and the Local Plan, as well as the statutory duty under section 39(2A) PCPA 2004. However, I do not consider that this was the Defendant's sole or indeed primary policy objective. I base this conclusion on my examination of the material in evidence before me."

48. In respect of the latter point, Lang J. then found at [119] that the policy had complied with the requirement to contribute to sustainable development.

49. The primary purpose of CL7 unsurprisingly reflects the purpose of the 2015 version of the policy as described by Lang J. The supporting text to CL7 begins:

> "22.3.46 This policy applies to all new basement development. For the purposes of this policy, basement development is the construction or extension of one or more

> storeys of accommodation below the prevailing ground level of a site or property.
>
> 22.3.47 Basements are a useful way to add extra accommodation to homes and commercial buildings. While roof extensions and rear extensions add visibly to the amount of built development, basements can be built with much less long term visual impact – provided appropriate requirements are followed. This policy sets out these requirements.
>
> 22.3.48 Basement development in recent years has been the subject of concern from residents. Basements have given rise to issues about noise and disturbance during construction, the management of traffic, plant and equipment, and concerns about the structural stability of nearby buildings. These concerns have been heightened by the growth in the number of planning applications for basements in the Royal Borough with 46 planning applications in 2001, increasing to 182 in 2010, 294 in 2012 and 450 in 2013. The vast majority of these are extensions under existing dwellings and gardens within established residential areas.
>
> 22.3.49 In the Royal Borough, the construction of new basements has an impact on the quality of life, traffic management and the living conditions of nearby residents and is a material planning consideration. This is because the borough is very densely developed and populated. It has the second highest population density and the highest household density per square km in England and Wales. Tight knit streets of terraced and semidetached houses can have several basement developments under way at any one time. The excavation process can create noise and disturbance and the removal of spoil can involve a large number of vehicle movements.
>
> 22.3.50 A basement development next door has an immediacy which can have a serious impact on the quality of life, while the effect of multiple excavations in many streets can be the equivalent of having a permanent inappropriate use in a residential area. There are also concerns over the structural stability of adjacent property, character of rear gardens, sustainable drainage and the impact on carbon emissions. Planning deals with the use of land and it is expedient to deal with these issues proactively and address the long term harm to residents' living conditions rather than rely only on mitigation. For all these reasons the Council considers that careful control is required over the scale, form and extent of basements."

50. It is unnecessary for me to quote more of the supporting text, but there are many other examples of the expression of the concerns set out in those opening paragraphs and amplifying them in terms of townscape (e.g. if gardens and planting are constrained), and heritage impacts (designated and non-designated), drainage and flooding, trees and access: see, e.g., paras. 22.3.54, 22.3.60-22.3.63, 22.3.66, 22.3.68. A new SPD was proposed, which was adopted in April 2016.

51. The Basements SPD 2016 did not play a significant role in the parties' cases, and is not in any event of primary relevance to the construction of the prior statutory plan policy CL7

with which it should be consistent – indeed, the SPD is specifically intended to provide detailed guidance as to the application of CL7: see para. 1.6. Its statement of the objectives of the policy at paras. 1.1-1.3 reflects what I have set out above.

52. The terms of CL7 reflect the controls which RBKC considers should be applied in the light of the objectives I have mentioned:

> "**Policy CL7 Basements**
>
> The Council will require all basement development to:
>
> a. not exceed a maximum of 50 per cent of each garden or open part of the site. The unaffected garden must be in a single area and where relevant should form a continuous area with other neighbouring gardens. Exceptions may be made on large sites;
>
> b. not comprise more than one storey. Exceptions may be made on large sites;
>
> c. not add further basement floors where there is an extant or implemented planning permission for a basement or one built through the exercise of permitted development rights;
>
> d. not cause loss, damage or long term threat to trees of townscape or amenity value;
>
> e. comply with the tests in national policy as they relate to the assessment of harm to the significance of heritage assets;
>
> f. not involve excavation underneath a listed building (including vaults);
>
> g. not introduce light wells and railings to the front or side of the property where they would seriously harm the character and appearance of the locality, particularly where they are not an established and positive feature of the local streetscape;
>
> h. maintain and take opportunities to improve the character or appearance of the building, garden or wider area, with external elements such as light wells, roof lights, plant and means of escape being sensitively designed and discreetly sited; in the case of light wells and roof lights, also limit the impact of light pollution;
>
> i. include a sustainable drainage system (SuDS), to be retained thereafter;
>
> j. include a minimum of one metre of soil above any part of the basement beneath a garden;
>
> k. ensure that traffic and construction activity do not cause unacceptable harm to pedestrian, cycle, vehicular and road safety; adversely affect bus or other transport operations (e.g. cycle hire), significantly increase traffic congestion, nor place unreasonable inconvenience on the day to day life of those living, working and visiting nearby;
>
> l. ensure that construction impacts such as noise, vibration and dust are kept to acceptable levels for the duration of the works;

> m. be designed to safeguard the structural stability of the existing building, nearby buildings and other infrastructure including London Underground tunnels and the highway;
>
> n. be protected from sewer flooding through the installation of a suitable pumped device.
>
> A specific policy requirement for basements is also contained in policy CE2, Flooding."

53. Mr Cannock submitted that the OR, and therefore RBKC, was wrong in law to apply CL7 to the car stacker which was not wholly subterranean but which rose above ground and in respect of which there were no planning controls to limit the time it was deployed above ground. He relied on 22.3.46 of the supporting text (quoted above) and its reference to "construction or extension of one or more storeys of accommodation below the prevailing ground level of a site or property". He submitted:

    (1) A basement should be considered as something that formed part of a building (see e.g. CL7(h) and (m);

    (2) CL7 applied a criterion by reference to 50% of a "garden or open part of the site" which necessarily assumes some form of building of which the basement will form part;

    (3) The application site was not underneath a property, or a garden or an open part of the site because it was neither private nor to the front, rear or side "of the property".

54. By approaching the matter the way RBKC did, Mr Cannock submitted that it not only misconstrued CL7 but in so doing failed to undertake a proper consideration of the impact of the stacker when above ground. I will return to that last point under other grounds.

55. Following the judgments of Lord Reed in ***Tesco Stores Ltd. v Dundee City Council*** [2012] PTSR 983 at [17]-[19] and Lord Carnwath in ***Hopkins Homes Ltd. v. Secretary of State*** [2017] 1 WLR 1865 at [22]-[26], Holgate J. helpfully summarised the approach to the interpretation of policy in ***Gladman Developments Ltd v Secretary of State*** [2020] EWHC 518 (Admin):

> "74. As the authorities make clear, and needs to be re-emphasised, not all planning policies are suitable for judicial interpretation. Development plans and other documents are full of broad statements of policy, many of which may be mutually irreconcilable, so that one must give way to another. Many policies may be framed in language the application of which requires the exercise of judgment by the decision maker, which may only be challenged in the courts on the ground of irrationality. Where the interpretation of a policy is truly justiciable, the court must interpret it

> "objectively, in accordance with the language used, read as always in accordance in its proper context". Development plans are not analogous in nature or purpose to a statute or contract and should not be interpreted as if they were (*Tesco* at [18-19]). Similarly, where submissions on the interpretation of a policy may properly be made to a court, they must also conform to those interpretative principles."

