



Neutral Citation Number: [2018] EWHC 2899 (Admin)

Case No: CO/1353/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 November 2018

Before :

JUSTINE THORNTON QC SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

THE QUEEN
on the application of

Claimant

SABINE GUERRY
- and -
LONDON BOROUGH OF
HAMMERSMITH & FULHAM

Defendant

-and-
NEWCO 8915 LIMITED

Interested Party

Mrs Annabel Graham Paul (instructed by **Richard Buxton Environment and Public Law**)
for the **Claimant**

Mr Cain Ormondroyd (instructed by **The London Borough of Hammersmith & Fulham**
Legal Services) for the **Defendant**

Miss Mary Cook (instructed by **Town Legal LLP**) for the **Interested Party**.

Hearing date: 25 September 2018

Approved Judgment

Justine Thornton QC, Deputy High Court Judge:

Introduction

1. This is an application for Judicial Review to quash the decision, dated 19th February 2018, by the London Borough of Hammersmith & Fulham (the Defendant) to grant planning permission for the demolition of existing buildings and the erection of a hotel with ancillary restaurant and bar and a retail unit, on Shepherd's Bush Green, to be developed by the Interested Party, Newco 8915 Ltd.
2. The Claimant, who owns a flat in a neighbouring property, challenges the grant of planning permission on two grounds:
 - (i) Ground 1 – that the Defendant unlawfully applied Policy 8 of its supplementary planning document on housing and significantly misled members by justifying the undisputed fact that the proposed building will infringe the 45 degree set back angle “general standard”, by relying on the existing and proposed tree planting precluding “any view” of the hotel beyond the rear line of the gardens.
 - (ii) Ground 2 – that the Daylight and Sunlight Assessment which accompanied the planning application misinterpreted and misapplied the Building Research Establishment (“BRE”) methodology such that members were significantly misled as to the effects on daylight at certain Pennard Road properties.
3. By an Order dated 24th May 2018, Neil Cameron QC, sitting as a Deputy High Court Judge, granted permission on the second ground, but refused permission on the first ground. The Claimant has applied to renew her application for permission on Ground 1 and the application was heard before me at the same time as the substantive hearing on Ground 2.

Background

4. The Claimant is the owner of a flat in a property at 72 Pennard Road, which faces, at an oblique angle, the rear of the proposed development, at Threshold & Union House, 65 Shepherd's Bush Green, London W12 8TX. The Claimant supported the principle of redevelopment of the existing outdated office building and its replacement with a hotel. She did not object to the Interested Party's original plans for the design of the new building. However, once becoming aware of revisions to the scheme, she and her neighbours objected to the revised design, on the basis of its impact on residential properties on Pennard Road, which lies to the rear of the development site and is within the Shepherd's Bush Conservation Area.
5. The London Borough of Hammersmith and Fulham has a high density of development and the main objections to new development tend to relate to loss of sunlight, daylight, outlook and privacy.

6. Consultants for the Interested Party, GIA, produced a report assessing the impacts of the proposals on neighbouring properties in order to understand the potential changes in daylight, sunlight and overshadowing (“the GIA Report”), which accompanied the planning application. The report relies on the methodology set out within the Building Research Establishment Guidelines, entitled “Site Layout Planning for Daylight and Sunlight – a Guide to Good Practice (2011). Thirty-six properties were assessed including thirty-four properties on Pennard Road.
7. The Executive Summary of the report states that:

“Relative to the urban context within which the proposed redevelopment site exists, GIA considered the daylight impacts to the neighbouring properties to be wholly within the intention and application of the BRE Recommendations and therefore should be considered acceptable in planning terms. Where variation to the guidelines does occur, the rest of our technical assessments demonstrate that this is principally due to low existing values (producing disproportionate percentage alterations) or the constraints imposed by the existing architectural design of the neighbouring properties (such as the rear extensions of the properties along Pennard Road) which create flank elevations.”

8. The Claimant commissioned her own assessment of the GIA report in March 2018. The assessment was critical of the GIA’s understanding of the BRE methodology, in particular, in the analysis of the vertical sky component of daylight as the primary methodology for assessing the impact of the development on daylight and daylight distribution as the secondary methodology. Where room layouts are known, both vertical sky component and daylight distribution should be assessed, and a failure to achieve either guideline represents a failure overall. This criticism forms the basis of the second ground of challenge.

