APPEAL BY ROOMS AND STUDIOS MANAGEMENT LTD

PINS REF: APP/E5900/W/20/3250665

CLOSING SUBMISSIONS FOR THE LONDON BOROUGH OF TOWER HAMLETS

Introduction

1. It is not disputed that Tower Hamlets is a borough, which despite delivering more housing than any local authority in England[1], has an acute need for affordable housing. That is why the recently adopted Local Plan (2020) lays down a policy imperative that all forms of housing, including HMOs, should make a contribution to the sort of housing that is most needed in the borough. The LPA raises no objection to the redevelopment of the existing hostel and, subject to its preserving the significance of the local heritage assets, it does not object to housing being brought forward on the appeal site *provided* it is of a type and tenure that meets an "identified need" and *provided* it contributes towards affordable housing. The Appellant's scheme, however, does neither.

2. The Appellant's proposal[2] for a commercial, purpose-built large scale hostel/co-living HMO ("appeal scheme") aimed at young professionals working in Canary Wharf and the City of London at rents of £12-16000 p.a. for an HMO room[3], has not demonstrated it meets an "identified need". Indeed there is an almost identical scheme which has been consented a few doors down.[4] Moreover, the appeal scheme makes no contribution whatsoever to affordable housing which is the tenure of housing the borough most needs and which is essential for ensuring mixed and balanced communities.

3. Despite boasting of "excellent services" and an "awesome experience" [5] much of the scheme's shared communal space, essential for occupiers for living, cooking

[1] B-03 para. 2.14
[2] Consent is sought for "*Demolition of existing building and erection of a building of seven storeys inclusive of two set back floors plus a lower ground floor to provide 109 rooms for short term hostel and HMO accommodation".*
[3] Actual rents likely to be substantially higher on A's case.
[4] Sailmakers
[5] A20

and dining, would be inadequately lit and would appear "dull"[6] even during the daytime. Residents would have insufficient outdoor amenity space and this despite a building whose scale, height and massing of the building is excessive and represents overdevelopment. That is problematic because the scheme occupies a highly sensitive site next to a local "landmark" Our Lady Immaculate Catholic Church which, everyone accepts, is a positive contributor to the St Anne's Conservation Area. The appeal scheme encroaches and intrudes in views of this special Church diminishing its prominence in the townscape, thereby harming the CA. That harm attracts great weight, which is not outweighed by the modest benefits of this scheme.

4. Under the Housing Delivery Test 2020, Tower Hamlets is now deemed to be a "presumption authority" and para. 11(d) of the NPPF is engaged. For the reasons set out below, and in the additional evidence of the LPA submitted following the conclusion of the hearing (26 January 2021), the LPA considers the tilted balance should be disapplied on heritage grounds. However, even if the tilted balance is to be applied, it should be considered in the context of the recently adopted and materially up to date Local Plan. The Local Plan policies which are central to this appeal should be afforded full (and if not very substantial) weight. Once those policies are applied as part of the overall s.38(6) balance, then even considering the *tilt* towards the presumption in favour of sustainable development, the adverse impacts of this scheme would significantly and demonstrably outweigh the benefits of the additional HMO units.

5. The issues in this appeal[7] and the structure followed in these submissions are as follows:

Reason for refusal 1

i. Whether this type of scheme meets "identified need" in this location? **(Need)**;

ii. Whether the scheme can be secured as a long term addition to the supply of "low cost housing"? **("Low Cost")**

[6] Mr Owens

[7] The appeal proposal was originally refused on seven grounds. Reasons for refusal 4 and 6 have been withdrawn. With respect to reason for refusal 5 (cycle storage), the LPA has outstanding concerns over the location of the cycle storage which it has addressed in a written statement (E-07). Reason for refusal 7 has been addressed by the agreed s106.[7]

iii. And, even if it is needed, whether the appeal scheme provides a policy compliant contribution to affordable housing? **(Viability)**

Reason for refusal 2

iv. Whether the appeal scheme would result in harm to the designated and non-designated heritage assets which contribute to the character of the area? If it would, then the question arises whether the public benefits of the scheme outweigh that harm? **(Heritage)**

Reason for refusal 3

v. Whether the accommodation provides a standard of amenity which accords with the applicable policy? **(Living conditions)**

Approach to the overall balance

vi. Whether, in light of the above, the 'tilted balance' under para. 11(d)(ii) of the NPPF is engaged, and, if so, what weight should be given to that consideration and to the development plan policies in the s.38(6) balance? **(Tilted balance + s.38(6) balance)**

Reason for Refusal 1 – Conflict with Policy D.H7(1)(a) and (c)

Scheme fails to demonstrate it meets an identified need

Introduction

6. Two points are not in dispute. First, the LPA does not object to the principle of housing delivery per se on the appeal site. Second, as the development plan (Policy D.H7) recognises, HMO style accommodation can, in principle, make a contribution to fulfilling housing need. As the Policy makes clear, however, any proposal for HMO accommodation must meet an *"identified need"* not simply for HMO accommodation in some general sense, but the particular type of HMO accommodation at the particular location. Further, and in addition, if the HMO is not providing "low cost housing" for people on low incomes, it must make an appropriate contribution to affordable housing in the borough, just as any market schemes would.[8]

Policy Framework

7. The proliferation of large-scale purpose-built HMOs (co-living), many of which like the present scheme charge commercial rents, is specifically addressed in recently adopted and emerging development plan policies. Both Policy D.H7 of the Tower Hamlets Local Plan 2031 (2020) ("Local Plan")[9] and draft policy H16 of the new London Plan[10], to which substantial weight can be given, apply to this scheme.

8. It is common ground that in order to satisfy Policy D.H7, the Appellant needs to satisfy all of the criteria listed in part 1 of this Policy which includes D.H7 1(a) and (c). If the Appellant's scheme is in conflict with *either* of those criteria it will be in conflict with the main development plan policy.

Does the appeal scheme meet "an identified need" (D.H7 1(a))?

Interpretation of "identified need"

9. The preliminary issue and on which the whole question of "need" turns is what is the correct of interpretation of D.H7 1(a).

[8] B-02, p.92 9.69
[9] B-02
[10] B-03

10. The secondary question which follows from that is whether the Appellant's evidence satisfies the policy test properly construed.

11. D.H7(1)(a) provides that new homes in multiple occupation will be supported provided they "meet an identified need". If a particular HMO scheme does not meet an identified need it will fail to satisfy the policy and will be in conflict with it.

12. The parties' respective positions on the interpretation of "identified need" can be summarised as follows:

    a) The Appellant considers that D.H7 1(a) requires a decision-maker to consider only the question of whether "there is a demand for more HMO units in this part of London?"[11] or to use Mr Bowen's formulation "can we show we can fill the [the appeal scheme]?" (in XX);

    b) The LPA's considers the criterion requires an applicant to show there is an "identified need" <u>for this specific type of HMO accommodation</u> at the appeal site's location?[12] (i.e. in this case a scheme for high-end, co-living accommodation targeted at those with incomes of £39,000+ at commercial rents)

13. If the Inspector accepts the interpretation that the Appellant contends for (ie "can we fill it?") then the LPA accepts that the evidence in the DAMA is capable of satisfying that low bar.

14. The LPA disagrees, however, with the Appellant's construction of the policy. That is for the simple reason that D.H7(1)(a) refers not just to a general "need" but an "*identified* need" for HMO housing. An "identified need" in this context must mean something different from a requirement to demonstrate whether there is a general "demand", or shortfall of HMO-style accommodation in Tower Hamlets. If that was all that the criterion required, D.H7 1(a) would be superfluous. Paragraph 9.69 of the supporting text to D.H7 expressly recognises that "*an increasing demand for HMO-style accommodation*" exists in the borough particularly among young people.[13] The Plan acknowledges that demand for HMO accommodation exists; it does not need developers to reiterate what the LPA already knows and what the

[11] I-01 p. 3 para. 11
[12] I-02
[13] B-02 based on the GLA household projections.

Plan already recognises. If the Appellant's construction is right, then the policy criterion adds literally nothing.

15. To ascertain its correct meaning D.H7 1(a) must be read in its proper context, with the criterion's stated purpose in mind. The context for the "identified need" criterion is the rest of the D.H7, the explanatory text to the policy and the objectives outlined in the rest of the Local Plan's Housing Chapter.

16. The supporting text to D.H7 [14] provides that whether high-quality large scale HMOs can help to meet the demand for HMO-style accommodation in the borough requires a developer to address the specific type of HMO scheme and location (under Part (a)). The supporting text provides as follows:

> "*9.69…This will need to demonstrated with regards to the specific scheme and location (Part (a)). Applications should seek to address housing need as outlined in Policies S.H1 and D.H2.* (underlining added)

17. The criterion is informed by its purpose. The Plan explains the rationale for the inclusion of Part 1(a) at 9.70 as follows:

> *9.70 Part 1(a), (b) and (c) [thus] ensures development contributes towards maintaining mixed and balanced communities…"*

18. The reason for that are clear. HMOs can be very different, from high end co-living schemes to low cost housing, for example, providing temporary accommodation. The purpose of the policy is to require the developer to identify the need for the particular type of HMO it is putting forward at the particular location. Each of the policy criteria in D.H7 (including D.H7(1)(a)) provide a restraint on the overconcentration of HMOs and are aimed at ensuring these are well integrated into their surrounding areas. This reflects a concern about the particular impacts this sort of shared accommodation can have on local amenity and on preserving mixed and balanced communities (see S.H1[15]), having regard to factors such the transience of HMO residents and the fact that HMO housing does not provide a

[14] Ibid. 9.69

[15] This is echoed in draft Policy H16 in the Publication version of the London Plan which provides H16 A) 2) provides that "Large-scale purpose-built shared living development must meet the following criteria: it contributes towards mixed and inclusive neighbourhoods"

housing typology for much-needed family housing. It is in that context and for those reasons that applicants are required to demonstrate that their scheme meets an identified need for their particular scheme in the chosen location.

19. Whether a particular scheme meets "an identified need" will thus require an applicant to address the nature of its particular scheme and consider who it is for, the rents charged, who locally might need this type of scheme, whether HMO development in this location compromises the supply of self-contained and family units (which links back to Policy S.H1) and what other developments already exist in the same location which might be meeting that need. All of these considerations relate to the purpose of criterion 1(a) set out at 9.70 (i.e. whether the HMO scheme is contributing towards mixed and balanced communities).

Appellant's evidence of need

20. If the LPA's interpretation is correct, it is clear that the Appellant has not provided evidence of a need for this particular type of HMO at this particular location.

21. The Appellant's need evidence comprises the Knight Frank DAMA and some anecdotal evidence based on the operator's experience that there is a demand for its scheme in the locality in the application documents.[16] (Parr in XX).

22. The sufficiency of that evidence depends on the test the Appellant is required to answer. As set out above, if the policy test is "is there a demand for HMO bedspaces in Tower Hamlets and/or the local area?" then the Appellant will have met the test through its Demand Assessment and Market Analysis.[17] On the Appellant's case, such is the extent of the "demand" for HMO bedspaces that there will always be an "identified need" for practically endless numbers of HMOs of any type and tenure under D.H7(1)(a).

23. However, that is not the question the policy asks the Appellant to respond to. If the Inspector accepts the LPA's interpretation then the DAMA alone – which essentially looks at the supply-demand imbalance for HMO bedspaces (of any type) on a borough-wide and local level - does not address whether there is a need for this specific scheme in this location.

24. In particular the Appellant cannot satisfy that requirement without consideration being given to other HMO schemes built, or for which approval has been given, in

[16] H-06, p.6, para 4.6-4.7
[17] D-02, Appendix 2

the locality of the appeal site. Mr Bowen accepted that he had not read the LPA's Committee Report[18] before preparing the DAMA. He, therefore, did not engage with the LPA's reasons for its objection on the grounds of D.H7(1)(a), which made specific reference to the need to consider the Sailmaker's co-living scheme, a few doors down from the appeal scheme. As the LPA explained in its Committee report:

> *"7.21 It should be noted that the applicant has not taken into consideration the approved scheme at 767-785 Commercial Road which would provide a similar type of shared accommodation…The need provided through the approved proposal should have been included in the assessment to understand the actual need for this type of accommodation in the area."* (underlining added)

25. The Appellant has never properly considered the nature of the scheme approved just a few doors down from the appeal site. Indeed, despite the fact that Mr Bowen's own firm carried out work on the Sailmaker's scheme, the DAMA omitted the nearby Sailmaker's scheme from its original analysis. Despite repeating at least 12 times in the DAMA that there are no co-living schemes operating or in the pipeline in Tower Hamlets, Mr Bowen admitted that his assessment had missed the Sailmaker's scheme, just a stone's throw from the appeal site, and the Collective in Canary Wharf[19], a ten minute cycle from the same site. Mr Bowen acknowledged those were schemes he should have taken into account but he said they made little difference to his quantitative conclusion that there is a substantial supply-demand imbalance (18K+ bedspaces) for HMOs in the whole borough (rather than the area) which he contended satisfied D.H7(1)(a).

26. Again, Mr Bowen's conclusion analysis misses what the policy is asking.

27. When one construes D.H7 1(a) as the LPA contends for, it is obviously a relevant matter not just the number of bedspaces that the Sailmaker's scheme will provide (134 HMO bedspaces) but the fact that a few doors down from the appeal scheme there will be another large-scale purpose built co-living scheme, providing almost identical facilities (en suite bathrooms, a gym, co-working spaces), pitched at the similar rent levels (1000-1300 for a single room) as the appeal scheme. The fact that the appeal scheme replicates the type and tenure of scheme at Sailmakers less than 2 minutes' walk away from its site is a relevant consideration which the policy requires to be addressed under criterion D.H71(a). The Appellant's evidence misses this completely because it is focused on a different test.

[18] E-02 p.19 7.21

[19] H-01 p.36 para. 8.103 This is a co-living scheme located in Canary Wharf, 20 Crossharbour Plaza E14 9YF; with studios of priced 1300 per month and similar (if not superior) facilities to the appeal scheme.