56. In my judgment, Mr Cannock's submissions do approach the local plan as if it were a technical statutory construction issue and apply a highly legalistic approach to the language used. They failed to recognise the absence of a definition of "basement", the broader purposes of the policy, and the opening words of CL7 applying to "all basement development". In my judgment, the consideration of whether a development is one to which CL7 applies turns to a high degree on the exercise of planning judgment in the light of the objectives of the policy.

57. In my judgment, as the opening words of the supporting text and policy make clear, the policy applies to "all basement development". Whilst it is clear that the paradigm case to which the policy is directed is the basement extension to a dwelling, which is the main context in which the issues have arisen in practice, I do not consider that as a matter of law the policy was restricted as Mr Cannock suggested. He quoted selective dictionary definitions of "basement" which I did not find assisted much given the clear purpose of the policy but in any event note that one of the definitions of "basement" in the Shorter Oxford English Dictionary is broader than the citations by Mr Cannock and is more aligned with the broad purpose of CL7-

> "2 The lowest or fundamental part of a structure; an underlying layer."

58. This proposal for the car parking is on any view a development which is primarily beneath the surface of an open area (i.e. the Road) and will lie beneath the structure of the road, whilst rising in order to allow access, the purpose is for it to remain closed to contain the parked cars

59. Mr Cannock's restrictive construction of the term "basement" would confine it to the paradigm case and render it inapplicable to basement developments that were capable of causing many, or even most, of the problems identified in the local plan and its predecessors but which would not be regulated by CL7. For example, none of the concerns below necessarily arises only in respect of development that is an extension to an existing building –

> "22.3.50 A basement development next door has an immediacy which can have a serious impact on the quality of life, while the effect of multiple excavations in many streets can be the equivalent of having a permanent inappropriate use in a

> residential area. There are also concerns over the structural stability of adjacent property, character of rear gardens, sustainable drainage and the impact on carbon emissions. Planning deals with the use of land and it is expedient to deal with these issues proactively and address the long term harm to residents' living conditions rather than rely only on mitigation. For all these reasons the Council considers that careful control is required over the scale, form and extent of basements."

60. The fact that much of CL7 is directed to the paradigm of a subterranean extension to a residential building and contains criteria, applicable e.g. to gardens or open parts of a site, seems to me to go nowhere in terms of the challenge. CL7 lists comprehensively the issues for which RBKC, through experience of dealing with such developments, considers to be those that need to be assessed and satisfied. It does not mean that each concern will arise in every case, or that the fact one or more may not be applicable, renders the general policy with respect to basements inapplicable. In those cases where the issue does not arise, then there will be no conflict with that aspect of the policy.

61. It would also be an easy device to avoid the applicability of the policy if the Cs' approach were adopted to include a surface structure, possibly of modest dimensions, or to ensure that the basement was freestanding. The concerns about amenity impact, disruption, structural stability and the like may still arise but would not be caught by CL7. I cannot accept that this is the correct approach to CL7 or was intended to be the result.

62. Even in the case of the stacker, while of course there is no condition to control the amount of time the stacker would be above ground, it was a question of judgment whether that point was of any real significance and the OR pointed out at 4.2 that the operational time from raising to closure was 3 minutes. It also appears to me to be highly artificial to assume that a development, the whole purpose of which was to provide underground parking for vehicles, would be kept open and in the raised position (where it would prevent parking, open the structure to the elements and block access not only to Thurloe Lodge but to Amberwood House) for any significant length of time.

63. In my judgment, therefore, the application of CL7 here is a classic example of a policy, described by Lord Reed in ***Tesco*** at [19] which is -

> "framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse…"

64. I consider that the OR and the RBKC decision based upon it represented a lawful exercise of planning judgment to treat the Application as comprising a basement within CL7 and,

thereafter, concluding that (despite some degree of non-compliance) overall the policy was satisfied.

65. Mr Cannock did not attempt to argue, wisely in my judgment, that the judgments under CL7 (if applicable) were irrational.

66. In view of my rejection of the basis of challenge, I do not have to deal with the application of s. 31(2A) to (2C). However, for completeness, I would have accepted RBKC's and the IP's submissions that had CL7 not been applied the same outcome would have been highly likely. I do not accept that the issues would have been so different that it would have led to a different outcome or that the exercise of the statutory provision would have involved the Court in the application of planning judgment (see ***R (Plan B Earth Ltd.) v Secretary of State for Transport*** [2020] EWCA Civ 214 at [267]-[273]):

    (1) CL7 was applied together with other relevant policies of the development plan (see OR para. 5.1 which listed them) and Mr Cannock accepted that RBKC had not omitted any relevant policies from its consideration of the Application;

    (2) The OR advised compliance with the other policies and (subject to the other grounds below) there is no basis to suppose they would have reached a different view on the merits if the additional restrictions in CL7 had not been applied;

    (3) CL7 was clearly a policy imposing additional restrictions on applications for development to which it applied and, if those restrictions did not apply, that would if anything make it easier to comply with the local plan as a whole (having regard to s. 38(6) of the Planning and Compulsory Purchase Act 2004 and NPPF 2019 para. 11);

    (4) if the issues considered under the rubric of CL7 arose outside the context of that policy (e.g. as amenity, drainage or townscape issues), there is no reason to suppose any different conclusions could or would have been reached outside the restrictive context of CL7 - noting that the other 3 decisive issues in OR para. 6.2 were heritage impacts, highway safety (with respect to the gates) and residential amenity.

67. Ground 2 therefore fails.

Ground 3: noise assessment

68. Section 8 of the Urban Infill objections submitted on behalf of the Cs set out clearly the areas of disagreement with the IP's noise assessment. It included following a summary of the problems said to exist with the IP's noise assessment at para. 8.1 a clear indication that

the Cs own assessment by Hann Tucker reached very different conclusions:

> "8.3. The Hann Tucker review of the KP Acoustics Report states "We have some concerns regarding the findings of the KP Acoustics assessment and consider their conclusions are not accurate". They go on to list that the survey was undertaken on a weekday (when noise levels are likely to be lower) that façade retention and tonality/ impulsivity correction have not been taken into account, their assessment is based on turntable operation only when the car-lift is down (meaning their calculation is based on the motor being attenuated by the car-lift roof) and that no noise information is available from the manufacturer. The application therefore does not allow adequate assessment of the impact of noise and should be rejected on that basis.
>
> 8.4. The Hann Tucker Noise Impact Assessment Report states that operation of the car-lift will exceed local authority requirements by 18dBA during daytime and 23dBA during night time and BS8233:2014 by 12dBA and 17dBA.28 Therefore every time a car enters or leaves the garage a nuisance will be caused to the occupants of Thurloe Lodge, especially during the night, and therefore the proposals should be rejected on that basis.
>
> 8.5. Pursuant to 8.4, the simultaneous operation of the turntable and car-lift will cause an increased noise level and therefore nuisance to the occupants of Thurloe Lodge…"

69. The summary at section 10 included –

> "10.1.8. The Noise Impact Assessment is inadequate and gives a misleading impression of the impact on neighbouring residents."