The Officer’s Report

9. The Planning Officer’s Report recommended approval. The report contains a section titled *Impact on Residential Amenity Daylight / Sunlight / Overshadowing*. The section of the report begins by setting out the policy position:

“3.154 Policies DM G1, and DM A9 of the Development Management Local Plan require all proposals to be formulated to respect the principles of good neighbourliness. SPD Housing Policy 8 seeks to protect the existing amenities of neighbouring residential properties, in terms of outlook, light, and privacy. Policy 7.6 of The London Plan states that buildings and structures should not cause unacceptable harm to the amenity of surrounding land and buildings, particularly residential buildings, in relation to privacy, overshadowing, wind and microclimate.

Daylight / sunlight / overshadowing

3.155 *The site's only immediate residential neighbours are to the rear on Pennard Road. Whilst other residential properties in the vicinity of the site would be able to see the proposed development, the residents to the rear are the main residents who have the potential to be directly affected in terms of amenity implications (i.e. light, outlook, privacy, and noise / disturbance) due to the proximity of the development to these neighbours.*

Daylight / sunlight / overshadowing

3.156 *The applicants have submitted a daylight and sunlight assessment, in line with the guidance provided in the Building Research Establishment (BRE) document entitled 'Site Layout Planning for Daylight and Sunlight' (2011).*

3.157 *The impact of the proposed development on the nearest residential properties has been considered. The properties considered in the assessment are 36-52 (even), 53-77 (consecutive) Pennard Road, Bush Green House and Library Mansions.*

3.158 *The BRE guide recommends that windows and rooms within residential properties need to be assessed."*

10. The officer goes on to explain the two methodologies used to assess impacts on daylight – vertical sky component (VSC) and no skyline (NSL):

"Daylight (assessment methodology)

3.159 *For all properties assessed, window maps have been produced, and an analysis of the daylight (vertical sky component (VSC) and no sky line (NSL)) that would reach an affected window and sunlight (annual probable sunlight hours – APSH), has been carried out. Figures showing the existing situation compared with the effect of the proposed development have been presented.*

3.160 *The VSC method measures the amount of sky that can be seen from the centre of an existing window and compares it to the amount of sky that would still be capable of being seen from that same position following the erection of a new building. The measurements assess the amount of sky that can be seen converting it into a percentage. The BRE guide advises that a good level of daylight is considered to be 27% VSC. Daylight will be noticeably reduced if, after a development, the VSC is both less than 27% and less than 80% of its former value.*

3.161 *The plotting of the NSL measures the distribution of daylight within a room. It indicates the point in a room from where the sky cannot be seen through the window due to the presence of an obstructing building. The NSL method is a measure of the distribution of daylight at the ‘working plane’ within a room. In houses, the ‘working plane’ means a horizontal ‘desktop’ plane 0.85 metres above floor level. This is approximately the height of a kitchen work surface.*

3.162 *The impact of the distribution of daylight in an existing building can be found by plotting NSL in each of the main rooms. The NSL divides those areas of the working plane in a room which receive direct sky light through the windows from those areas of the working plane which do not. If a significant area of the working plane lies beyond the NSL (i.e., it receives no direct sky light), then the distribution of daylight in the room will be poor and supplementary lighting may be required.*

3.163 *For dwellings, the NSL would be measured for living rooms, dining rooms and kitchens. Bedrooms should also be analysed, although they are considered less significant in terms of receiving direct sky light. Development will affect daylight if the area within a room receiving direct daylight is less than 80% of its former value.*

3.164 *When reviewing the daylight results for each property, the methods would normally be considered sequentially; VSC and NSL. In the first instance, therefore, the VSC results should be considered.*

3.165 *If all the windows in a building meet the VSC criteria, it can be concluded that there will be adequate daylight. If the windows in a building do not meet the VSC criteria, the NSL analysis for the room served by that window needs to be considered. If neither the VSC nor NSL criteria are met, then average daylight factor (ADF) results should be considered.”*

11. Having set out the assessment methodology, the officer considered the results of the assessment:

“3.166 The applicants have submitted VSC and NSL assessments for all of the properties mentioned above.