28. If one is trying to work out whether there is an "identified need" for this type of co-living scheme in the location, it is critical not just to look at the demand for numbers of HMO bedspaces but at what other schemes there are in the locality and who they are targeted at and whether – having examined those things – there is "an identified need" for another very similar scheme having regard to the policy objective of ensuring mixed and balanced communities.[20] Here, it is telling that the Appellant's evidence failed to look at either the Sailmaker's[21] or the Collective Canary Wharf schemes (10 mins by bicycle) and failed to ask whether there was a need for another very similar scheme in this location, whether its proposal would result in the overconcentration of this type of accommodation or whether the site could be utilised for a type of HMO accommodation which does meet an identified need.

29. Much was made in the cross-examination of Ms Milentijevic about the alleged vagueness of what evidence the LPA requires in relation to this criterion. As the Inspector intimated in a question to Ms Milentijevic, it may be that in future that developer and LPA alike would be assisted by the production of published guidance/SPD on what an applicant is required to show to discharge this test. However, that is irrelevant to the question of construction of D.H7(1)(a) which the Inspector must resolve.

30. In the end, the Inspector will have to decide what he thinks D.H7(1)(a) means. If he thinks it means what the Appellant says it means then, in policy terms the criterion is effectively superfluous, and the DAMA quantitative assessment of HMO demand will fully address this test. If it means what the LPA says, then the Appellant has not addressed the test and will have failed to have demonstrated an "identified need" for this particular scheme in this particular location which results in conflict with the policy.

The is not low cost and does not contribute to affordable housing

Is the appeal scheme "low cost housing"?

31. Even if the Appellant establishes its scheme meets an "identified need", it must also satisfy criterion 1(c) of policy D.H7 and demonstrate *either* that its scheme can

[20] B-02, p.76, S.H1 part (2)
[21] The Sailmaker's consent (LBTH ref: PA/16/0 3657) in 2017 predated the adoption of policy D.H7. At that time there were no other co-living schemes in the local area.

be *"secured" "as a long term addition to the supply of low cost housing"*[22]. If not it must otherwise *"provides an appropriate amount of affordable housing"*[23].

32. The Appellant's primary case is that its scheme is a scheme for "low cost housing". That is obviously wrong. The Appellant's approach to "low cost" makes a mockery of the term.

33. In D.H7(1)(c) the terms "low cost housing" and "affordable housing" are used to mean different things (New HMOs *"can be secured as a long-term addition to the supply of low cost housing* ***or otherwise*** *provides an appropriate amount of affordable housing"*). Paragraph 9.70 of the explanatory text expands on the definition of low-cost accommodation with shared facilities:

> *" …Our affordable housing service – using the evidence from the latest strategic housing market assessment – will assess the proposed rent levels to determine whether the development would primarily provide housing with shared facilities for people on* ***low incomes****. Where is would not meet the housing needs of people on* ***low incomes****, developments will be required to meet affordable housing requirements outlined in Policies S.H1 and D.H2"* (B-02, pp.92-93)

34. The LPA's case is simple. "Low cost housing" in this context means what the Plan says namely, "housing with shared facilities for people on **low incomes.**"[24]

35. The Local Plan does not provide a specific rent guide because it does not need to. It leaves the assessment of proposed rent levels and whether those would primarily provide housing for those on low incomes to the LPA's "affordable housing service". Based on the SHMA, the affordable housing service will make an assessment in order to reach a view of whether the proposed rent levels are affordable to those on "low incomes" [25].

---

[22] B-02, p.92
[23] Ibid, p.92
[24] The Local Plan definition is consistent with the definition of "low cost rents" in the new London Plan (B-03, p.199). Policy H6 of that Publication version of the London Plan concerns Affordable Housing tenure. Part A 1) of Policy H6 provides that residential development should provide "a minimum 30 per cent low cost rented homes, as either London Affordable Rent or Social Rent, allocated according to need and for Londoners on low incomes." As in the Local Plan, in the London Plan low cost rents are those affordable to people on low incomes. However, it should be noted that his comparison is given only to provide additional explanation to the reference of 'low incomes' (given that the affordable housing does not include shared accommodation).

[25] The Council's Statement of Case (E-05, p.23-25, para 6.19 – 6.29) and Ms Milentijevic's Proof of Evidence (H-01, p.19-21, para. 8.38 – 8.48) provide a detailed assessment of this assessment.

36. The Appellant accepts that if the LPA's interpretation of D.H7(1)(c) is correct and "low cost housing" means housing "for people with low incomes" then its scheme is not providing that (Parr in XX). That is not surprising.

37. The appeal scheme is quite obviously not housing for people on low incomes.[26] It has not been designed that way and it is no part of the operators' business model. Rather this is a *"market scheme"* (Parr, XX), which includes facilities such as a gym, cinema and co-working, with rent levels (£1,000 per month for a single room, £1,083 for a double room[27]) predicated on *average* local incomes (£39,000)[28]. No one is suggesting that an average income, which can be "skewed" where you have some very high earners in places like Tower Hamlets, is a *"low income"*. It is obvious that at the proposed rent levels for the appeal scheme (between £12,000-16,500[29]) per annum housing at the appeal scheme would be entirely out of reach for persons on "low incomes"[30].

38. The Appellant's position seems to be that whether housing is "low cost" is a relative concept which can be assessed without reference to people's incomes. It makes no attempt to base its rental assessment on people with low incomes. Instead it argues that because there is no specific formula for calculating "low cost rents" in the policy it is somehow entitled to ignore the wording of D.H7 1(c), paragraph 9.70 as well as draft Policy H6 which defines "low cost rented homes" as being homes for Londoners on "*low incomes"* equivalent to London Affordable Rent or Social Rent.

39. The Appellant simply asserts that its rents are "relatively low cost"[31] (relative to what?), affordable "compared to 'affordable' one bed flats in the E14 area"[32], "low i.e. below London Living Rents"[33], "equivalent to an affordable tenure" (Parr XX). All of these various formulations ignore the critical link to the housing needs of those on "low incomes" and none find any support in the development plan.

40. Even on the Appellant's own definition of "low cost" rents", its proposed rents are not "low cost". The Appellant says its rents could be considered "low" because they are below London Living Rent.[34] Firstly, LLR is not a rent for those on "low

[26] See analysis in H-01 based on the Government's definition of low incomes, as well as Local Housing Allowance Shared Accommodation Rate.
[27] A-19 10.8
[28] A22 p. 2 Bar Chart Rent Levels in E14
[29] E-06 para. 9
[30] H-01, p.19-21, para. 8.38 – 8.48
[31] Parr PoE
[32] A-20 p.3
[33] I-01 p. 6 para. 19
[34] I-01 para. 19

incomes" but is a rent expressly set for people on *medium* incomes (up to £60,000 per household) and for C3 self-contained accommodation rather shared accommodation.[35] Secondly, and in any event, the Appellant's market rents (£1,325 for a double room[36]; or up to £1376.80 for all rooms based on the proposed rent cap contained in the Unilateral Undertaking) are in excess of LLR for a one-bedroom flat (£1118).[37] Therefore, even using their own erroneous benchmark, which has no policy basis, the Appellant's rents are not "low".

41. The Appellant's comparisons to arrive at a definition of "low cost" for shared accommodation are almost entirely based on a comparison to rents for C3 self-contained accommodation. This is despite the fact that the Appellant itself admits treating HMO units as if they were C3 flats "doesn't add up" and is contrary to draft policy H16[38] It may be that the reason that the Appellant is reluctant to compare its proposed rent levels with other forms of shared accommodation in the local area is that this comparison highlights the stark extent to which its rents are not "low cost" (or even affordable). The one occasion where the Appellant makes that comparison[39] it demonstrates that rent levels for shared accommodation in E14 (based on a room in a flat share (£600)) are well below the market rents which will be charged at the appeal scheme (now at £1,325 for a double room[40]).

The unilateral undertaking

42. The Appellant says the aim of rent cap at 80% of market rents for studio flats is to provide "an ongoing control that will keep [its rents] "low cost"" (Parr, XX). The justification for this is a "commercial decision" (Parr, XX).

43. The LPA's objection to the proposed rent cap is twofold:[41]
    (1) the cap would not in fact restrain market rents for the co-living scheme. Mr Parr accepted in XX that the cap reflects the rents the Appellant believes it would charge anyway without an obligation. Those rents (as Mr Brown's HMO rent levels indicated) are considerably higher than the rents the Appellant proposed in its application and far in excess of what people on low incomes could afford.[42] Mr Parr conceded the UU is "not perfect but it

[35] B-03, p.237 *4.16.9 "The rental cost of this form of accommodation is not directly comparable to the rental costs of conventional Use Class C3 housing, as shared living units are significantly smaller than the minimum housing space standard i.e. a one person dwelling of 37 sqm."*
[36] D-05
[37] H-01 Para. 8.56-8.58
[38] B-03, p.237, para. 4,16.9
[39] A22 p.2
[40] D-05
[41] E-06
[42] E-06, paras. 9-11,13

provides an ongoing control which will keep the rents low cost *in future*" (Parr, XX). There is simply no basis for that assertion. If the level of rent in the UU does not now limit the rent to a level that is "low cost" there is no basis for assuming it will do so "in future".

(2) Since the UU fails to secure the housing as "low cost" there is no proper policy basis for its inclusion as a lawful s.106 obligation.

Conclusion on "low cost"

44. The LPA's construction of "low cost housing" accords with the wording of the D.H7(1)(c) and para. 9.70 which defines "low cost" as housing for those on low incomes. No one is suggesting this is a scheme for those on low incomes. It is a high-end market scheme. As such it is required to make a policy compliant contribution to affordable housing, the issue to which we now turn.

The appeal scheme can viably support a much-needed affordable housing contribution

Policy framework for affordable housing

45. Affordable housing requirements are applicable to the co-living scheme because it is not a "low cost" housing scheme. The co-living housing will be charged at market rents (subject to the rent cap[43]). There is thus a strong policy imperative set out in Local Plan policy D.H7 and in the new London Plan draft policy H16, to which "substantial weight" (Mr Parr XiC) can be attached, that such schemes are expected to make an appropriate contribution towards affordable housing.

46. D.H7 requires a developer, where they are not bringing forward a "low cost housing" scheme, to provide "an appropriate amount of affordable housing". This engages the affordable housing requirements in Local Plan policies S.H1 and D.H2.[44]

47. Under those policies, development is required to "maximise" the provision of affordable housing.[45] Lower levels of affordable housing are only acceptable where this is "robustly justified" through viability evidence.[46] S.H1 and D.H2 policies seek affordable housing contributions from all residential developments, including small sites. (2 to 9 new residential units, subject to viability[47]). Sites providing 10 or more new residential units require the provision of a minimum 35% affordable housing, subject to viability[48]. There is thus an imperative to ensure the maximum reasonable provision of affordable housing with the strategic targets in mind.[49]

Affordable housing preliminary points

48. The Appellant cannot viably provide any affordable housing.[50]

[43] As set out above this does not (currently) act as a restraint on the market rents the Appellant thinks it can charge for the rooms. It is unlikely to do so in future since the rent levels have been pegged to the market rents for studio flats, a different more expensive type of self-contained housing unit, rather than shared accommodation.
[44] B-02 Local Plan, p92, 9.70
[45] B-02, Policy S.H1, p.78, para 9.19, Policy D.H2 (2), p.80
[46] B-02, p.78, para. 9.19
[47] B-02, S.H1 (2)(a)(ii), p.76
[48] B-02, S.H1 (2)(a)(iii), p.76
[49] Ibid. 9.21, 9.28
[50] D-02, p.7, para. 4.15

49. It is well-established that the evidential burden for demonstrating that the proposed scheme provides "an appropriate amount" of affordable housing lies with the Appellant.[51]

50. The issue is whether the Appellant can demonstrate that it is unable to viably provide *any* such housing. If there is *any* viability surplus then that should be provided (in the form of a commuted sum) towards affordable housing. In other words, an "appropriate amount" of affordable housing in this context will be whatever level of affordable housing the scheme can viably support. As such, the planning policy does not pose a binary test of either providing 35% or 0% affordable housing. Such is the severity of the need for affordable housing in the borough that even a modest viability surplus would need to be captured as a payment in lieu. If the LPA persuades the Inspector that there is even some surplus in this scheme, the Appellant will have breached the affordable housing requirements of the Local Plan.[52]

51. At the application stage, the Appellant argued that its scheme produced a deficit of £6.29 million[53], which wiped out the notional profit included in the appraisal, resulting in an overall loss of £2.5 million. It now says that whilst the deficit has reduced to £2.41 million, this would still result in the notional profit being reduced from the target of 15% to around 5% and, therefore, it cannot viably provide any affordable housing. That claim requires robust justification.

52. Dr Lee's evidence is that the appeal scheme generates a viability surplus and can viably support a range of affordable options. Based on providing 35% of the HMO units let at rents which are discounted by up to 50% from market rents Dr Lee's expert view is that the scheme can support a payment in lieu[54] which equates to £2.4 million[55].

53. The Appellant sought to make much in cross-examination of the fact that Dr Lee's valuation position has shifted since his initial review of the Appellant's Financial Viability Assessment in July 2020; but this line of argument takes it nowhere. It is entirely proper that when new information comes to light and which is relevant to valuation that the independent expert should revise his or her opinions in light of that new information. That is precisely what Dr Lee has done here in order to

[51] see *Parkhurst Road Limited v Secretary of State for Communities and Local Government* [2018] EWHC 991 Holgate J at [47]-[48]
[52] As set out in Policies S.H1, D.H2 and D.H7.
[53] A-19 Rapleys 'Financial Viability Assessment' 3 December 2019
[54] Affordable housing cannot be delivered as shared accommodation. A payment in lieu is supported by the Local Plan and the draft London Plan.
[55] Dr Lee has explained the methodology for calculating payment in lieu contributions.

provide as much information to the Inspector to make a well-informed decision-making process.