70. The Hann Tucker report made a number of criticisms of the IP's report (undertaken by Victor Lindstrom of KP Acoustics Ltd) including disputing the issue of whether there would be effective attenuation of the noise from the lift. Hann Tucker presented calculations which were said to show that the proposals would breach RBKC's noise guidelines.

71. Additionally, the note submitted to the Committee by Urban Infill following the publication of the OR stated:

> "**Harm to residential amenity**: The stacker would open right in front of no17A Thurloe Place – which is currently being rebuilt as a private home of the highest design quality following several years of very careful negotiation with the Council. The stacker would extend nearly 3 metres above ground, well in excess of the top of the ground floor of no.17A. It would impede access to the house and prevent anyone from reversing out of the garage. The noise from the stacker would breach the Council's own guidelines: see the expert report prepared by Hann Tucker

> Associates, which has been entirely ignored in the Officer's Report."

72. Beneath this passage were elevations and sections showing the proximity of the stacker to Thurloe Lodge and, above them, in a grey box for emphasis:

> "The applicant's own noise report gives a misleading impression of the impact, being undertaken during noisy working hours on a construction site whereas the stacker will operate at all times, including late at night and the weekend."

73. In the speaking note for the Committee by Jeremy Palmer for the Cs, noted in the minutes of the meeting, para. 4 stated (although it appears to be slightly garbled in places):

> "4. The next critical issue is the loss of amenity contrary to policy CL5 which requires that reasonable enjoyment of building will not harmed due to disturbance etc. To say the car lift will create little visual and audio impact when not in use ignores the dramatic impact on Thurloe Lodge when it is raised. Please remember that there will be no limit to the number of times a day that the car lift can be in operation and each time that the mechanism takes three minutes to raise and lower the lift. So immediately in front of Thurloe Lodge a structure more than the length of a car and wider than a car will rise up to 3 metres like a submerged submarine rising from the sea. If the visual impact is not enough Hann Tucker's noise report concludes that the noise from the stacker will breach Concerns about access."

74. It is clear therefore that the Cs' concerns about noise were advanced in several documents, not merely the Hann Tucker report, and before Committee and were concerned with harm to the residential amenity of Thurloe Lodge in terms of noise (as well as in other respects). The OR therefore, in my judgment, has to be read in the light of the clear articulation of the noise concerns of the Cs, including before the Committee, and their clear disagreement with the IP's assessment.

75. It is also important, as Mr Moules submitted, to approach the issue in the context that what was being raised was a concern about protecting the residential amenity of Thurloe Lodge, especially late at night and at weekends. See the passages from Section 8 and 10 of the Urban Infill representations above and the note and oral representations to committee.

76. It is true, as Mr Cannock submitted, that the OR in considering the noise issue did not bring to members' attention that there was a dispute in the assessment raised by the Cs' expert or that they claimed that the noise limits set would be breached. There was no evidence that the planning officer had consulted an EHO or other noise expert in reaching the views set out in the OR that:

> "**Living conditions**

> 6.15 Concerns have been raised regarding the noise implications resulting from the proposed operation of the car lift. This is an existing driveway in connection with residential dwellings and the use by vehicles of the driveway and gates would not in itself result in material harm to the living conditions of occupiers of neighbouring properties. With regards to the operation of the car lift, the application has been submitted alongside a Noise Impact Assessment complied by KP Acoustics Ltd. Measurements were taken on site and the lowest ambient background were recorded. The report satisfactorily demonstrates that the noise generated by the equipment would be line with the Council's standards and guidance in the Noise SPD. In order to ensure that these standards are achieved and maintained, and an acceptable standard of living conditions for neighbouring occupiers is maintained, conditions 9 and 10 are recommended to secure the following:
>
> - Noise emitted by the car lift plant and vents shall not exceed a level 10dBA below the existing lowest LA90(10min) background noise or shall be switched off upon written instruction from the local planning authority and not used again until it is able to comply; and,
>
> - The car lift plant and vents shall not operate unless it they are supported on adequate proprietary anti-vibration mounts."

77. However, this demonstrates that the officer was aware of the key concerns relating to impact on residential amenity from noise. Moreover, the Table at section 8 of the OR summarising objections also shows the concerns were noted and considered to be resolvable by condition:

> "8. It has not been demonstrated the car lift could operate without causing harm to the living conditions of neighbouring occupiers.
>
> The noise impact report satisfactorily demonstrates that the noise generated by the equipment would be line with the Council's standards and guidance in the Noise SPD. Conditions 9 and 10 are recommended to secure compliance."

78. Condition 9 and 10 were as a result imposed on the Permission:

> "9. Anti-vibration mounts for air-conditioning/ extraction equipment
>
> The car lift plant and shall not operate unless it is supported on adequate proprietary anti-vibration mounts to prevent the structural transmission of vibration and regenerated noise within adjacent or adjoining premises, and these shall be so maintained thereafter.
>
> *Reason - To prevent any significant disturbance to residents of nearby properties and comply with development plan policies, in particular policy CL5 of the Consolidated Local Plan.*
>
> 10. Noise from building services plant and vents

> Noise emitted by all building services plant and vents associated with the car lift shall not exceed a level 10dBA below the existing lowest LA90(10min) background noise level at any time when the plant is operating, and where the source is tonal it shall not exceed a level 15dBA below. The noise emitted shall be measured or predicted at 1.0m from the facade of the nearest residential premises or at 1.2m above any adjacent residential garden, terrace, balcony or patio. The plant shall be serviced regularly in accordance with the manufacturer's instructions and as necessary to ensure that the requirements of the condition are maintained. If at any time the plant is determined by the local planning authority to be failing to comply with this condition, it shall be switched off upon written instruction from the local planning authority and not used again until it is able to comply.
>
> Reason - *To prevent any significant disturbance to residents of nearby properties and comply with development plan policies, in particular policy CL5 of the Consolidated Local Plan.*"

79. It was therefore submitted by Mr Cannock, following ***Mansell*** and the authorities summarised by Lindblom LJ in that case, that the OR materially misled Members in that it created the impression that not only was there no contrary view to that given by the IP's noise excerpt, but that the report was satisfactory when it was (at least arguably) not. At the very least, the OR should have highlighted the differences of view and advised members, however briefly, why the view was reached that the IP's report was to be preferred.

80. Mr Parker and Mr Moules submitted, however, that the relevant issue before the Council was whether there would be an adverse effect on amenity through noise, as had been made clear to Members through the representations submitted and the note sent before the decision was made, quoted above, which headed the noise concerns "Harm to residential amenity". Further, it was submitted that this issue was resolved by the imposition of the conditions referred to which would prevent the operation of the stacker if the stipulated noise levels could not be met.