54. In so far as it is said that Dr Lee's valuation has changed substantially, the same is true of the Appellant's appraisal. Having presented a deficit on its scheme of £6.8 million at the application stage, the Appellant has substantially revised its view on both the hostel and HMO rent levels and shifted markedly on benchmark land value such that its RLV has increased from £1.7 million to £3.4 million.

55. Such shifts are predictable particularly when valuing a novel product such as co-living where valuers have little transactional evidence to base their assessment on. In such cases, it is all the more important to take account of additional evidence and learning as that becomes available. That is precisely what Dr Lee has done in taking into account the CBRE paper to inform his co-living yield. As an approach, that is professional and appropriate.

Main areas of difference on viability

56. The main matters in dispute in respect of viability, and which we examine in turn, are:
    a. Development values – the Gross Development Value (GDV) of
        (i) hostel element (difference of c. £1.86 million); and
        (ii) co-living element of the scheme, the most significant driver of which is the difference in the applied yield (difference of c. £8.3 million).
    b. Build costs – (difference of c. £851,883);
    c. Finance rate;
    d. Value attributed to food and beverage revenue (difference £452,941).

HMO - Gross Development Value

Yield - Principles for calculating yields for co-living

57. The yield is an expression of risk level assumed by an investor and is indicative of how sure an investor can be they are going to secure the rental income. Put simply, the more likely it is that a tenant/s will remain in occupation and reliably pay the expected rent, the lower you would expect the yield to be. That is because the income stream is less risky (Mr Brown, XX).

58. As indicated above and stated by both parties, valuing co-living schemes is a new area of valuation. The product is in its infancy. There is very little transactional evidence to the parties. The evidence which does exist is anecdotal, in the form of individual appraisals for different co-living/HMO schemes which can vary in typology (from high end co-living to temporary accommodation) where a range of yields have been applied. Those yields will reflect the rental assumptions in those specific schemes and are themselves likely to be inherently unreliable since they reflect other valuers' attempts to identify accurate yields working with a similar dearth of information.

59. The best evidence before the inquiry of a general approach to take to co-living yields is the CBRE paper *"Co-living: How is it valued?"*[56]. Unlike the sample of individual appraisals on which Mr Brown bases his yield of 4.5%, the CBRE paper presents a synthesis of the evidence on valuing co-living schemes and provides guidance on how to approach yields, operating costs and other inputs for valuing co-living. This independent paper offers an overview of the approach to co-living valuation should be afforded substantial weight reflecting the considered view of the "market leaders" in real estate valuation (Dr Lee, XiC). Indeed, Mr Brown does not challenge the guidance as such (only Dr Lee's application of it); Mr Brown himself relied in XX on CBRE's guidance in respect of the % range for operating costs on co-living schemes which just shows the value of such guidance attributed by both parties.

60. In relation to capitalisation rates, the CBRE paper provides:

> *"In terms of cap rates, we would expect these to sit between the build to rent and PBSA sector for long stay income, depending on location, design and the tenant profile. Yields on short stay income would be higher than for long stay and more aligned to hotel cap rates."*

61. CBRE indicate for long stay income that capitalisation rates/yields will expect to sit within a range, with build to rent (BTR) at the lowest end of the range and purpose build student accommodation (PBSA) at the upper end of the range. As the authors of the paper explain (albeit in the context of rental levels for co-living schemes), as a built product co-living is *"very similar to PBSA"* it is therefore "appropriate to make comparisons to PBSA rents, as well as build to rent and the general rental market".

[56] H-05, Appendix 5.

62. The co-living element of the appeal scheme is long-stay rather than short stay accommodation. As a matter of planning policy, the HMO rooms only qualify as such if they are for tenancies of 3 months or more. In this case, the Appellant is putting forward its co-living scheme on the basis that it will offer 12 month assured short hold tenancies with a 6 month break close and an option to renew at month 11[57]. Therefore, since the co-living scheme is long term accommodation, according to CBRE one would expect the applicable capitalisation rates "to sit between the build to rent and PBSA sector".

63. Moreover, the CBRE paper draws attention to the following factors which are relevant to the yield to be applied:

    (i) Location of the property;
    (ii) Whether the accommodation is for short stay or longer term stay
    (iii) Tenant profile;
    (iv) Quality of the accommodation including level of facilities.

    The relevance of those factors is agreed by Dr Lee and Mr Brown. All of those considerations will be relevant to the demand for the particular co-living accommodation and how much risk is being assumed in developing the land for this use or purchasing such a property in anticipation of renting it.

64. In terms of yield figures, the paper sets out indicative yields in bed sectors for Q4 2019. At the lower end of the range, the yield for BTR in London Zone 2 is 3.25%. At the higher end of the range we are told that the yield for PBSA Direct Let in Zone 1 is 4%. Whilst there is no specific figure provided for the PBSA in Zone 2, there are no obvious reasons why the yield would materially differ for PBSA yields in Zone 2 (Dr Lee, XX). On the Appellant's own case, the appeal scheme is in an excellent location between two employment centres and near to several London universities and a large student population where demand for this type of accommodation is high (Matthew Bowen, XiC). It is therefore perfectly sensible to read the advice that capitalisation rates will "sit between the build to rent and PBSA sector" as suggesting a yield range between 3.25-4.00/4.25% subject to the various relevant factors.

Dr Lee's yield

[57] A-22

65. Dr Lee, having become aware of the CBRE paper in autumn 2020, properly incorporated that guidance into his thinking which informed his valuation. He refers to CBRE's suggested range for co-living capitalisation rates – with BTR at lower end and yields for PBSA at the top end - and has had regard to the scheme specific factors in respect of location, tenant profile, quality of accommodation to evaluate *where* within that range the yield should fall.

66. In his written and oral evidence Dr Lee gave weight to the following factors:

    (a) The appeal scheme's excellent location between Canary Wharf and the City of London with very good transport links providing journey times of five minutes to either (Lee, XiC). This is likely to support demand for this accommodation from both areas.

    (b) The long term length of stay at the co-living. The co-living is proposed to be let on 12 month assured shorthold tenancies. The length of tenancy proposed is long stay and reflects the tenancy lengths which a reasonable operator would seek (Dr Lee XX). The HMO rooms by their very nature are all long term accommodation. As the Building Management Plan[58] (dated September 2019) (A22) states (and as confirmed by Parr, XX), the Appellant is promoting the scheme on the basis that all tenants of the HMO rooms (first floor to sixth floor) will be offered 12 month assured short hold tenancies (which includes a 6 month break clause and the option to renew at month 11). Dr Lee has valued the units accordingly.

    (c) The strong tenant profile targeted by this development is young professionals (earning, at least, average annual incomes of £39K), students and others looking for long term accommodation rather than more transient short stay accommodation. The tenant profile coupled with the length of stay contributes to a lower yield.

    (d) The quality of the accommodation when looking at the range of facilities (including private and shared terraces, cinema, gym) is likely to support high demand for this long stay accommodation.

67. Each of these factors supports Dr Lee's expert judgment that the appropriate yield for this co-living scheme is at the lower end of the guide range indicated by CBRE. His analysis supports a yield of 3.25%.

[58] A-22

68. Dr Lee's is not a "very unusual yield" as the Appellant seeks to suggest[59]. His yield is within CBRE guide range for yields for long stay co-living schemes. As he explained in XX, Dr Lee considered CBRE's indicative range and in applying it to the appeal scheme in question, he had regard to each relevant factors all of which show strong support for a yield at the lower end. He had particular regard to the alignment between the agreed yield of 4.25% for the short stay hostel accommodation and the yield for the long stay co-living which one would logically expect to be less than 4.25%. Finally, as he explained in his oral evidence he also considered the alternate yield of 4% for co-living put forward by Savills in respect of the existing hostel use as part of the Appellant's original Financial Viability Assessment[60] and Rapleys' applied yield of 4.25%.)

Jo Winchester (CBRE) 12 January email

69. Dr Lee's conclusions on yield remain unaltered by the email which was produced on Day 2 of the Inquiry by the Appellant capturing an exchange between Jo Winchester, one of the authors of the CBRE paper, and the Mr Ogunmakin of Interland Group[61]. The Appellant seeks to suggest that this email undermines Dr Lee's adopted yield. It does nothing of the sort.

70. Firstly, the view very briefly expressed by Ms Winchester in response to the leading propositions put by the Appellant is that she considers a yield of 3.25% would "too low for this type of property". She comments that a yield of 3.25% "would represent an up and built stabilised yield in the more established mainstream build to rent market".

71. Ms Winchester offers <u>no</u> view on the yield to be applied to the appeal scheme. In her view 3.25% would be too low for *"85 HMO bedrooms"* but she does not say what the yield should be. Ms Winchester confirms that 3.25% is a yield associated with BTR in Zone 2. That is precisely how Dr Lee has interpreted the CBRE paper, with BTR yields at the bottom end of the suggested range with co-living yields falling *"between"* that and the PBSA yields.

72. Ms Winchester, unsurprisingly, does not qualify the CBRE published guidance in this private email. The paper remains the best evidence regarding guide yields for co-living before this inquiry.

[59] I-01, para.21
[60] A-19
[61] I-05

73. Secondly, in so far as it is being suggested that Ms Winchester is offering a view on what a suitable yield for this property would be (which she plainly is not) there is absolutely no basis whatsoever for treating hers an expert opinion on the yield to be applied to this scheme. She provides no support for the Appellant's yield.

74. We simply have no evidence of what information she based her short responses on. In contrast to Dr Lee and Mr Brown, who have spent the last 6 months considering a substantial suite of appeal documents, to arrive at their valuation, the Inspector has absolutely no information, beyond this short email from the developer, about what Ms Winchester knew about the scheme. The email refers to a "*brief*" conversation between Mr Brown and Ms Winchester but we have no record of what was said in that conversation and what Ms Winchester based her comments on. We have no idea what information or which documents (if any) Ms Winchester had seen. We have no idea what she knew about the tenant profile, the length of tenancies, the surrounding area; we know nothing of what she knew about all of the factors which CBRE (and Mr Brown) recognise as being highly relevant to the determination of the yield.

75. In just a short email Mr Ogunmakin of Interland Group describes the appeal scheme variously as an "84 co-working scheme", "a co-living scheme", "85 HMO bedrooms". All of those descriptions connote different types of accommodation. Again, we have no idea what assumptions Ms Winchester had in mind when she recorded her comments by private email and neither the LPA nor the Inspector has had the opportunity to ask her.

76. Given that Inspector can have little (if any) idea what Ms Winchester's very short email response was based on and the LPA has had no opportunity to cross-examine her; the Inspector should therefore not give *any* weight to this email.

Scrutinising Mr Brown's yield (4.5%)

77. Mr Brown's yield for the HMO scheme was at 4.25% in September 2020. In his December appraisal Mr Brown applied a higher yield of 4.5% which he claimed in XiC is at the very bottom end of the range of potential yields he would consider suitable for a co-living scheme, notwithstanding his having applied a lower yield only months before.

78. The entire evidential basis for Mr Brown's co-living yield of 4.5% is as follows:
    (a) the 4.25% yield applied to the hostel element;

(b) evidence of other individual appraisals of co-living schemes, including a couple of co-living schemes outside of Tower Hamlets with a completely different set of factors to consider where yields of 4.75% have been applied;
(c) what he refers to as the "risk" and "uncertainty" in connection with the novel concept of co-living.

79. Mr Brown agreed in XX with Dr Lee's view that the appeal scheme was in a good location that was "likely to attract those wanting to live in co-living", that the quality of the accommodation was good and that the tenant profile included those in good jobs, working in the financial centre.

80. He disagreed (in XX) that the co-living rooms should be valued on the basis of their being let on 12 month tenancies and suggested they would attract demand for a variety of stays. The fact remains, however, that the only tenancies currently proposed for the HMO rooms are for 12 months and as such it is reasonable for them to be valued as such (in any event, for the purposes of planning policy, tenancies in the HMO would have to be for at least minimum of 3 months to qualify as an HMO[62]).

81. In relation to Mr Brown's yield of 4.5% the LPA makes the following observations:

(a) The application of a higher yield to the long stay co-living scheme (4.5%) than the short stay hostel (4.25%) is illogical and contrary to the CBRE guidance. As Mr Brown agreed in XX, the yield on short stay income will generally be higher than for long stay.[63] That is because in short stay accommodation such as a hotel or hostel, there will be more frequent turnover of guests and greater risk of voids. Demand for short stay rooms is more likely to fluctuate with seasonal demand. CBRE advises that yields on short stay income will be "more aligned to hotel capitalisation rates". By contrast, where the accommodation being valued is for long stay, one would expect the yields to be lower because the income stream will be more reliable. In this case, the location is the same and quality of the accommodation will be materially the same for both hostel and co-living rooms. The only real difference between the two elements is the length of stay. One would expect the yield on the short stay hostel accommodation to be higher than the co-living yield (which should be lower than 4.25%) yet Mr Brown's yields show the opposite and contradict CBRE's advice. He offered no explanation for this fundamental inconsistency in XX.

[62] A-22
[63] H-02, Appendix 5 CBRE paper

(b) Mr Brown's yield of 4.50% is based on individual viability appraisals for viability schemes. The limitations of such evidence is that, as Mr Brown fairly acknowledged, "no comparable is precise", different rental assumptions will be in play in each of these appraisals and in a novel sector, with very limited comparable evidence[64], such appraisals cannot give a synthesis or overview of the generally applicable co-living yields. Cherry-picking particular yields is unhelpful and unjustified. For example, one of the comparables James Brown relies on, Chatfield Street, Wandsworth was applying a yield of 4.75%, but as Dr Lee informed the inquiry, following a s.73 application a 3.25% yield has been applied by his firm in the light of the CBRE paper. This example illustrates the value of the CBRE paper which offer a synthesis and suggests a general approach to capitalisation rates. It is notable that Mr Brown does not actually challenge the contents of the CBRE, although he does not reflect its advice in own yield assumptions.