81. It was not suggested by the Cs in submissions that the conditions did not comply with NPPF guidance on conditions or that the conditions were incapable of implementation and compliance. Whilst there was a suggestion in John Gibbs' witness statement that this might be the case, it did not appear in Mr Cannock's oral or written submissions to the Court despite reliance on the condition by both RBKC and the IP. The C's submissions focussed on the failure to engage with the differing assessments and the contention that the condition was a means to deal after the issue of noise after the even (see Cs' Skeleton at paras. 79-80). I am not therefore inclined to regard it as a point relied upon by the Cs and, in any event, it was an issue on which members were entitled to reach a judgment as resolving the issue. The complaint was made that there was no engagement with the technical issues or

advice to members. However, the Urban Infill Note to members, which commented on the OR specifically drew members' attention to the lack of reference to the Cs' noise assessment:

> "The noise from the stacker would breach the Council's own guidelines: see the expert report prepared by Hann Tucker Associates, which has been entirely ignored in the Officer's Report."

82. It was also submitted by RBKC and IP that, in reliance on Andrews J.'s judgment in ***Pagham Parish Council v Arun District Council*** [2019] EWHC 1721 (Admin), there was no requirement for the OR to explain the controversy between the noise assessments nor to advise members why they should prefer the IP's noise assessment.

83. In ***Pagham***, the claimant argued that, in assessing the impact that the development would have on the setting of a Grade 1 listed mediaeval church, the planning officer had erred in assuming that because an impact on the setting which the applicant's expert had identified in the heritage impact assessment as harmful was not substantial or significant, the setting of that building would be preserved. It submitted that since the HIA had advised that there was a harmful impact on the setting, albeit a slight one, the planning officer ought to have explained why he had rejected that advice.

84. Andrews J., having referred to a number of the authorities cited before me (including ***Mansell*** and ***CPRE Kent***), dismissed the challenge noting the terms in which the submission before her had been advanced as what she described as a "novel argument" at [51]:

> "It argued that, in assessing the impact that the development would have on the setting of the church, the planning officer had fallen into error by assuming that because an impact on the setting which the expert had identified in the HIA as harmful was not substantial or significant, the setting was preserved. It asserted, relying on ***R. (on the application of NHS Property Services Ltd) v Surrey CC*** [2016] 4 W.L.R. 130, that since the HIA had advised that there was a harmful impact on the setting, albeit a slight one, the planning officer ought to have explained why he had rejected that advice."

85. She held:

> "55. I regard every stage in that argument as fundamentally misconceived. I do not read the judgment in the *NHS* case as going anywhere near supporting the proposition that there is an obligation on a planning officer to specifically engage with the opinions of a consultant instructed by the applicant (or, for that matter, by an objector to or supporter of the application). Subject to rationality, and any mandatory legislative requirements, he is free to take those opinions into account or

> to disregard them; he can make a value judgment about the relevance and usefulness of the contents of the expert report. If he does take them into account, he can choose what he accepts and what he rejects and how much weight to place on them.
>
> 56. He does not have to give reasons in his report for disagreeing with an assessment made by an expert who has expressed an opinion on a matter within his expertise, let alone where (as here) the expert has expressed a view on a matter which the decision maker has to determine, applying planning judgment. There is no such obligation, even on the decision maker, who is not the planning officer. Even in a situation in which, unlike the present case, the decision maker is under a duty to give reasons for his decision, he does not have to give reasons for those reasons."

86. However, it may be relevant in this context to note that the issue was one on which the officer could have formed his own judgment:

> "57. In any event, "harm" to a landscape setting is not something that can be assessed by objective criteria using some recognised technique. The applicant's consultant was able to explain how the vistas from the north over the fields towards the Church tower contributed to its significance, and how the development might affect those vistas and vistas from further afield. Armed with that information, (if the planning officer accepted it), the assessment of "harm" was largely a matter of aesthetic impression on which two people familiar with the vistas described could reasonably differ.
>
> 58. The planning officer was in just as good a position as a consultant on listed buildings to form a view about whether the slight impact on a long-distance view of the Church tower, from the angle and positions to the north-east described in the HIA, (or indeed from anywhere else) failed to preserve the special qualities of the setting of the Church. Ultimately that was a matter of planning judgment, not a matter of expert opinion. He was entitled to use his common sense and local knowledge and to refuse to accept the consultant's suggestion that the identified restriction "could be" of a nature which harmed the Church's wider setting and therefore to be given "great weight"."

87. Andrews J. also rejected a submission that the officer had materially misled members:

> "61. As a variant on the "reasons" argument it was submitted that the Committee was materially misled because its members were not told that the consultant had expressed the opinion that there was some harm to the wider setting of the Church, albeit of a very limited nature. I reject the submission that the planning officer was under any obligation to tell the Committee anything about the views of the applicant's heritage consultant. Subject to fairly reflecting the views of the statutory consultee, Historic England, which he did, it was up to the planning officer to decide what other information should go in the report and how much detail to

include. There is and can be no challenge to the rationality of that exercise of judgment."

88. Mr Cannock submitted that this decision ought to be viewed in context, and in the light of subsequent paragraphs of the judgment, and having regard to the fact here that no specialist noise advice had been sought by the officer to resolve the differences, although it appears to me difficult to treat the judgment at [55] and [56] as other than a statement of general principle.

89. It is notable that amongst the volume of representations and expert reports on this issue it was not contended that it would not be possible to achieve suitable noise levels which would meet standards. I am sure that had the consultants considered that noise standards could not be met in this location they would have said so – as opposed to disagreeing with the IP's assessment and explaining the implications if the nose levels were higher than the IP predicted. When pressed, Mr Cannock appeared to complain that the effect of the condition if it was triggered to require the stacker not to be used would have meant that the residents would have had to put up with the disruption from the works for nothing. That is not a legal basis for regarding the condition as ineffective or unlawful and I bear in mind Mr Cannock's acceptance that the Cs did not advance irrationality as a basis of challenge. Moreover, it overlooks the fact that it must be in the IP's interest to secure compliance with the condition and not to build a white elephant.

90. In my judgment, although it would also provide a basis for dealing with this ground of challenge, it is not necessary for me to go as far as applying Andrews J.'s analysis in ***Pagham*** at [55]-[56] for a number of reasons:

(1) The overall resolution of concerns about amenity was the application of a noise condition which was not said to be either incapable of enforcement or which set levels inappropriate to protect residential amenity, the core concern of the representations;

(2) It must have been clear to members that an issue had been raised with regard to noise from the stacker given not only the OR but also the representations from the Cs and I am satisfied they would have those issues well in mind when considering the application;

(3) On the facts of this case, whilst the technical noise differences between the Cs and the IP's consultants are not ones on which a planning officer could reach a conclusion without assistance, members were told by the Cs through Urban Infill

that their noise assessment had not been mentioned by the OR. They were therefore aware there was a disputed assessment. However, the OR was able to recommend the imposition of a condition which would deal with the Cs' concerns regarding impact on residential amenity and noise nuisance;

(4) Regardless of whether the OR ought to have flagged up the disputed assessment, which in any event was drawn to members' attention by Urban Infill, the issue was one which officers considered could be resolved by the condition and it is not suggested that the imposition of such a condition was incapable of compliance or irrational.