(c) Mr Brown's contention that co-living yields are substantially riskier than other rental products needs to be interrogated. Mr Brown claims that his higher yield (which on the CBRE yield guide puts his yield on par with a yield for a hotel, albeit in Zone 1) is warranted because this is an "unproven concept". All parties accept that co-living schemes are a relative novelty however, as the CBRE paper suggests this is an expanding sector for which there is growing demand.

Mr Brown says the level of risk is inextricably linked to the level of demand. If that is right then his evidence that the co-living scheme is a risky proposition is flatly contradicted by the evidence of Mr Bowen of Knight Frank. As Mr Bowen set out in the DAMA and in his oral evidence, very strong demand for HMO/co-living accommodation "is not in doubt". Mr Bowen's view (in XX) is that he expects to see a significant increase in the numbers of co-living schemes coming forward to meet this demand. He said this: *"the question no one has thought to ask me is do I think the scheme is going to be filled up? My answer would be, of course, we would expect it to be fully occupied"*. Mr Bowen's evidence that there is a massive demand for HMOs generally and for this kind of co-living scheme in particular in Tower Hamlets (and particularly within the local area of the appeal scheme) supports Dr Lee's case on yield (i.e. that the rental income

[64] H-05, Appendix 5, p.1

on such a co-living scheme for long stay is relatively secure and comparable to a BTR scheme) rather than the far riskier proposition which Mr Brown seeks to portray.

(d) Finally, Mr Brown raised in his oral evidence (for the first time) the relevance of the pandemic to yield. Without any specific evidence he suggested that this added to the general uncertainty and contributed to his higher yield. This claim is without foundation. The impacts of Covid-19 pandemic on the property market are, as Knight Frank's evidence indicates, inconclusive and it is unclear how long (if at all) they will endure for[65].

Overall conclusion on yield

82. If the yield is an expression of risk an investor should have regarding the rental income he could reasonably hope to obtain on the property, then the Appellant's evidence in relation to the demand for its co-living scheme (in relation to its case D.H7 (1)(a)) strongly supports a lower yield (as adopted by Dr Lee).

83. Mr Bowen's emphatic evidence was that he had no doubt there exists very strong demand for the scheme and one easily could fill the scheme with tenants. The LPA does not disagree. Whilst the LPA does not accept this shows the Appellant's scheme meets an "identified need", the evidence of strong demand for this type of housing, in this location, with this tenant profile strongly supports Dr Lee's evidence that a lower yield should be applied to the HMO valuation. On that basis the Inspector is invited to apply Dr Lee's lower yield of 3.25%.

A yield somewhere in between both experts' yields

84. The Appellant sought to suggest in opening that the Inspector is faced with a binary choice between Dr Lee's yield 3.25% and Mr Brown's current yield of 4.5% which he now claims is a "starting point" having previously been at 4.25%. That is not the case.

85. As Dr Lee illustrated in his table[66] showing the impact of different yields between 3.25% and 4.5% on the RLV, even if the Inspector were to apply a higher yield than 3.25% it would still be possible for the scheme to support a surplus at a higher

[65] H-04, Appendix 1, p.13-14
[66] I-11

yield. Specifically, on any yield between 3.25 and 4% the scheme will generate an RLV on Dr Lee's values that would support a payment in lieu.

86. If Dr Lee's HMO rents are aligned with those of Mr Brown, then applying a yield of 4.25% (equal to what Mr Brown contended for until December 2020), the scheme (assuming Dr Lee's other inputs) would still support a viability surplus. On a yield of 4%, the scheme would still support a surplus, even if the Inspector were to accept the Appellant's build costs and fail to account for any Food and Beverage profit which we say he should.

87. This is therefore not an all or nothing argument. The LPA can succeed on its case even if the Inspector does not accept its primary case that a yield of 3.25% is appropriate in the circumstances. Again, it is for the Appellant to justify its position that no affordable housing can be viably delivered.

88. For the reasons given above, the Inspector is invited to prefer the evidence of Dr Lee and to apply a yield of 3.25%. But even if the Inspector is not persuaded that the yield should be as low as 3.25% it is clear that in circumstances where the appeal site boasts a strong location near important employment hubs, universities and has an excellent PTAL[67] rating, a good tenant profile (including graduate employees on average annual pay of £39K p.a) and very strong demand for this sort of co-living/HMO product (Mr Bowen, XX) the yield to be applied should lie at the lower end of the range set out in the CBRE paper.

HMO Operating costs

89. It is common ground that the operating costs of the hostel element of the scheme would be 25% of GDV.

90. In relation to the HMO element of the scheme Dr Lee's operating costs are at 25%; Mr Brown having previously been at 25% in his June appraisal[68] now has the HMO operating costs at 27%. Both experts' figures are within the guide range suggested by the CBRE paper on valuing co-living.

91. The key point in relation to operating costs is that, here, where one has to assess the operating costs in relation to the hostel and in relation to the HMO those two values should be consistent.

[67] Public Transport Accessibility Level.
[68] H-05, Appendix A

92. It is illogical to suggest as Mr Brown has done that the operating costs of the HMO would be higher than the operating costs of the hostel. If anything, it should be the other way around.

93. The operating costs that have been applied on other schemes – schemes which will have different room types, different amenities and services – offer little by way of assistance in determining the operating costs for this scheme. For example, the scheme at Kingsland Road offered higher levels of service (including room cleaning) which accounted for the additional costs applied in that case.[69] Here, where we the operating costs for hostel rooms is agreed and the hostel rooms are materially the same as the HMO rooms, with access to similar communal facilities and services, the most relevant comparison is with the operating costs for the hostel rooms (i.e. 25% as agreed).

94. It is common ground that the main operating costs in the appeal scheme relate to a) reception staffing (responsible for managing check-in and out and tenant requests); b) maintenance (including replacement of fixtures and fittings); and c) cleaning (both of individual rooms and communal areas) (Brown XX). In light of that, it is unreasonable to apply a higher percentage for the operating costs of the HMO than the hostel. If anything it should be the other way around.

95. In terms of the costs associated with:

    a) reception – the costs of regularly checking hostel guests in and out of the hostel will be more labour intensive than supporting the check-in of HMO tenants who move in once at the start of (usually) 12 months and move out at the end of their tenancy.

    b) maintenance – if anything one would expect more intensive use and greater wear and tear in relation to the hostel rooms where people are on a short stay rather than living in a place as their home. In the HMO tenants are required to provide a deposit and therefore are likely to be more careful with furniture and fittings for which they are liable.

    c) cleaning – the Appellant has made clear that in terms of this "substantial cost", HMO tenants are expected to clean their own rooms. The hostel

[69] As Dr Lee explained the operating costs at another scheme Chatfield Road assessed by BNP had been critiqued as high by Dr Lee's colleagues, and only provisionally adopted pending receipt of supporting evidence (which was not forthcoming).

rooms, with a far higher turnover of guests, will need be cleaned far more often with higher corresponding costs.

96. In summary, there is no good reason why the operating costs for the HMO would logically exceed the operating costs for the hostel rooms. There is no justification for Mr Brown putting his HMO costs higher than hostel's costs which are 25%.

HMO rents

97. Mr Brown increased his rents for the HMO rooms between his valuations. His market rents on the double HMO rooms (which comprise a majority of the rooms 60 out of 84 rooms) are substantially higher (£250pm higher for the accessible rooms and £242pm higher on the double rooms) than Rapley's proposed rents[70].

98. That increase, as Dr Lee confirmed in XiC, is entirely reasonable. Dr Lee considered it would be appropriate for him to adopt the Appellant's market rents on its HMO double rooms.

99. Dr Lee's evidence is that the Appellant's rents on the single rooms, however, remain too low. Although the difference is less substantial than the difference between Mr Brown's rooms rents on the single and double hostel rooms (see below) it is difficult to see on what basis the Appellant justifies a 32.5% increase (or charging 325pm more for double rooms than its single rooms). Many (if not most) of the single and double rooms are comparable in size and, therefore, in amenity (all 24 of the single HMO rooms are between 15-17 m2 with 40/60 double rooms are between 16.5m2 and 20m2). Whilst a modest supplement for an extra person might be justified, the difference between the single and doubles does not justify the 32.5% price increase. Tellingly, Rapleys' original proposed HMO rents showed only a modest difference (£83 only) between the single and double rooms. On that basis Dr Lee's higher values[71], which are closer to the values on the double rooms, are more plausible than the rent levels put forward by Mr Brown.

In any event, the proposed rent cap put forward by the Appellant through the Unilateral Undertaking, leaves open the possibility of charging yet higher rent levels - up to 80% of average market rents for *studio units* - in respect of all the co-living rooms. At present that would not restrain the market rents the Appellant considers its HMO rooms can fetch (Parr XX).

[70] See A22 and I-06.
[71] H-02, p.19, Table 6.17.1

Gross Development Value – Hostel Rooms

100. The two main differentials between the parties on the valuation hostel rooms concern:

1. The valuation of the single rooms which Mr Brown values at half the rate of the double rooms;

2. Whether it is appropriate (as a general matter) to apply lower rates to this type of product in comparison with comparable budget hotels.

101. Mr Brown has chopped and changed on his rents values on the hostel rooms. In September 2020, he was valuing the single rooms at £45 per night based on his identified comparable of a Travelodge at Coriander Avenue E14 2AA charged at £50.99 per night and the double rooms at £40 per night.[72] At that time he was valuing the double rooms on the basis that people would be expected to share rooms with people they did not know. On that basis, Mr Brown applied a discounted rate of £20 per person to the double rooms.

102. In his December proof[73] and at the inquiry, Mr Brown changed tack and applied rents to the single hostel rooms of £24 per night ie. half the rate which he now applies to the double rooms at £48 per night.

103. With respect, Mr Brown had it right on the single rooms the first time around in September 2020. By December, however, he bizarrely decided to halve those rents. In respect of the doubles, in September he priced the double rooms as if they would be for shared use by two strangers but by December he applied a much more sensible valuation for the doubles.

104. The LPA's argument in relation to the hostel room is simple. There is no sensible basis for charging the single rooms at half the rates of the double rooms. Neither Rapleys[74] nor Dr Lee have taken that approach which cannot be justified.

105. All the hostel rooms, irrespective of whether they are singles or doubles are single occupancy[75], all have en suite bathrooms and enjoy access to the same facilities and services. The single and double rooms provide materially the same

[72] D-08, p.13-14
[73] H-05
[74] At December 2019 Rapleys was at £32.88 per night for singles and £35.60 per night for doubles)
[75] A-22

type and quality of accommodation. In terms of size, the single hostel rooms (which are mainly 15-15.5m2) are only marginally smaller than most of the doubles which are 16.5-17.5m2.

106. Given that, it is implausible that one would price the single rooms at half the rate of a double room. Where the rooms have the same facilities and levels of amenity you would expect to pay *a rate for the room* (rather than a bedspace). Whilst that rate might reflect a small discount for a single person, it is not plausible that a hostel (or budget hotel equivalent) would charge double the rate on a double room to that on a single room. Indeed, a couple paying for a double room would be very surprised to discover that they were paying double the price for essentially the same room as a single.

107. All of the budget hotel comparables shows that pricing – whether for one or two people – is based on a rate *for the room*. What Mr Brown refers to as the single person hostel options are all rates *for a bedspace* within a shared room[76]. But that is not what is being valued here where we have a single occupancy room en suite rooms.

108. Even at the hostel comparables cited by Mr Brown, where a person wishes to occupy a hostel room on a single occupancy basis[77] – the price charged is given as the rate for the room, and therefore, is substantially higher (usually about double) than the *per bedspace* rate relied on by Mr Brown.

109. Mr Brown's rent on the single rooms is implausible, unsupported by the pricing structures of the budget hotel/hostel comparables and is also inconsistent with his own approach to valuing the single/double HMO rooms. Mr Brown has not charged double for the double HMO rooms! Mr Brown's pricing of the single hostel rooms produces bizarre outcomes whereby the equivalent nightly rate in the HMO (c. £32.25 per night) would, on his analysis, be greater than the single room rate at the hostel. That is the very opposite of what you would expect and underscores why Mr Brown's room rate for the single rooms is not justified.

110. Generally, Mr Brown's valuation of the hostel is too low. Mr Brown accepts that the proposed hostel is "conceptually different" from the existing hostel.[78] Low quality multi-bed dormitories are being replaced by en suite sole occupancy rooms, with access to "excellent facilities" including a gym and cinema. Moreover,

[76] H-05, p.16, para. 6.4
[77] A-22
[78] H-05, p.8, para. 4.4

the hostel is part of a completely modernised development under the same management as the co-living scheme. These factors need to be factored into the valuation of a hostel product which is as good, if not better in certain respects, than the Travelodge comparables, none of which have a gym, cinema or co-working space[79]. The quality of the proposed hostel certainly exceeds the other bedspace/hostel comparables[80] cited by Mr Brown none of which boast these facilities. As Dr Lee puts it there are no material reasons why the rates charged in a high quality hostel would be lower than the rates charged at budget hotels for comparable accommodation.[81]

Food and Beverage profit

111. Dr Lee accounts for a modest profit associated with food and beverage in connection with the hostel only. Mr Brown attributes nil value to this potential source of profit.

112. Mr Brown dismisses this profit as a "remote opportunity" and takes no account of it.[82] Far from being a "remote" possibility the inclusion of some level of food and beverage service (comprising a vending machine, café or breakfast box service) at the hostel is highly likely. No planning permission would be required. Mr Brown's failure to account for any profit in relation food and beverage in the hostel at all represents an omission.

113. Most people would expect a short stay hostel (or budget hotel) to provide a basic food and beverage service. People who enjoy a hostel stay of a few days are willing to pay for that service. All of the comparables referred to by Mr Brown bar one include a food and beverage/breakfast offer. That includes:

(i) the existing hostel, which generates a profit from its café/canteen and generate a profit;[83]
(ii) all of the Travelodge budget hotels have some form of food and beverage offer. In particular, the Travelodge Docklands offers a breakfast box service.[84]
(iii) All of the hostel comparables (with the sole exception of the Budget guest house) offer breakfast and some form of food and beverage on site.

[79] H-05, p.15, para. 6.3
[80] Ibid, p.16, para. 6.4
[81] H-02, p.18, para. 6.10
[82] D-05, p.13, para. 7.2
[83] A-19. Appendix 3, p.2
[84] D-08, p.13

114. This demonstrates a strong expectation on the part of of a food and beverage offer. Mr Brown has simply ignored this potential element of value altogether.

115. This is surprising, since a food and beverage offer is contemplated by the proposed operators. Whilst the Appellant has not included any dedicated A3 space (restaurant/café), a breakfast bar or vending machine could be accommodated within the ground to serve hostel guests. This is not, as has been implied, a "remote" possibility or speculation raised by Dr Lee, it is something which the Appellant has repeatedly referred to.[8586]. This suggests that some form of food and beverage provision is within the Appellant's contemplation, yet Mr Brown's valuation fails to account for it.

116. Mr Brown's evidence is that he does not know whether a food and beverage element would be profit or loss making. Yet he has not sought to ascertain what the profit could be generated would be or to reflect that in his appraisal.

117. By contrast, Dr Lee, drawing on his experience of valuing hotel properties and the comparable of the Travelodge budget hotel breakfast boxes, has attributed a conservative profit in relation to food and beverage comprising a breakfast box offer and the profit associated with a vending machine, something one would expect to find in a hostel aimed at young people[87]. As he explained that is a service you would expect and a demand which you would expect commercial operators to exploit (Dr Lee, XX).

Finance rate

118. Dr Lee applies a finance rate of 6%. Mr Brown applies a rate of 7%. The Inspector is asked to prefer Dr Lee's evidence for the following reasons:

a) Dr Lee is the head of department at one of the leading development viability consultancies in the UK. Inevitably, as a head of department he sees a large volume of viability appraisals (larger than the volume that a sole practitioner such as Mr Brown would expect to deal with). Dr Lee's XiC was that of the appraisals he had reviewed in recent months, the vast majority (77%) applied a finance rate of 6%, with very few (if any) at 7%;

[85] E-03, p.9, para. 5.3
[86] A-20, p.2
[87] H-02, p.20, paras. 6.22-6.24

b) Mr Brown bases his higher finance rate on four examples (i) two 'cherry picked' reports for co-living schemes by BNP Paribas[88], which apply a finance rate of 6.5% lower than Mr Brown contends for; (ii) the Tide Construction appeal (which took place over a year ago) in which the inspector adopted 7% in circumstances where the LPA did not present any evidence for its finance rate, and (iii) the Bath Road scheme agreed with Hounslow in which Mr Brown agreed a 7% finance rate with the local authority in November 2019. This handful of examples, either do not support a finance rate of 7% or are over a year old.

119. In those circumstances, Dr Lee's evidence should be preferred.

Build Costs

120. The difference between the parties on construction costs is £851,883 with three items – mechanical and electrical services installations, overheads and profit and contingencies - comprising 94% of that overall difference. The explanation for those differences is explained in RLF's review of the Appellant's Construction Costs Estimate[89]. In the deliberations over costs, RLF's costs have increased by £145,441, whereas the Appellant's costs have reduced by £252,816. RLF's cost estimate represents a "*fair and reasonable*" estimate[90] and should be preferred in this instance. That delta on the build costs could assume significance if the Inscpector were were to take a position on the yield t somewhere between the positions of the two experts.

Overall Viability Position

121. The Appellant has failed to demonstrate that its scheme provides the maximum reasonable affordable housing. It provides none whatsoever. It could and should be providing more. That matters because the provision of this form of housing for which there is an "*acute need*" in Tower Hamlets is critical to achieving sustainable development. The scheme misses the opportunity to provide affordable housing and conflicts with the policy imperative to maximise affordable housing articulated in the London Plan[91] and in the recently adopted Local Plan[92]. There is

[88] D-05, para.8.2
[89] H-03
[90] H-03, p.9, para. 4.5
[91] B-01 Policy 3.12
[92] B-02, Policies D.H7, S.H1, D.H2

also conflict with the draft new London Plan to which, the parties agree, substantial weight must be given.[93]

122. Affordable housing policies assume great importance in the context of residential applications. Here, where the scheme conflicts with multiple important development plan and emerging policies there is, as the LPA concluded, overall conflict with the development plan.

123. Finally, it is necessary to stand back in respect of the overall scheme and consider whether the relationship between the value generated by the development is commensurate with the cost of developing it. When one stands back from the viability evidence presented by the Appellant it becomes clear that the alleged costs and value in this scheme are out of kilter. On the basis of the figures presented by Mr Brown, a rational owner would retain the existing hostel. While his appraisal outputs suggest that the Appeal Scheme would generate a profit of circa 5% of GDV, this is not a return that is commensurate with the risk of constructing a new scheme and logically, therefore, the owner would not bring the scheme forward. The Appellant's apparent willingness the redevelop the Site indicate that Mr Brown's appraisals understate the value generated by the Appeal Scheme.

124. The LPA recognises the need to encourage rather than restrain development but that must not come at the expense of delivering much needed affordable housing and sustainable development. Nor should inflated development costs be subsidised by a reduction in badly needed affordable housing. Set against the strategic policy background, the provision of zero affordable housing conflicts with the objectives of sustainable development which run through local, regional and national policy.

125. It is for the Appellant objectively to prove that its scheme provides the maximum reasonable amount of affordable housing. It has not done so.

[93] B-03, Policy H16

Reason for Refusal 2 - Heritage, Character and Archaeology

The scheme will harm the special interest of the St Anne's Church Conservation Area

Introduction

126. Reason for refusal 2 is that the *"scale, height and massing of the proposed seven storey building"* would fail to preserve or enhance the character of the St Anne's Conservation Area ("CA") and would result in (less than substantial) harm to the significance of the designated heritage asset ("DHA"). The appeal scheme represents "overdevelopment of the site" and fails to follow good urban design principles. [94]

127. The LPA's heritage case is straightforward. The appeal scheme is located on a sensitive site directly adjacent to a historic Church – Our Lady Immaculate & St Frederick Roman Catholic Church - which is a local landmark[95] and which makes, what everyone agrees is, an important positive contribution to the CA.

128. The sensitivity of the site means it is important to be a "good neighbour"; regrettably, however, the appeal scheme fails to achieve that.[96] Instead of responding respectfully to the Church and its setting, the proposed scheme's increased 7-storey height, bulk, massing and scale will compete with and reduce the prominence of the Church in views along Commercial Road thus diminishing its legibility as a historical asset and its significance as part of the most significant grouping of public buildings at the heart of the CA. This encroachment results in considerable harm to the Church and by extension to the CA which must be afforded "great weight" and which is not outweighed by the public benefits of the scheme.

Significance of the Church and the St Anne's Conservation Area

129. The starting point is a correct understanding of the heritage baseline and the contribution made by the Church to the character and appearance of the CA. The

[94] E-04 p. 5
[95] Described as a "marker" in the street scene (Mr Collins) which currently "draws the eye" (Mr Handcock)
[96] Mr Handcock the proposal scheme "can't be a good neighbour if it's too big"

appeal site is sensitive and "challenging"[97] in heritage terms being sited directly adjacent to the Church, a non-designated heritage asset.[98]

130. The significance of the Church within the wider St Anne's Conservation Area can be in little doubt. The Church is specifically referred to in the Conservation Area Appraisal[99] as making a positive contribution to the CA and is "notable" in its own terms and as part of a significant group of public buildings, which themselves are central to the significance of designated asset.[100] The Church forms a key part of the significance, character and appearance of the Conservation Area.

131. Moving along Commercial Road, through the linear CA, one can appreciate the group of prominent public buildings which underpin the basis for the designation namely St Anne's Church, Limehouse Town Hall, the Passmore Edwards Library and the Our Lady Immaculate Church. The views along Commercial Road, including the Church, in both directions make a "strong contribution" to the character of the CA.[101] When built, all of those buildings would have been visible without being obscured by intervening buildings; the prevailing building height was predominantly low rise at the time giving greater prominence to the public. The Church was designed for this urban context and built to be seen along the main road, which explains why it is pushed a far north as possible[102].[103]

132. The Church is thus a 'landmark' in the townscape and contributes to the CA through both its architectural[104] and associative qualities.[105] The Church is a striking urban church of a "robust"[106] Italianate inter-war design designed to be clearly legible in this prominent location.[107] Attributed to AJ Sparrow, construction of the Church started in 1927 but was not completed until 1934 (reflecting the

---

[97] Mr Handcock at roundtable
[98] D-02 Appendix 4 Heritage Note para. 11; B-08 pp. 6-7; E-02, para.7.74
[99] B-08 pp 6-7. The CA Character Appraisal notes that "the notable Our Lady Immaculate Catholic Church Limehouse (consecrated in 1945) …completes this grouping of significant public buildings."
[100] Ibid. The CA Appraisal notes "*The prevailing character of the St Anne's Church Conservation Area is defined by the mixed uses of the principal public buildings of Limehouse amongst the more recent residential townscape"*. It is clear that the group of public buildings is central to the CA's significance and included in that group is Our Lady Immaculate Church.
[101] Mr Handcock
[102] Mr Handcock at roundtable
[103] A 21 fig 14. Local residents also highlighted the local historical significance of the statue of Christ the Steersman which together with the tower would have been visible across the docks and throughout the CA.
[104] The Church is of robust and obvious architectural quality. It warranted a reference in Pevsner's Buildings of London (see A 21 para. 2.18).
[105] D02 Appendix 4 Heritage note para. 11
[106] Mr Handcock roundtable
[107] E-02 para. 7.111

challenging finances of an inner city working class parish). As Mr Handcock explained, the Church was designed to be prominent along the Commercial Road but also visible to the docks to the South from the Limehouse where many of its congregants would have worked. The Church was built for the Irish Catholic community which grew in the late-19C and early 20C alongside other immigrant groups in the East End. The Church thus contributes to a narrative about the industrial, maritime, civic and migrant history of Limehouse that lends significance to this CA. These associative qualities are underplayed and largely missing from the Appellant's Heritage appraisal.[108]

133. The Church's landmark qualities and significance in terms of wider group value are best appreciated in kinetic views moving along Commercial Road.[109] Photographs and CGIs[110] inevitably present only a snapshot view, and need to be seen by the Inspector as examples of the views that one would get as one moves up and down Commercial Road. As Mr Handcock explained, the Church has great significance as a non-designated asset and in these kinetic views, makes an undoubtedly important contribution to this mixed, industrial, urban CA.

134. The Appellant has understated the significance of the Church and the CA. It has sought to downplay the Church's significance on account of it not being locally listed.[111] It is not clear why the absence of a local listing matters in circumstances where the Church is accepted to be a non-designated heritage asset and a 'landmark' building which is specifically recognised in the CA Character Appraisal.[112] It is a matter of judgment under para. 197 of the NPPF what significance the building holds but it is clear that the primary consideration is the considerable positive contribution it makes to the CA. The Appellant has also downplayed the significance of the CA, apparently in order to justify the harmful impact of its scheme. The Appellant suggests that the "urban quality of the area as a whole is poor" and has been "denuded of its coherence" and "its historic character…has suffered" due to modern development in the area. The LPA disagrees that the CA has been substantially degraded by such change[113], but even if that were the case, that would reinforce why it is critical to protect the most

[108] A21
[109] D-02 App 4 para. 5 Heritage Note notes that Church will be appreciated from different positions "*As a component of the townscape of a busy thoroughfare an appreciation of its qualities will mostly be a dynamic one passing from east-west or vice versa when different elements will reveal themselves at different moments.*
[110] A 03
[111] A 21 para. 2.38
[112] See B-08. There are no other locally listed buildings in this CA.
[113] A21 para. 2.35-2.36

important heritage assets within the CA are from cumulative harm[114] so that their significance can still be understood.

Impact of the appeal scheme on the Church and Conservation Area

135. The view that appeal scheme will harm the Church, and therefore the CA, is widely shared. It is a view held by Mr Handcock,[115] the LPA's design and conservation officer - who concluded that the proposal was *"visually intrusive"* and *"detrimental"* to the character and appearance of the CA,[116] and a number historical amenity societies, including the Twentieth Century Society, the Georgian Group and Ancient Monuments Society who formally objected to the appeal.[117] All of these heritage experts agree that the scheme will harm the Church and CA.

136. Moreover, the Inspector heard from, Cllr King, the ward councillor for Limehouse, there have been a large number of local objections on heritage grounds. The Inspector will have seen these in the residents' responses to the planning application. This suggests that the associative significance of the Church is not only academic but also experiential as it is widely recognised by local people who fear the proposed scale and massing of the appeal scheme will "dominate" the Church.

137. In contrast to this wealth of independent opinions, the Appellant's consultants contend the scheme will cause <u>no harm</u> to the CA and that it will in fact result in a "considerable enhancement"[118] on the existing position. At the roundtable on heritage, character and appearance, Mr Williams, the scheme architect, gave his view (on multiple occasions[119]) on the scheme's impact on the significance of the heritage assets. As the scheme's architect Mr Williams understandably seeks to defend the merits of his own scheme but, as Mr Handcock pointed out, he is not a heritage expert. His views on heritage matters should be given limited weight, and certainly no more weight than other non-expert consultees.