91. In these circumstances, and when properly analysed, I do not consider that the OR did materially mislead members as to the issues and did take account of the concerns as to the impact of noise on residential amenity and addressed them by the imposition of the conditions. I note that this is the basis on which Swift J., albeit in short form, refused permission on this issue.

92. I have already made it clear that I do not intend to deal with the technical evidence advanced by the IP on the noise objections raised by the Cs. However, had I not found against the Cs on this ground and, even if there had been an error in the report in not drawing attention to the technical disagreement between experts and assessing it, then I would have exercised the power under s. 31(2A)-(2C) since the imposition of the conditions nonetheless resolved the issue and secured the amenity of the residents in a manner which is not criticised by the Cs as unlawful. This does not involve the exercise of planning judgment by the Court since it is already clear that the planning officer (and members) considered that the conditions imposed suitably protected amenity. It is therefore highly likely in my judgment that the outcome would not have been substantially different in respect of this ground of challenge.

93. Ground 3 therefore fails.

Ground 4: neighbouring amenity

94. The Cs raised a number of concerns regarding the impact of the proposals on amenity and safety and submit that they were not taken into account by the Council:

(1) the visual impact of the car lift -

(a) rising/moving to its maximum height of c 2.5 m immediately in front of Thurloe Lodge;

(b) when open at its maximum height above ground given that there is no limit on the number of times which the car lift can be used in a day;

(2) The interruption to access to the Cs' properties since the Road has shared use and is the only road access to Cs' properties. The construction and operation of the development will also have a significant impact on Cs' amenity because of the interruption to access during the lengthy construction process and during its operation and use.

(3) the impact of the operation of the car lift and turntable (which may be remotely operated from Amberwood House) on the safety of users of the Road;

(4) the impact on works to buried services and utilities located in the footprint of the development both generally and in terms of heritage designations. Although the issue was raised by the Cs, RBKC fail to consider whether the identified services needed to be moved and, if so, to where they might be moved, together with the impact of such works on the Cs' residential amenity or on heritage assets.

95. These issues, which were detailed at some length in Mr Cannock's argument, are all matters of planning judgment and the question is whether they were taken into account by RBKC in granting permission.

96. Mr Parker submits:

(1) The Council took of account of the visual impact of the car lift both moving and when open. These impacts were obvious and it is absurd to suggest that they were not considered. The application drawings demonstrated the car lift in its open position, provided sufficient information as to the visual relationship between the proposed development and the surrounding buildings and the operation of the car lift for RBKC to assess and reach a judgment on these aspects of the proposal. Moreover, the Cs' own representative highlighted the issue in his oral submissions to the Committee as had the Urban Infill Committee Note;

(2) With regard to the possible disruption to other road users and impact on safety of, during construction and operation, this matter was addressed by para. 5.4 of the Design and Access Statement and this was considered in the OR (Section 8 items 22 and 25). The Cs' submissions amount to a contention that the OR should have provided more detailed reasons, but such additions were not required. The OR contained the following in Section 8 -

(a) At item 22 it rejected the Cs' objection in relation to pedestrian safety and the safety of those with mobility issues -

"22. [objection] The proposal would restrict pedestrian access along the laneway, as well as restricting persons with mobility issues.

[response] This is a private driveway and the car lift can operate without causing access restrictions. The tacker construction/mechanism would be fully automated with an operation time from raising to the open position/car loading/descent/closure of 3 minutes. It will be closed at other times."

(b) At item 25, it rejected the Cs' objection regarding potential conflicts for vehicles -

"The location of the turntable would not impede access to the garage of Thurloe Place. Whilst the car lift could potentially give rise to conflict within the driveway, this would be for a limited time only, this is a private driveway and the proposed installation of the turntable would not result in any undue impact upon the function of the highway."

(3) Utilities were expressly considered in the report (Section 8 item 19) and it was not necessary for them to be further addressed as part of the decision. To the extent that existing below ground utilities will need to be relocated, they will be relocated adjacent to the enclosure of the car/lift without any above ground impacts (DAS para. 5.3) and the impacts of construction on residential amenity and heritage assets will otherwise be adequately controlled by the Construction and Traffic Management Plan and Site Construction Management Plan as required by Conditions 3 and 6 and which would need to be approved by RBKC.

97. Mr Moules, in general agreement, added:

(1) The potential for disruption is to be managed and mitigated in the usual way through the Construction Traffic Management Plan secured by Condition 3. Thurloe Lodge is itself a construction site at present, being accessed via the Road and the Cs' complaint about construction disruption is misconceived;

(2) There was sufficient information before members to enable them to conclude that the proposed development would operate safely including para. 5.4 of the DAS which explained that the automatic parking mechanism is controlled from Amberwood House as well as from the Road and when the lift is in the raised position, and when in operation, automatic safety barriers will be in place to the lift opening. The automatic entry gate (which serves only two other dwellings) will be

positioned off Thurloe Place allowing for two parked cars within the Road clear of the car lift for manoeuvring of vehicles associated with the operation of the car lift. The safe movement of persons and vehicles within this space is governed by the users themselves as would be the case anywhere where different users have access to a shared drive space. The pedestrianised footpath would be unaffected by the operation of the car stacker and turntable.

98. In my judgment, Mr Parker and Mr Moules are correct and the issues set out at considerable, not to say excessive, length by Cs in these proceedings are ones which were properly considered by the Council and were ones on which both officers and members were entitled to form their own judgments. For example, it can scarcely have been overlooked by members that the visual impact of the stacker when open was being objected to, given the material submitted on behalf of Cs, including the Urban Infill Committee Note which contained "*Accurate elevation and sections of the stacker in Thurloe Place*", or that objection was taken to impact on the amenity of the Cs' property, to their ability to access their property safely (also raised in the Committee Note) or to the impact on utilities – that latter of which can scarcely be a rare occurrence in the case of a development in the Royal Borough. This is also the type of a case where members were bound to be very familiar with the issues being raised given their experience of planning in a central London borough.

99. I do not consider that this is a matter on which members were misled by the OR or where members failed to take account of the Cs' objections on impact into account. Given the written and oral submissions they received from the Cs, after the OR was published, they must have been well aware of them.