138. In terms of the nature and extent harm, Mr Handcock explained the principal source of the harm was the appeal scheme's excessive scale and height (7 storeys) which would "encroach" and "diminish" the townscape role of the Church and its

[114] Mr Handcock drew attention to B12 and how it should be applied.
[115] As Mr Handcock explained he frequently acts for developers so his evidence that the scheme would result in harm has added credibility
[116] E-02 paras. 5.19-5.24
[117] I-01 Twentieth Century Society; Georgian Group; Ancient Monuments Society
[118] A21 Heritage Appraisal 4.15
[119] A-16 mainly by reference to his Design Revision document of October 2019

contribution as a local landmark building which contributes to the group value of the other main public buildings in the CA. The impacts of the proposed scheme can be seen in the CGIs.[120] The overall height of the proposed building would reach the top of the tower's lantern section. The two setback floors would introduce massing in views of the Church's tower which would undermine the Church's strong presence in the townscape and diminish the appreciation of the church as an important focus in this location; these are not recessive, discrete elements of the building's architecture.[121] This would result in the Church losing its landmark quality which positively contributes to the CA. Due to the harm this would cause harm to the "key group" of buildings in what is a geographically small CA, there would be "a notable degree of harm to the group on a moderate level".[122] This, Mr Handcock explained (careful not to exaggerate) would result in less than substantial harm in "the middle of the spectrum"(between no harm and substantial harm).

139. Mr Handcock's assessment is consistent with the LPA's Design and Conservation officer assessment that:

> "*5.21 The height of the [proposed] building, particularly the upper set back floors, and the building mass fail to allow the tower to be read as the most prominent tall and standalone feature in the townscape. This impacts [on] the character and distinctiveness of this area of the conservation area…"*[123]

140. The harm to the prominence of the Church in CA thus contributes to the *cumulative* harm to the CA.[124] The Historic England guidance warns that incremental harms can produce as great an effect as larger scale change on a heritage asset.[125] The guidance states that *"where the significance of a heritage asset has been compromised in the past by unsympathetic development to the asset itself or its setting, consideration still needs to be given to whether additional change will further detract from… the significance of the asset in order to accord with NPPF policies"*.[126] This is relevant where the Appellant is seeking to justify the impact of its scheme in the context of the "poor" urban quality of the area.[127] If anything the significant changes in the CA and the banal design in and around the Church, heightens the

[120] A-03 CGI 1 and 2
[121] E-02 para. 7.116
[122] Mr Handcock at the roundtable
[123] E-02, para.5.21
[124] Mr Handcock at roundtable
[125] B-13 para. 28, Mr Handcock at roundtable
[126] B-13 para. 28, Mr Handcock at roundtable; This concern with "cumulative impacts" is echoed in draft policy HC1 C of the Publication version of the London Plan.
[127] A21 para. 2.36

significance of the remaining heritage assets and their settings and makes their protection from further cumulative impacts all the more important.

141. The Appellant's suggestion that its design can be read as a ground floor and 4 storeys along Commercial Road and that the top floors are *"barely visible"*[128] is untenable. As the CGIs make clear, that is not how the building will appear even with the setback.[129] Mr Handcock disagreed with Mr Williams assessment that the top two floors would effectively "disappear from view" and explained that these floors would draw the eye, appear out of context[130] and "almost upscale the Church".[131]

142. The suggestion by Mr Williams that because the views of the Church along Commercial Road would not be altogether lost, there would therefore be no harm[132] to the heritage asset is, with respect, an overly simplistic argument which fails to take account of how the building would be perceived with the additional height and massing encroaching in views of the Church and its landmark tower. From the CGIs, it is clear the Church is afforded very little 'breathing space' and will become less easy to spot and appreciate. This means the Church's prominence and historic legibility will be diminished and with it that of the key group of public buildings in the CA.

Response to Appellant's case on heritage

143. As set out above, the Appellant substantially understates the significance of the Church and the CA and so begins its heritage assessment from the wrong baseline. Further, the Appellant's case that its scheme causes no harm (or at least not significant harm to CA[133]) is flawed in the following key respects. The Appellant:

(a) overstates the improvement achieved by the replacement building over the existing Panda House;
(b) misplaces or places excessive reliance on the 2012 planning permission (for an extension and recladding to the existing hostel with a maximum of 5 storeys in height);

[128] Mr Williams at roundtable
[129] A-03 CGI 1 and 2; also E-02 Update report para. 1.1
[130] E-02 para. 7.82
[131] Mr Handcock
[132] A22 p.2, the Appellant claims *"can only be seen together from a limited part of Commercial Road in one direction (east looking west) with the proposed building being hidden by the Church in the opposite direction"*. That analysis misses the point.
[133] H-06 0.13 para. 11.4

(c) in seeking to justify the excessive height of its scheme, has relied on other tall buildings which simply do not share the same sensitive context as the appeal site.

144. For the reasons set out below, none of these arguments are persuasive.

145. **(a) A "better" replacement?** It does not follow that merely because the proposal is replacing an old, dated building with a new one that the new building will automatically be better than one it replaces in heritage terms. The test is what is the overall net effect, in heritage terms, on the CA of the demolition of the Panda House and its replacement with the proposal scheme.[134]

146. The Appellant says its scheme represents a "considerable enhancement" on the 1960s Panda House which it argues, makes a "negative contribution"[135] to the CA. That is an exaggeration.

147. Whilst Mr Handcock did not pretend that Panda House has any architectural merit (and indeed the LPA has never objected to its replacement in principle) he observed that the existing building preserves the historic prominence of the Church and does not actively harm the heritage asset. Unlike the proposal building, it is not actively intrusive and falls into the background of longer views**.** The low scale of the buildings on either side of the existing church ensure that its status as a local landmark is preserved[136] allowing it *"breathing space"* and "*creating a differential relationship that reinforces the visual prominence of the church within its townscape and streetscape setting"*[137].

148. In assessing the replacement building, it is not possible to divorce the specific design details from the height, scale and massing of the building. Design is to be appreciated in the round. The LPA does not accept that the proposed scheme is of high quality such that it represents a dramatic improvement over the existing building. The fact that the replacement scheme may, for example, introduce better brickwork than the existing scheme, does not overcome the fundamental harm generated by the scheme if the replacement building is too tall.

149. In any event, the LPA's design and conservation officer considered the design generic, lacking in detail and its "incoherent fenestration pattern" does not respect

---

[134] Bohm v SSCLG [2017] EWHC 3217 paras. 33, 36
[135] A 21, 2.40
[136] E-02 para. 5.20, 7.115
[137] E-02 para. 7.78, 7.112 The existing arrangement "*allows for the Church and its tower to be appreciated in its entirety*"

local character;[138] "*Overall the proposal represents overdevelopment. In addition the building has a boxy appearance and lacks any design detailing"*[139].

150. Even if the proposal scheme is judged to be an upgrade in terms of the design quality on Panda House that does not make it less harmful *in heritage terms*. The scheme's increased height, mass and scale is more overbearing and encroaches more on the significance of the Church than the building it replaces. The net effect of the redevelopment is a scheme which results in greater harm to the Church and CA than the building which it replaces.

151. **(b) 2012 permission.** The 2012 consent does not provide a baseline for what is acceptable in terms of built development and height on the appeal site. First, the 2012 consent was never implemented, has now expired and does not represent a fallback. Second, the hostel scheme was granted on its own merits and specification. Whilst the consent post-dates the adoption of the NPPF, it predates the *Barnwell*[140] Court of Appeal decision which clarified the approach to a decision-maker's statutory duties in relation to designated heritage assets. That decision made clear that harm to the setting of a designated asset must be given "*considerable importance and weight*" and that even if the harm to the designated asset was less than substantial that did not remove the presumption against the grant of planning permission. It is not clear the 2012 scheme would have been consented post-*Barnwell*. Thirdly, and in any event, the proposed scheme is some 1.5m higher than the 2012 consented scheme along Commercial Road.[141] The fact that the appeal scheme may be lower in terms of the elevation immediately fronting Commercial Road does not mean that its overall impact, including increased height and massing, is not more detrimental to the heritage asset than the consented scheme. It is important, as Mr Handcock emphasised, to view the scheme as a whole.

152. The LPA has consistently made clear that five storeys is at the upper limit of what it would consider to be acceptable in terms of height in this location. In 2017 it refused a planning application (PA/15/01882) for a hostel scheme of six storeys on heritage grounds, repeating its stance that any proposal on the appeal site must be "*subordinate"*[142] in height and massing to the Catholic Church. The Appellant has ignored those concerns and instead proposed a building which exceeds the height and scale which was rejected. The effect of its scheme diminishes the

[138] E-02 para. 7.82, 7.84
[139] E-02 5.24
[140] *East Northamptonshire DC & Barnwell Manor Wind Energy v SSCLG* [2015] 1 WLR 45 at [26]-[29]
[141] D-06 para. 13
[142] E-02 para. 5.19

Church's prominence and legibility in the CA[143] and *"would result in an incongruous relationship with the adjoining church which would no longer be the most prominent tall feature in the townscape"*.[144]

153. **(c) Inappropriate height?** The starting point for any proposal on the appeal site should be to respond to its immediate context and historic environment in which is situated. In this case that means respecting the prominence of the Church's tower. The excessive height of the 7 storey building, even with the set back of the top two floors fails to achieve that.[145]

154. The prevailing building heights in the immediate context of the appeal site and Church are between 3 to 6 storeys in height. The residential block immediately adjacent to the west of the appeal site is 6 storeys with a top floor setback and steps down to three storeys along its southern boundary. To the south, there is a part 3/part 4 storey residential building on the corner of Island Row and Mill Place.[146] The Appellant's case relies on the fact there are a number of buildings in and around the CA which are of the same height or taller that the proposed scheme to justify the seven storey proposed here.

155. That argument is unconvincing for the following reasons:

156. First, because none of the tall buildings taken as reference points are located adjacent to and in line with a landmark non-designated heritage asset. Where these exist, they are set back from the line of the CA's important group of buildings (see Park Heights, set well back[147]). Context is everything, given the direct proximity of this site to a landmark building, and the existence of buildings of a similar scale within the wider CA does not justify the scale of the proposed building appropriate (or capable of avoiding harm) in *this* location.[148]

157. Second, a number of the taller buildings referred to by the Appellant lie outside the CA and therefore are not useful comparables. This includes the building directly across Commercial Road to the north. These may be part of the wider

[143] Mr Handcock at the roundtable
[144] E-02 para. 7.79
[145] Mr Handcock
[146] E-02 para. 7.75
[147] This means that Park Heights does not have prominence in the street scene and *"comes and goes from sight as you move along [Commercial Road]"*.
[148] Mr Handcock at the roundtable : *"It is not my view that you should look at the heights of the buildings down the road and compare [to the appeal scheme]. The appeal scheme's height will need to be viewed in relation to its immediate context and impact."*

context, but are not subject to the same designations and sensitivities as the appeal site.

158. Not a single scheme referred to by the appellant as a precedent possesses the same sensitivities as this site. By contrast, the appeal scheme is located in the CA, directly next to the Church which is a non-designated heritage asset, fronting onto Commercial Road. The impact of seven storeys in this location is greater – and more significant in heritage terms – than it would be in the location of the other taller buildings referred to in the CA. In those locations a tall building does not have the effect it has here of encroaching immediately upon the Church and diminishing its landmark quality in the townscape and the main thoroughfare from which the CA is appreciated.

Weighing of heritage considerations

159. Section 72 of the Planning (Listed Building and Conservation Areas) Act 1990 (1990 Act) provides that in determining planning applications, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of the conservation area. 'Preserving' in this context means doing 'no harm'[149] and any harm to the designated asset, even if the harm is "limited" or "less than substantial" should be given "considerable importance and weight".[150]

160. The operation of paragraphs 192-197 of the NPPF is consistent with development plan heritage policy S.DH3 and with the emerging policy in new London Plan, HC1.

161. The proposed development would result in

(a) overall harm to the CA and its setting[151]; and

(b) harm to the Church which the parties agree is a non-designated heritage asset.

The two types of impact fall to be considered separately and are subject to different policy tests (para. 196 and 197 respectively) although the real focus of the LPA's case in on the harm to the Church as a strong positive contributor to the significance of the CA. The harmful impacts which arise to the Church are the principal source of the overall harm to the CA.

[149] *South Lakeland DC v SSE* [1992] 2 AC 141

[150] *Forge Field* at [43] and [45] [2014] EWHC 1895 (Admin)

[151] The desirability of preserving the character or appearance of the conservation area must be given "considerable importance and weight" (see *East Northamptonshire DC & Barnwell Manor Wind Energy v SSCLG* [2014] EWCA Civ 137 at [26]-[29]);

162. The "notable degree of harm" to the CA, in the "middle of the spectrum" between "no harm" and "substantial harm" must be afforded *"great weight"*.[152] If the Inspector agrees with the view of Mr Handcock, the LPA's conservation officer and the specialist amenity societies that there is considerable harm to the CA, then that gives rise to a presumption against the development.

163. It is for the Appellant then to establish that there is a 'clear and convincing justification for the harm' and that public benefits which arise outweigh the harm.[153] This is not a case where the Appellant is contending that the only way of delivering its upgraded hostel/HMO is by delivering a larger and taller building. That forms no part of its case. There is, therefore, no justification why the building needs to be as high as it is, where that height and additional massing of the top floors which are is the principal cause of the heritage harm.

Archaeology

164. Finally, to the heritage balance and overall planning balance needs to be added the potential impact on archaeological assets as a result of the proposed basement works.[154] The appeal site is located on the site of a Congregationalist chapel, which raises the prospect of human remains being present; the significance of which was explained by Mr Single. Archaeological assets are non-designated heritage assets. The impact on these assets is currently unknown given the lack of information provided by the Appellant, which has been requested since summer 2020. In accordance with NPPF para. 189 further appropriate assessment or field evaluation is needed *before* it is possible to assess the significance of the assets which may be impacted.[155] Para 197 of the NPPF requires any impact to the significance of a non-designated heritage asset to be taken into account at the stage of determining the application. At present this cannot be appropriately assessed due to the lack of information. The LPA and the statutory consultee Greater London Archaeology Advisory Service do not consider this omission can be addressed by Condition 5.