100. This ground of challenge fails.

Ground 5: heritage assessment

101. Mr Cannock submits that the OR assessment of impact on heritage assets is defective, and has misled members –

(1) There is no identification and assessment of the significance of heritage assets that may be affected contrary to the advice in para. 190 of the NPPF (2019);

(2) It failed to take account of the impact (alone and cumulatively with other impacts) of the lift when raised above ground. The limited visual impact of the car lift when underground was not a reason to conclude that the car lift would preserve the settings or any features of special architectural or historic interest of listed

buildings or conservation areas when it is raised above ground;

(3) It failed to identify whether Thurloe Lodge was considered to be a non-designated heritage asset ("**NDHA**") within para. 197 of the NPPF or consider the impact of the proposals on the setting or significance of Thurloe Lodge as a NDHA;

102. Mr Parker and Mr Moules submit that the Cs submissions should be rejected since the OR (drawing on the advice from the Conservation Officer) summarised the position sufficiently clearly to members who would also have been familiar with the location, given that the entrance to the Road faces the Victoria and Albert Museum and the location in Knightsbridge.

103. The OR stated:

"**Listed building and conservation area**

6.6 The site relates to a shared private road accessed from Thurloe Place which provides access for Thurloe Lodge and Amberwood House. The adjoining properties within Thurloe Square and Thurloe Place were constructed in the 1840's and form part of the planned townscape within the Alexander Estate. These terraced groups, consisting of London townhouses in the Classical style, are characterised by their ordered composition and formal and balanced appearance. The immediately adjoining piers to the entrance of the private road contribute to this coherent, ordered and balanced character.

6.7 The application site is surrounded by both designated and non-designated heritage assets. The adjoining properties on Thurloe Square and Thurloe Place are Grade II listed, and it is noted that the Grade I listed Victoria and Albert museum lies directly opposite. Whilst Thurloe Lodge and Amberwood House are not listed, they both contribute positively to the character and appearance of the Conservation Area. As the site is surrounded by heritage assets, it is important that any new development is undertaken in a sensitive manner and is visually unobtrusive. Whilst a car lift and turntable is a modern intervention, the proposals are relatively minimal and will have a limited visual impact when the car lift is not in use and will therefore preserve the special architectural and historic interest, character and significance of the listed buildings and the character and appearance of the conservation area.

6.8 Concerns were raised as part of the earlier withdrawn applications (ref. PP/18/08354 and LB/18/08355) with regard to the scope of the assessment which had been carried out with regard to the associated impact of the excavation/construction works on the adjacent listed garden walls to Thurloe Square. A listed wall protection method statement has been submitted as part of the current application which concludes that the effect of the proposed piling method on the existing listed wall will be negligible. Detailed drawings and a construction

> method statement have also been submitted to support this view. As such, it has been demonstrated that the basement excavation will preserve the special architectural and historic interest of the designated heritage assets and is acceptable in heritage terms.
>
> 6.9 As part of the associated landscaping works, condition 12 is recommended to secure further details of the hard landscaping materials to ensure that the materials are appropriate. The private road is a secondary space within the formal planned townscape and the materials, including the bound gravel, should all have a similar colour/tone to ensure a balanced, pared back and relatively unassuming appearance.
>
> 6.10 With regards to the proposed gates, the private road was created in the 1840s and it is unlikely that any gates enclosed the northern end of this space at that time. However, the historic maps provided as part of the heritage statement indicate that gates did exist in 1872, but were removed by 1895. As late as the 1952 OS map, there are still no gates shown. As such, whilst the existing gates are attractive and idiosyncratic, it has been demonstrated that they are not original. As such, there replacement is acceptable. The proposal seeks to replicate the existing design and would preserve the special architectural and historic interest, character and significance of the listed buildings and the character and appearance of the conservation area."

104. This is another issue, as with the impact of the car stacker on amenity, where the members would have been well able to form their views from their knowledge of the area and the likely effects of the stacker on heritage assets. Indeed, as I have already noted, additional materials, including visual representations, of the raised stacker were submitted to members by Urban Infill in its Committee Note shortly before the meeting in order to persuade them to refuse the application and which criticised the OR:

> "**Heritage harm**: The Officer's Report says that the car-stacker won't harm the Conservation Area or the neighbouring listed buildings (including the V&A) "when the car lift is not in use" – see paragraph 6.7 of the Officer's Report. But what about when it is? It is absolutely obvious that the scheme would be harmful when it is open. Quite apart from the stacker itself, there would be guard rails and associated infrastructure, none of which is detailed in the application (though their pre-application shows things such as control boxes and intercoms). And remember of course that there is no way to control how often the stacker is used or how long it would be left open for when it is."

105. I reject as simply not credible the submission that members were not aware of the issue or failed to consider it.

106. I do not consider that there was any requirement on the members to treat Thurloe Lodge as an undesignated heritage asset within NPPF para 195 since with one exception in the form

of a preserved element of the former building (the 19th century northern flank wall), which did not face the site of the stacker, Thurloe Lodge was undergoing substantial rebuilding. At the date of the decision, the rebuilding was incomplete and in any event would be a modern building which preserved part of the older building, namely that northern flank wall.

107. Whilst the OR at para. 6.7 did not identify each and every asset, it sufficiently drew the existence of both designated and non-designated heritage assets to members' attention having regard the application and the consequent need for care –

> "The application site is surrounded by both designated and non-designated heritage assets …. Whilst Thurloe Lodge and Amberwood House are not listed, they both contribute positively to the character and appearance of the Conservation Area. As the site is surrounded by heritage assets, it is important that any new development is undertaken in a sensitive manner and is visually unobtrusive..."

108. In my judgment, this was sufficient to summarise the key issues, that the site was "surrounded by" heritage assets, including NDHAs, and the general approach to be taken, requiring a sensitive approach. In my judgment, there was no duty for the OR to go further especially given the extensive materials presented to RBKC by the Cs, and what I expect was members' own familiarity with the area.

109. For the reasons already given, I decline to engage in the exercise of assessing the new evidence submitted by the IP in relation to the heritage assets. However, had it been necessary I would also have found that s. 31(2A) to (2C) would have applied since the heritage issues were assessed to a large extent and the scope of the Cs' concerns would have been clear to members who would be very familiar with this part of the borough.

110. I therefore reject ground 5.

Ground 6: parking spaces

111. C submits that RBKC was misled by the OR which advised that the proposed development would not lead to an increase in car parking as opposed to an increase which would be in conflict with Policy CT 1 of the Local Plan (2019) and the London Plan. The Minutes of the Committee Report noted that the Senior Planning Officer stated that an increase in parking provision would be contrary to the London Plan and local policies, but that the scheme would not lead to increased parking provision. This was incorrect and at least one additional space would be provided but more likely the net addition would be two spaces.

112. Mr Moules submitted that IP had provided technical information, which was confirmed in

the application form, that 4 spaces would be provided. Further, on 4 September 2019 IP wrote to RBKC to explain that the proposal would provide three parking spaces within the red line application boundary and one space would continue to be provided at Thurloe Lodge in a garage directly accessed from the Road. Two spaces in the car stacker would replace two spaces currently provided at ground level, and parking would not take place on the turntable or directly above the stacker because the stacker would not be able to operate when being parked on.

113. Although this issue has been framed as a material error of fact properly considered it is nothing of the sort. It resolves itself into an exercise of judgment with regard to the application of policy that there should be no net increase in car parking. The issue was clearly explained to members not only in the papers but in the Cs' oral representations. The issue of rights over the Road, which is privately owned by IP, is currently the subject of litigation which is not relevant to these proceedings.