Conclusion on heritage

[152] Even if the harm is "limited" or "less than substantial" this should be given "considerable importance and weight" (*Forge Field* at [43] and [45] [2014] EWHC 1895 (Admin)). In *Forge Field* where the harm to significance was less than substantial and involved an effect on setting rather than damage to the assets themselves, the CA nevertheless held there was a strong presumption against granting planning permission;
[153] Para. 196 NPPF
[154] E-02 7.126
[155] Greater London Archaeology Advice Service Note (4 December 2020)

165. For the reasons set out in Ms Milentijevic Proof of Evidence[156] and Supplementary Note, the Appellant has not shown that the public benefits of the scheme outweigh the heritage harm under the para.196 balance. As such, the heritage harm represents a stand alone reason for refusal.

[156] H-01

Reason for refusal 3 – Inadequate Amenity and Living conditions

166. Despite the Appellant's grand claims about the "excellent facilities" in its commercial scheme, the proposed HMO falls short of the policy requirements requiring good quality shared living accommodation. In particular, the development fails to provide adequate daylight to the main living areas (living, kitchen, dining ("LKD")) areas for the majority of residents within the HMO. The daylight levels to the communal spaces on the first, second and third floors are not just below, but are substantially below the BRE daylight guidelines.[157] Given the reliance that will be placed on these spaces by the many HMO occupants for basic services and amenity, this amounts to a serious breach of policy.

Policy framework

167. HMO developments are expected to provide "high quality living space"[158] D.H7 1(f) specifically requires that HMOs to comply with the relevant standards and space standards set out in policies D.H3 and D.DH8.

168. Policy D.DH8 requires development to "*protect and where possible enhance…the extent of amenity of new…buildings*". To that end "*developments must* c. *ensure adequate levels of daylight and sunlight for new residential developments, including amenity spaces within the development.*" The supporting text explains that the daylight levels of living room, kitchen and dining rooms should all be considered and the assessment of daylight levels should follow the approach in the most recent version of the BRE guidance and the British Standard Code of Practice.[159]

169. Policy D.H3 sets out the requirements on minimum amenity space standards. Of particular relevance to the appeal scheme is D.H3(5)(c) which provides that "*for developments with 10 or more residential units, the minimum communal amenity space should be 50sqm for the first 10 units plus a further one square metre for every additional unit thereafter*".[160]

Daylight levels to main amenity spaces

[157] Building Research Establishment 'Site Layout Planning for Daylight and Sunlight' BR209 The guidance for Average Daylight Factor expects new developments to achieve a minimum Average Daylight Factor (ADF) of 2% or more for kitchens, 1.5% for living rooms and 1% for bedrooms.
[158] B-02 p. 93 para. 9.72
[159] B-02 p.68 para. 8.89
[160] B-02 p.84

170. As Ms Milentijevic and Mr Owens, the LPA's internal daylight & sunlight officer explained at the roundtable[161], the daylight levels to the communal areas, namely to the living space, kitchen and dining areas on the first and second floor (and one LKD on the third floor) would fall well short of the BRE guidelines[162] for expected Average Daylight Factor (ADF) for these spaces. In real terms, Mr Owens explained that below ADF of 2% the rooms in question would look "dull" and probably require electrical lighting during daylight hours[163]. Considering these rooms are going to provide basic facilities for future occupants on those floors, as highlighted by Ms Milentijevic, one would expect them to provide adequate levels of daylight; as Mr Owens put it bluntly, an ADF below 1% in a space which serves as the sole primary living space for several (5-10) people that is "not great".

171. The BRE guidance expects new developments to achieve the minimum Average Daylight Factor (ADF) of 2% or more for kitchens and spaces incorporating kitchens, 1.5% for living rooms and 1% for bedrooms[164].

172. In the appeal scheme[165], both living/kitchen/dining (LKD) windows on the first and second floors fail to achieve the minimum ADF of 2%. The LKD windows on first and second floor, which are north-facing, would achieve significantly less than the minimum required 2% ADF (0.81% - first floor and 0.95% - second floor). In addition, the north facing LKD window on the third floor would achieve 1.07% against the 2% minimum ADF guide.

173. The lack of adequate daylight to these main living areas is a serious failing. These areas on the first, second and third floors will serve as the primary living spaces for up to 82 occupiers of these floors.[166] Occupiers will expect to use the communal facilities for basic activities including cooking and eating, as well as socialising on the same floor as their bedroom. This means some 60% of occupiers of the HMO will not have access to adequately lit essential living areas; this constitutes a significant breach of Local Plan policy D.DH8 1(c)[167] and D.H7.

174. The Appellant's response is that

[161] Also E-02 paras 7.48-7.55
[162] Building Research Establishment 'Site Layout Planning for Daylight and Sunlight' BR209 Guidance
[163] Also B-09, p.3, para. 2.1.8
[164] B-09, p.3, para. 2.1.8
[165] A-17, Appendix 3
[166] Based on up to 68 occupiers on the first and second floors and half of the third floor occupiers given that the third floor contains two LKD areas (one south-facing and one north-facing).
[167] B-02 p.62

(a) its scheme achieves "very good" natural daylight levels which would be hard to improve upon[168];
(b) there are no minimum daylight levels set out in Policy D.DH8 prescribing the lighting levels for communal spaces in HMOs[169];
(c) the BRE guidelines are guidelines only and should be applied flexibly; and
(d) daylight levels to the identified LKDs are rendered more acceptable because of the ample space provision and the open plan chosen by the Appellant. That said, Mr Williams was keen to point out at the roundtable, the LKD layout could be rearranged.

175. As to (a) and (b) it is notable that the Appellant does not dispute the affected spaces fall below the minimum requirement of ADF levels in the BRE guidelines for LKD. There is no reason why the expected daylight levels to these essential spaces in shared accommodation should not be the same as the expected levels as for self-contained units. Policy D.DH8 does not discriminate between the two and refers to ensuring adequate daylight levels in "new residential developments". In addition, policy D.H7 requires development proposals to provide "high quality" HMOs undoubtedly includes adequate levels of daylight for future occupiers. The suggestion that the BRE guide levels, endorsed in the Local Plan, do not apply to HMOs and communal spaces is a bad point. Indeed, as Mr Owens argued you could argue the need for adequate daylight in communal facilities which are shared by many people is even greater than in private LKDs.

176. In relation to (c) the LPA has applied the BRE guidelines flexibly, focussing its case on the most egregious transgressions of the ADF guide levels. It has done so against in a policy context where requirement for adequate daylight levels to amenity spaces is expressed in mandatory terms in D.DH8. Whilst the BRE may not be an instrument of planning policy[170], where, as here, the BRE guidelines are specifically referred to in the Local Plan, the ADF guide levels should be given additional weight. The ADF guide levels are the most reasonable barometer (and the only measure put forward by any of the parties[171].) for assessing the adequacy of the daylight levels in a consistent way. In qualitative terms, the Inspector also has the expert view of Mr Owens that at these light levels the worst affected LKD will appear "dull" even in the middle of the day. That is plainly inadequate in daylight terms on any view.

[168] D-02 Appendix 5, para. 46
[169] D-02 Appendix 5, para. 42
[170] Paragraph 1.6 of BRE Report 209 (2011 2nd Edition).
[171] A-17.

177. In respect of (d) Mr Owens explained that rearranging the layout and location of the kitchen area would not make a material difference to the calculation of the ADF formula which looks at different factors including the floor and window ratios.[172] Indeed, Mr Williams appeared to accept that rearranging the layout "will not change the ADF scores".

Insufficient amenity space

178. In addition, to the inadequate daylight levels, the appeal scheme provides insufficient external communal amenity space for the number of HMO rooms in conflict with planning policy D.H3 5(c) which is referenced in policy D.H7 1(f).

179. Against the policy requirement, the appeal scheme should have provided a *minimum* of 124 sqm but instead it provided 110 sqm. That calculation is not in dispute, as confirmed by Mr Williams at the roundtable session. That results in an under provision of 14 sqm of vital outdoor space. The LPA does not consider this is offset by the provision of private or indoor amenity space within the scheme as the Appellant suggests. At the roundtable, Ms Milentijevic referenced New London Plan policy H16 which provides the emerging planning policy on co-living/HMO developments. This policy emphasises the importance of communal spaces in lowering barriers to social interaction and encouraging engagement between people. It is unlikely that the provision of private balconies, which are not accessible to all occupiers, could meet this aim and the need for communal external amenity space accessible to all occupiers.

Conclusion on living conditions

180. In large scale shared accommodation, ensuring acceptable living conditions over the long term for occupiers is a key requirement of the Local Plan. Despite the appeal scheme boasting excellent facilities in some respects (the gym, cinema, co-working), it falls short in other fundamental respects most notably the poor daylight levels of communal spaces serving as basic facilities on first, second and third floors, as well as lack of minimum communal external spaces.

181. The LPA has followed para. 123 (c) of NPPF in taking a flexible approach to applying the policy and guidance in relation to daylight levels. National policy, whilst emphasising the need to boost housing development, does not suggest that daylight policy should be applied at the expense of acceptable living standards; it specifies that LPAs should take a flexible *"as long as the resulting scheme would provide acceptable living standards"*. Applying that approach here it is clear that the

[172] B-09, Appendix C, p.53

daylight levels to the primary living, kitchen and dining spaces of up to 82 people will be poor and "dull". In a large scale HMO of this kind, the provision of adequate amenity space and adequately lit spaces is all the more important because those spaces are shared so widely. The inadequate daylight levels, coupled with the paucity of outdoor amenity space, amount to material conflicts with the development plan which need to be weighed in the overall planning balance.

Overall Planning Balance

Introduction – the implications of the HDT

182. On 19 January 2020, following the conclusion of oral evidence, the Ministry of Housing, Communities and Local Government published its latest Housing Delivery Test ("HDT") results for 2020. These results show the LPA has delivered 74% of the total number of homes required over three years.[173] As this is "substantially below" the target requirement, the LPA has (albeit by the finest of margins) become a "presumption" authority meaning paragraph 11(d) of the NPPF is engaged (per footnote 7).[174]

183. Contrary to the Appellant's assertion in correspondence to PINS[175] that the consequence of this is a very simple matter necessitating no more than a two-page explanation of the policy position, the position is both legally and evidentially is complicated.

184. The correct legal approach to para. 11(d) of the NPPF and its interaction with the s.38(6) of the Planning and Compulsory Purchase Act 2004 balance is outlined in the High Court authorities in *Monkhill*[176] and *Gladman*.[177] However, it is important to note that both of those decisions are currently the subject of appeals in the Court of Appeal; in other words, the approach to para. 11(d) is contested.

185. On the current understanding of the law, where para. 11(d) is engaged, the following steps are required:

i. First, it is necessary in any event to apply s38(6);
ii. In this case, which raises a heritage objection, para. 11(d)(i) falls to be applied. The Inspector must consider whether the scheme's conflict with para. 196 of the NPPF provides a clear reason for refusing the development. If it does, the tilted balance is disapplied and permission should be refused subject to applying s.38(6)[178];
iii. If there is no clear reason for refusal on heritage grounds, the Inspector should proceed to apply limb 11(d) (ii) and determine the application by applying the tilted balance and the s.38(6) balance. That will involve an

[173] The LPA has delivered 8,106 of the 11,002 homes required over the 3 year period.
[174] Per footnote 7 of the NPPF
[175] Email from Appellant's counsel to PINS 21 January 11:36
[176] *Monkhill Ltd v SSHCLG* [2019] EWHC 1993 (Admin)
[177] *Gladman Developments Ltd v SSHCLG* [2020] PTSR 993 ("*Gladman")*"
[178] *Monkhill* at [45]

assessment of the weight to be given to the development plan policies and considering those policies alongside the tilted balance. As the High Court has made clear, there is no basis for excluding the consideration of development plan policies from the tilted balance.[179] Holgate J in *Gladman* summarised the exercise a decision maker must undertake as follows at [108]-[110]:

> *"108. It is permissible for the decision maker to assemble all the relevant material and to apply the two balances together or separately. For example, if a proposal accords with the development plan as a whole, but there is a shortfall in the 5 year supply of housing land, so that paragraph 11(d)(ii) applies, both of the balancing exercises are likely to point in favour of the grant of permission and plainly there would be no difficulty in applying them either in either one overall assessment or in two stages. If there is a shortfall in the 5 year supply of housing land or "important" policies are assessed as being out of date, and the proposal conflicts with the development plan as a whole, the two presumptions can still be considered together in an overall assessment, weighing all factors relating to the proposal, whether positive, negative or neutral. There is no incompatibility in the operation of the two presumptions which would require them to be applied separately in two stages. In substance effect is given to paragraph 11(d)(ii) by tilting the balance in favour of the grant of permission unless the benefits of the proposal are significantly and demonstrably outweighed by the adverse effects (Lord Carnwath in Hopkins at [54]), i.e. by giving more weight to those benefits. Whichever approach is taken, the amount of weight to be given to benefits, harm and the presumption in favour of sustainable development is a matter of judgment for the decision-maker.*
>
> *109.It is important to recall the following statement of Lindblom LJ in the East Staffordshire case at [50]: -*
>
> > *"Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion."*
>
> *110… All that is happening is that the same factors are assessed against two different criteria or tests to see whether both are satisfied. The*

[179] *Gladman* at [100]

> *position is no different in substance if the decision-maker applies an overall judgment to all relevant considerations which applies both the tilted balance in paragraph 11(d)(ii) and s.38(6).* (underlining added)

186. Both *Monkhill and Gladman* concerned the operation of para. 11(d) in circumstances where that was triggered by the lack of a 5 year housing land supply rather than the HDT.[180] However, the courts' approach to construing footnote 7 and para. 11(d) will apply equally in both scenarios. In the case of both footnote 7 "triggers", the policy concern is the same, namely, how successful is a local authority at delivering housing. Whilst consideration of the five year supply is forward looking and the HDT relies upon past delivery data, the policy mechanism (footnote 7 and para. 11(d)) is the same and so are the considerations which arise in the application of para. 11(d).