114. The OR advised:

> "**Parking and highway safety**
>
> 6.11 The existing private driveway does not appear to have any allocated spaces, but is sufficient in length to accommodate a number of parked vehicles. The applicant states that four existing off street parking spaces could be provided and whilst it is likely that more could be accommodated, they would unlikely be independently accessible. The proposal would involve the addition of two new underground spaces at the southern end of the driveway which would be accessed by the new car lift and a turntable. This would involve the loss of an equivalent level of parking capacity at ground floor level. The applicant, should they wish to do so, could continue to make use of remaining driveway for parking as they currently can and there would not be any material increase in off-street parking capacity. Whilst the level of off street parking spaces available would exceed the maximum standards for off-street parking as set out in the Transport and Streets SPD, this is already the case, and there would not be any material increase in off-street parking or increase in traffic congestion as result. In this context, it would not be necessary to attach a condition limiting the number of cars that could be parked on the driveway.
>
> 6.12 The introduction of a vehicle turntable will allow vehicles to manoeuvre in and out of the driveway in forward gear, which is not currently possible. The turntable would provide sufficient clearance to accommodate a 5m long vehicle and this improvement in manoeuvrability of vehicles on the driveway would likely lead to less disruption to the Transport for London Road Network (TLRN) and as such the proposals are acceptable. Recommended condition 7 would secure the installation of the turntable, prior to the use of the car stacker.

> 6.13 The private road is accessed via a crossover directly from Thurloe Place, which forms part of the TLRN. The application seeks to restore the gates which are located at the front boundary of the property, directly onto the public highway on Thurloe Place. Subject to recommended condition 8 to ensure that the gates are automatic inward opening gates, there would be no material harm on highway safety.
>
> 6.14 An objection has been received from Transport for London (TfL) relating to an increase in parking and potential for disruption during construction works. However, there is an existing vehicle access point in this location and the proposals would not materially alter how this is used. Furthermore, there would be no material increase in off-street parking capacity. With regards to the CTMP, it is noted that the site is accessed directly from the TLRN and as such, the applicant would need to get agreement form TfL prior to carrying out the works. As such, this does not preclude the determination of the current application. The final CTMP, secured by recommended condition 3 should address the comments raised by both the Council and TfL and show that TfL is in agreement prior to the approval of the final CTMP."

115. Whilst the Cs have sought to persuade me that more cars than 4 could, in theory, park in the mews this was not a matter for the Court primarily but a matter for the expert judgment of RBKC with the assistance of its transport and planning officers. Indeed, I observe that it might be said that if the use of the Road were abused by residents, more than 4 vehicles could already be parked (albeit possibly blocking access and the use of the stacker) but new gates were proposed, in order to control access to and from the public highways, and a judgment has to be reached with regard to accessibility, as was done by the transport officer. His consultation advice (summarised in the OR above) was:

> "**Car Parking**
>
> The applicant has stated that the driveway currently provides space for three cars, with a further space provided within a garage belonging to Thurloe Lodge. A site visit confirmed that this garage has been demolished however the developer's intentions as part of the wider extant planning permission are to reinstate this area as a garage. The driveway measures c.4.5m wide with more space available on the pathway. Car parking provision is judged on the number of spaces that are independently accessible and it is considered likely that the driveway could have accommodated the stated number of vehicles. The swept path drawings submitted within the Transport Note show that vehicles could park alongside each other or on the pathway without blocking access to other vehicles on the driveway.
>
> The current provision of four car parking spaces exceeds the maximum car parking standards as detailed in the Transport and Streets SPD however the proposal would not result in an increase in off-street spaces and it is not considered that there would be any material increase in vehicular traffic as a result. No conflict with CT1(b)."

116. Although TFL took a different view, this was highlighted to members, who accepted the assessments and recommendations of their officers. This turned on the likely usage of the existing access and accessibility and in my judgment this is not one which could be regarded as unreasonable and Mr Cannock did not seek to challenge the exercise of judgment but to attempt to recharacterize the issue, which I have not found persuasive.

117. I reject this ground also.

S. 31(2A) to (2C) of the Senior Courts Act 1981

118. It has not been necessary for me to exercise the power in these provisions for the reasons already set out above. However, as I have explained in respect of each of the grounds, had it been necessary to do so I would have rejected the claims in the exercise of these powers.

Conclusion

119. In conclusion, I have found the grounds advanced, albeit skilfully, to amount to a concerted effort by the Cs to revisit a series of planning judgment issues and not to reveal errors of law. The application is therefore dismissed.

Costs

120. Following the circulation of the draft of this judgment, I received submissions on costs. There is no dispute that the Cs should pay RBKC's costs to be summarily assessed (since the hearing only exceeded one day by a small margin). However, this is subject to the following (summarised from the detailed written submissions which I have not set out in full):

    (1) Cs seek their costs necessitated in responding to the IP's evidence which I have held I would not take into account in considering the exercise of the powers in s. 31(2A) to (2C) of the Senior Courts Act 1981. Although the costs submissions take the matter at length, in essence the complaint is that Cs have had to respond to significant evidence which has been ruled to be inadmissible;

    (2) Similarly the Cs submit that they should not pay RBKC's costs occasioned by the production of evidence which relates to ex post facto evidence and/or a commentary on the robustness of D's decision; and

    (3) RBKC also seeks a proportion of its costs from the IP to the extent that they cannot be recovered from the Cs.

121. In response, the IP submits that:

(1) I should bear in mind my criticism of the Cs' grounds in my judgment and that on the submission of Tom Hawkley's witness statement, Cs withdrew their Ground 1 allegation relating to the height of the stacker;

(2) The IP accepts that the Court found that RBKC and the IP's evidence "went too far in assuming the court's willingness and ability to adjudicate on what are matters of planning and related expert judgments" (at 25]) was not unreasonable such that it should attract a costs sanction. It was directed at a legitimate submission on discretion (which actually succeeded on other grounds not requiring reference to the witness statements). Moreover, the witness statements did contain significant factual content (e.g. in relation to the demolition of most of Thurloe Lodge –a matter Cs agreed during the hearing as reflected at [106]);

(3) Cs' 5 witness statements and Reply were an unnecessary and excessive response to the IP's evidence;

(4) Cs misunderstand the statutory question to which RBKC and THE IP's evidence was directed. Under s.31(2A)-(2C) SCA 1981, the issue is whether it would have been "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". To respond to such a submission, and beyond making short submissions on admissibility, it is not necessary for a claimant to file substantial evidence seeking to show that its planning arguments are correct. A claimant instead has to show that it is not highly likely that the claimant's arguments are wrong. Cs' extensive evidence in response went well beyond rebutting reliance on s.31(2A)-(2C) and amounted to a full blown attempt to argue the planning merits and was symptomatic of the way in which it has pursued this claim;

(5) The IP did not act unreasonably. As is clear from Lindblom LJ's judgment in ***Watermead PC v Aylesbury Vale DC and Crematoria Management*** Ltd [2017] EWCA Civ 152, at [35]-[36], the decision about whether evidence is admissible to support an argument under s.31(2A)-(2C) SCA 1981 is a discretionary one and the boundary between discretion and the planning merits is not a bright line;

(6) Cs' whole claim sought to reargue the planning merits and those defending it should not be criticised if they went too far that those defending the claim "went too far" in responding to what was an impermissible attack on the planning merits to

begin with. Nevertheless, the IP's evidence was directed at showing Cs' planning concerns were "contrived or overstated" (IP Skeleton para. 17) such that it is highly likely that the outcome would not have been substantially different.