187. As explained below, a key matter for the Inspector will be the assessment of the weight to be given to the development plan policies in circumstances where the effect of footnote 7 is to *deem* those policies "out of date" but not to render them substantively out of date.[181] In circumstances where the trigger for para. 11(d) is the shortfall in housing delivery, it is necessary for the Inspector to take into account "the nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced."[182] Those matters are addressed in the Supplementary Note on the Housing Delivery Test ("Supplementary Note") prepared by Ms Milentijevic submitted on 26 January 2021 and in which she invites the Inspector to give full weight to the development plan.

188. The Appellant's assertion in its email of 21 January that it is unreasonable for the LPA to put before the inquiry material which, the courts have explained, is legally relevant to the assessment the Inspector must undertake in respect of the weight to be given to the development plan, is preposterous and any costs application related to this submission will be resisted in the strongest terms. Had the HDT been published prior to the inquiry, this is exactly the sort of evidence which would have been tendered during the inquiry.

---

[180] It is unsurprising that the relevant case law solely considers the scenario where the application of para. 11(d) is triggered via footnote 7 in circumstances where there is an absence of a 5 year housing land supply. That is because the publication of the HDT on 19 January 2021 is the first time the fully phased HDT, applying a 75% threshold, has come into force.

[181] See also [103] in *Gladman Developments Ltd v SSHCLG* [2020] PTSR 993: "Whether they are in fact out-of-date and, if so, in what respects, and how much weight should be attached to those policies remains to be assessed."

[182] *Gladman* at [82].

Policy Approach in light of HDT

189. In light of the HDT 2020, the policy approach to be taken to determining this appeal is as follows:

(1) The LPA accepts that as a consequence of the HDT and the operation of footnote 7 of the NPPF that paragraph 11(d) is engaged. As the courts of repeatedly made clear, the operation of 11(d) informs but does not displace the need to conduct the s.38(6) balance with the statutory presumption in favour of plan-led development.[183]

(2) Para. 11(d)(i) is engaged in this case.[184] Under limb (i), the test is whether the application of one or more of the "Footnote 6" policies provides a clear reason for refusing planning permission. Here, the appeal scheme's impact on the designated heritage asset requires the Inspector to consider those factors which are relevant to balance under paragraph 196 of the NPPF (and only the factors relevant to that balance) namely, whether the "public benefits" of the proposal outweigh the great weight which is to be given to the "less than substantial harm" to the heritage asset. The LPA's case is that the harm to the St Anne's Conservation Area is not outweighed by the public benefits and provides a clear reason for refusing the appeal. That being the case, the tilted balance should be disapplied.

(3) In the instant case, where para. 196 of the NPPF provides a clear reason for refusing planning permission, the Inspector still needs to have regard to all other relevant considerations before determining the appeal under the s.38(6) balance but that exercise must be carried out <u>without</u> applying the tilted balance.[185]

(4) If the Inspector disagrees with the LPA that there is a clear reason for refusal on heritage grounds, then he should proceed to limb (ii) and determine the application by applying the tilted balance and s.38(6).[186]

[183] *Gladman* at [79]
[184] The approach to be taken limb (i) is summarised in *Monkhill,* Holgate J at [39] and [45]. Limb (i) is generally to be applied first before going on to consider whether limb (ii) should be applied.
[185] *Monkhill*, [39] (13)
[186] *Monkhill*, [45]

(5) In applying the tilted balance, the Inspector must determine the weight to be given to relevant development plan policies.[187] As Holgate J explained in *Gladman,* the effect of the *trigger* in footnote 7 is only to *deem* certain policies to be out-of-date; "whether they are in fact out-of-date and, if so, in what respects, and how much weight should be attached to those policies remains to be assessed."[188] The Inspector will need to "assess the weight to be given to development plan policies, including whether or not they are in substance out-of-date and if so for what reasons".

(6) "The nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced"[189] and considerations of whether the housing delivery shortfall may have resulted from problems pre-dating the development plan or reflect a temporary problem, are all legally relevant to the assessment of weight to be given to the development plan.[190] At the conclusion of that assessment the Inspector may attach substantial or full weight to those policies.[191] In this appeal, the LPA contends when the shortfall is properly contextualised[192] it is clear that the LPA is delivering both towards its local need and London's strategic housing need and neither the Local Plan nor the operation of the planning process is holding back delivery. That justifies giving the development plan policies full weight.

(7) Having established the weight to be applied to the development plan policies the application of the tilted balance may take place alongside the application of s.38(6) PCPA 2004 as part of an overall assessment or separately.[193] The two balancing exercises are not hermetically sealed and the relevant development plan policies should be considered in the tilted balance.[194]

(8) In this case, when considering whether the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, the Inspector should take into account all of the harms and benefits of scheme in applying both the tilted and s.38(6) balances. As part of that exercise he should give full (and if not full, very substantial) weight to the most relevant development plan policies. For the reasons set out in LPA's Supplementary

[187] *Gladman* at [82].
[188] *Gladman,* at [103].
[189] *Gladman* at [82].
[190] *Gladman* at [97].
[191] *Gladman* at [97].
[192] LPA's Supplementary Note
[193] *Gladman,* at [108].
[194] *Gladman,* at [90] and [100].

Note, and elaborated below, the Inspector should take account of the fact that the recently adopted Local Plan is up to date in all material respects and contains a robust housing delivery strategy and that the borough's housing delivery shortfall is due shortly to be reduced by the the anticipated reduction of the borough's housing requirement in the new London Plan. In that context, the adverse effects arising from the appeal scheme's fundamental conflict with multiple important development plan policies (in relation to HMOs, affordable housing, heritage and housing standards) outweighs the benefits of the scheme even with a 'tilt' applied under para. 11(d)(ii). Viewed overall, the adverse impacts of scheme would significantly and demonstrably outweigh the benefits of this scheme.

Detailed Analysis

Clear reason for refusal on heritage grounds - Paragraph 11(d)(i)

190. For the reasons set out above in relation to Heritage (reason for refusal 2), there is a clear reason for refusing the appeal proposal by virtue of the appeal scheme's impact on the St Anne's Church Conservation Area as a result of its impact on the Our Lady Immaculate Church. The nature of the heritage harm and the weight to be afforded to it were explained in detail in the evidence of Mr Handcock (heritage) and in the LPA's Statement of Case.[195] In summary, Mr Handcock identified a "notable degree of harm", in the "middle of the spectrum" between no harm and substantial harm, to the Church and by extension to the key group of public buildings in the CA as a result of the height, scale and massing of the scheme. Great weight must be afforded to such harm.

191. The evidence of Ms Milientijevic (planning) at paras. 8-15 of the Supplementary Note demonstrates that applying the heritage balance in para. 196 of the NPPF, the harm to the designated heritage asset would not be outweighed by the "public benefits" of the appeal proposal. Even when additional weight is accorded to the benefit in terms of the provision of housing which contributes towards meeting the borough's unmet need against a housing delivery shortfall, that benefit together with the other modest benefits of the scheme, still do not outweigh the harm to the designated asset.

192. If the Inspector agrees with the LPA's evidence on these matters, para 11(d)(i) is satisfied and the presumption in favour of sustainable development will not apply. The appeal then falls to be determined by a straightforward application of s.38(6) into which balance the heritage harm to designated asset should be taken

[195] E-05 p.29-40

into account. On such a s.38(6) balance, when the heritage objection is coupled with the other multiple conflicts with the development plan in relation to the "identified need", affordable housing and living conditions, such conflict is not outweighed by any other material considerations. Accordingly, the appeal should be dismissed.

Paragraph 11(d)(ii)

193. If the Inspector disagrees with the LPA's case on heritage matters, he will need to apply paragraph 11(d)(ii), the 'tilted balance'.

Assessment of weight to be given to the development plan

194. The tilted balance must be understood in the context of the development plan-led system, established by the presumption in favour of the development plan contained in s.38(6) PCPA 2004.[196] Since the policies of the development plan are relevant to carrying out the tilted balance,[197] the Inspector must first determine the weight to be given to relevant development plan policies.[198]

195. Applying the principles set out above to the circumstances of the appeal, the starting point in this appeal is the recently adopted and up to date in all material respects Local Plan,[199] whose adoption in January 2020 post-dated the years of housing delivery shortfall which have triggered the operation of para. 11(d).

196. The Inspector can and should give full weight to the development plan for the reasons set out in the Supplementary Note[200]. In summary, he should do so because:

a. The nature and extent of the shortfall should not be overstated. Had the LPA been able to show an additional 146 completed homes over the 3 year period, para. 11(d) would not be engaged and full weight would unquestionably have to be applied to the development plan. The LPA has delivered more homes than any other local authority in England in recent

[196] *Gladman,* at [86].
[197] *Crane,* at [74]; Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] JPL 1151 , paras 87, 105, and 108–115; Hallam Land Management Ltd v Secretary of State for Communities and Local Government [2019] JPL 63 , at [46]. Applied in the context of para 11 of the NPPF 2019 in *Gladman,* see [90].
[198] *Gladman* at [82].
[199] B-02
[200] Pp 5-17

years[201] (4570 homes in 2019-20) and when viewed over the longer term, housing delivery has been largely in line with, and has sometimes even exceeded, delivery targets.[202]

b. The shortfall is likely to be substantially and imminently reduced.[203] That is because the new London Plan (Publication Stage), to which everyone agrees substantial weight can be attached, will reduce the LPA's housing target from 3931 to 3473 homes a year. Once the London Plan is adopted, the borough's housing target will go down. When that happens, the delivery shortfall will be substantially reduced. If, for example, the new housing target were applied to this year's supply figures (2019-2020), the LPA would have comfortably exceeded the 75% threshold in footnote 7 and would not be a presumption authority. There is thus a strong possibility that presumption could be removed very soon.

c. The causes of the delivery shortfall pre-date the adoption of the Local Plan in January 2020. Some of those causes are temporary in nature (Brexit and recent fluctuations in international investment[204]) and are beyond the LPA's control (the typology of residential development in Tower Hamlets and its impact on completion rates).[205] The key point is that the causes of the shortfall are unrelated to planning. The Local Plan (which the Plan Inspector considered was capable of meeting the current housing requirements) and the operation of the planning process locally (which consents a very high number of residential schemes every year[206]) is not holding back delivery. Since the causes of the HDT result are not related to any shortcomings in the development plan or local planning processes there is no justification for subtracting weight from its policies which are designed to meet the borough's housing need in a sustainable way.

d. The prospects of the shortfall being reduced are supported by the recently adopted Local Plan and Housing Delivery Action Plan which together set out a comprehensive strategy for achieving the borough's housing delivery targets. The Local Plan for example contains a clear housing delivery strategy and a number of policies (in relation to tall buildings, densification and growth areas) aimed at boosting housing delivery.[207]

[201] Supplementary Note para. 23; B-03 para. 2.14
[202] Supplementary Note para. 26
[203] Ibid. paras. 29-35
[204] Ibid. paras. 39 and 40
[205] Ibid para. 38
[206] Ibid para. 37
[207] Ibid. para. 46

197. Pulling those threads together, when it comes to the assessment of what weight to give to the development plan, the Inspector can justifiably give full weight to the development plan. When properly contextualised, the housing shortfall is not substantial (and certainly not as substantial as first appears). Critically, the shortfall is soon to be reduced by the introduction of a significantly lower housing requirement in the new London Plan which recognises the borough's reduced capacity for housing growth. When the borough's solid long term record of housing delivery and the range of strategies which it is implementing to remedy the shortfall are taken into account, it is clear that neither local planning policy nor the operation of the planning process is holding back housing delivery in this area. This justifies giving full weight (and if not, very substantial weight) to the up to date Local Plan in the overall planning balance.

Overall balance

198. Leaving aside the LPA's important heritage objection, the LPA does not oppose the redevelopment of the appeal site for housing. Its objections to this scheme do not prevent housing delivery coming forward at the appeal site *provided* that the proposed scheme makes an appropriate contribution to affordable housing and that the scheme demonstrates that it meets an "identified need" for this type of commercial co-living scheme in this location. The conflicts between the appeal scheme and the Local Plan (D.H7(1)(a) and (c) and S.H1), are entirely consistent with the policies in the NPPF, and fall to be considered individually and cumulatively in the overall planning balance.

199. When one understands that the LPA is not holding back the site from housing development provided it makes an appropriate contribution in terms of the type and tenure of accommodation, the justification for approving this scheme does not exist. To approve this scheme on an ad hoc basis, would be contrary to plan-led development, when all the evidence is that delivery shortfall is being actively addressed and is about to be reduced with the new housing target.

200. In the Supplementary Note, Ms Milientijevic applies the tilted balance as part of an overall assessment in the context of the s.38(6) balance.[208] In conducting that balance, it is important to recall that the presumption in favour of sustainable development, is a material consideration which does not displace the s.38(6) balance.[209] [210]

[208] *Gladman,* at [108]. Supplementary Note para. 62
[209] *Gladman* at [79]
[210] *Monkhill* at [39]

201. The LPA, of course, acknowledges the benefits of providing housing on the site, particularly in light of the HDT shortfall and the regeneration benefits of replacing the existing hostel. Those benefits must be weighed in the balance. In addition, the LPA recognises the benefits of the scheme providing disabled parking, cycle storage, improved energy efficiency and the socio-economic benefits arising from employment and additional spending of future occupants, albeit those benefits would not be unique to this scheme and would be provided on any scheme.

202. However, despite those benefits, and as the Supplementary Note explains, the adverse impacts of an HMO scheme which makes no contribution to much-needed affordable housing, provides inadequate living conditions to its occupants, harms the designated heritage asset and fails to establish an "identified need" for a commercial co-living a few doors down from a very similar consented scheme, individually and cumulatively, significantly and demonstrably outweighs the benefits of the scheme.

203. For those reasons, the Inspector is respectfully asked to dismiss the appeal.

Sarah Sackman

27 January 2021