(7) Cs' submissions regarding ***Gladman Developments Ltd v SSHCLG*** [2020] EWHC 518 (Admin) at [66]-[70] were misplaced (see the IP's skeleton argument para. 16) since Holgate J was not considering the exercise under s. 31(2A)-(2C) SCA 1981, but evidence in a statutory planning challenge on a point of policy interpretation which exhibited a series of Inspectors' reports interpreting the same policy;

(8) The suggestion that there is a "risk that parties will continue to submit inadmissible evidence" without a costs sanction is dealt with by the terms of the Court's judgment.

122. The IP ask me to reject RBKC's claim against it since RBKC was not required to respond to IP's evidence and it and the IP were aligned in defending D's decision. RBKC chose to adopt IP's evidence and refer to it because it considered that evidence strengthened D's defence of its decision. There is no justification in those circumstances for IP to pay any of D's costs.

123. The parties agreed that if I accepted the Cs's submission on costs in principle, I should then deal at a later stage with the details of the costs assessment on paper. For reasons set out below, I have not found it necessary to do so.

124. Whilst it is open to the Court to make separate costs awards with respect to specific aspects of the case, and it is correct that I rejected the contentions seeking to engage in the detailed merits which was suggested as relevant to the exercise under s. 31(2A) to (2C), the matter is far from as straightforward as the Cs' submissions suggest.

125. First, it was necessary for RBKC and the IP to respond to the highly detailed grounds of challenge which, as I have found, sought to re-engage with many of the planning issues put before members before they reached their decision. The abandonment of the first part of the challenge by Cs was a response to the IP's evidence.

126. Secondly, here are many examples in the Cs' evidence and its lengthy Reply of 78 paragraphs which went well beyond either engaging with the witness evidence of RBKC and the IP and, as with the Statement of Facts and Grounds, sought to engage at length with the planning merits.

127. If a claimant choses to provide a reply, for which there is no provision in CPR Part 54,

it should as a rule focus on key points of law in response and in a manner which might assist the court in its consideration of the case. A document which simply provides at considerable length a more detailed exposition of criticisms regarding planning issues not only misunderstands the function of the court but also fails in what should be the objective of assisting the court. It served to underline the approach of the Cs in this case which I have already made clear in my judgment.

128. Substantial elements of Cs' witness statements engage with the planning merits regardless of the IP's new contentions: see, for example, the statement of Nicholas Smith (of Urban Infill) whilst partly engaging with the later evidence also traverses in detail the details of the planning decision including the height of the stacker (later abandoned), the issue of the control panel, including criticising the Addendum Report and the condition imposed. He also deals with the points made regarding noise, amenity, parking and heritage issues. Whilst it is true that to some extent he engages with the new evidence but to a significant extent he is simply seeking to reinforce the Cs' primary case.

129. A further example is found in Hilary Bell's evidence, whilst dealing with the IP's evidence at paras. 7-9, it appears that much of what follows is directed to criticising the OR and then seeking to support Cs' case on NHDAs, the control panel and visual and residential amenity challenge. Similar comments can be made regarding Grant Leggett's statement which moves from an initial consideration of the new evidence to a detailed critique of the OR and the decision.

130. John Gibbs' statement probably deals most with the new evidence since it starts as a detailed response to Victor Lindstrom's new noise evidence for the IP but also turns to criticise the decision of RBKC to impose condition 10. Jeremy's Palmer's second statement deals with a dispute over private rights over the roadway.

131. To my mind the overall impression is that the Cs' response evidence resembles evidence in rebuttal presented to a planning inquiry and is not appropriate to a judicial review planning challenge bearing in mind the well-established principles of limited intervention on which this court operates.

132. I am therefore far from satisfied that I should treat the Cs' evidence as simply responding to evidence from the IP or RBKC which I have declined to consider since it appears to me closely connected to supporting Cs' primary case regardless of the IP's evidence (whilst still responding to the IP). It is an unattractive position for claimants, who have run a case so heavily directed to disputing planning issues considered by the

planning authority, to seek costs because the IP has responded in kind, though in the context that its primary case (as was that of RBKC) to maintain that the council properly considered the planning issues and did not err in law. I have agreed with those submissions. If criticism can be made of the IP it can at least equally be made of the Cs themselves both in their primary case and in their Reply and evidence in response.

133. I also note that not all of RBKC's and the IP's evidence was seeking to raise new material but also to reject aspects of the Cs' case on the facts as they appeared at the time of the decision, e.g. regarding the control panel, the plans submitted for the stacker and its dimensions and the works to Thurloe Lodge.

134. I do not consider it a proportionate exercise to attempt to disentangle the extent to which Cs' response evidence engaged only with the IP's new evidence, which I declined to consider, or which was in fact simply reinforcing Cs' primary case or taking issue with matters properly put in evidence by RBKC and the IP. It is clear that there was some of the former but also a considerable degree of the latter.

135. In the circumstances, I am not satisfied that I should make a costs order against the IP (or make an equivalent discount to RBKC's costs) especially having revisited for the purposes of the costs submissions the evidence filed by the Cs in response. It therefore is unnecessary to discount RBKC's costs on that basis also or to require the IP to make up any shortfall (which on Mr Parker's latest submissions amounted to less than 8% of RBKC's total costs).

136. It follows that I do not have to deal with the imposition of costs on the IP as a deterrent to others. In any event, as Mr Moules submits, I have set out my reasons for my application of the Court of Appeal's judgment in ***Plan B*** and whether they are relevant to the circumstances of other cases is a matter to be decided by others.

137. I have considered RBKC's claim for costs which is not resisted in principle by Cs which is sought in the sum of £28,182.50. Whilst there were elements in RBKC's evidence which I have not found relevant (e.g. the issue of the approval of details following the grant of the permission under challenge) it seems to me nonetheless, and in the light of the discussion above, that there is no justifiable basis for making any significant discount in the sum claimed. None is suggested by the Cs other than on the principled basis set out in its submissions, which I have rejected. These costs also appear reasonable in the context of the costs incurred by the Cs which amounted to some £150,000 for a judicial review that was completed in less than a day and a half.

138. I therefore summarily assess the costs to be paid by the Cs to RBKC in the sum of £28,182.50.

Disposition

139. I dismiss the application for judicial review and order the Claimants to pay the Defendant's costs summarily assessed in the sum of £28,182.50.