3.167 Against the primary daylighting methodology, Vertical Sky Component (VSC) 24 of the 36 properties will experience full BRE compliance by reference to the primary daylight methodology (Vertical Sky Component) i.e. all windows within these properties would maintain at least 80% of their former VSC value, and therefore any reduction in daylight would not be perceptible. These properties are 36-52 (even), 53, 57-73

(odd) and 74-77 (consecutive) Pennard Road and Library Mansions.

3.168 11 of the 36 properties assessed will experience BRE transgressions to their windows or rooms. Such transgressions are not uncommon in more urban environments and if development is to meet the scale and proportion of neighbouring buildings some measurements beyond the guide figures are very difficult to avoid. In an appeal hearing decision (GLA), it was noted that the 27% VSC figure when measured on an absolute scale is derived from a low density suburban housing model, and may not be appropriate for an inner city urban environment.”

12. The officer then proceeded to consider the properties that transgress the BRE guidelines in more detail, a sample of which are set out below:

“3.169 The 11 properties that will experience BRE transgressions include 54, 56, 58, 60, 62, 64, 66, 68, 70 and 72 Pennard Road, as well as Bush Green House. A commentary of each of these 12 properties is provided below.

3.170 For 54 Pennard Road, 8 windows serving 6 rooms have been analysed, of which 6 windows comply with the VSC guidelines. The two windows that fall short show losses about VSC guidelines (22.9% - 23.4% loss). The room affected is served by a further window that does pass VSC. In addition the NSL assessment demonstrated that the room achieves full BRE compliance.

3.171 For 56 Pennard Road, 16 windows have been analysed, of which 11 windows comply with the VSC guidelines. The remaining 5 windows experience losses between 21.1% and 29.5%, which given the urban context of the site is considered to be wholly within the flexibility intended within the BRE guidelines.

.....

3.177 For 64 Pennard Road, 10 windows have been analysed, of which 5 windows comply with the VSC guidelines. Three of the five remaining windows demonstrate a retained VSC equal to or in excess of 15.6% post implementation of the proposed scheme. The two remaining windows (W3/Ground and W1/Ground) are located on the ground floor extension of 64 Pennard Road. W3/Ground has a VSC of 6.6% in the existing scenario, therefore the marginal loss of 1.6% leads to a disproportionate percentage change to this window of 24.2%. Given the context of the site, the curve of Pennard Road and the proximity of this window to the site the overall impact is

small. W1/Ground serves one room (R1/Ground) which we have also considered in terms of the third daylight methodology, the average daylight factor (ADF). There is a marginal change in ADF of 0.2% post implementation of the scheme.

....

3.181 For 72 Pennard Road, 10 windows have been analysed, of which 9 windows comply with the VSC guidelines. The remaining window (W1/Ground) only falls marginally, below the 20% target value with an alteration of 20.9% between the existing and proposed scenario. Further to this, the room served by this window shows full BRE compliance to the No Skyline methodology.

.....”

13. The officer’s conclusions on daylight matters was as follows:

“Conclusion on daylight matters

3.183 Officers accept that BRE guidance needs to be applied flexibly and sensibly in relation to an existing urban environment. By nature, the design of the properties along Pennard Road are subject to a number of existing site constraints, in the form of rear returns, recent extensions and flanking walls. These components restrict the amount of daylight which can reach the rooms in the existing scenario. Where transgressions do occur, most of the windows will experience a 20% - 30% VSC change, which given the urban context of the site would be considered small alterations and to be wholly within the flexible intentions of the BRE Guidelines. In the majority of instances, those windows that do experience a 20% - 30% VSC change will continue to have a retained VSC in excess of 15%.

3.184 Officers also note that many of the properties along Pennard Road, located to the rear of the Dorset Hotel and The Walkabout building will experience lower levels of daylight than those properties to the rear of the site, post implementation of the scheme. Of those isolated windows that experience in excess of 30% change in VSC and do not have a retained VSC of 15%, the vast majority of these rooms experience an ADF alteration of 0.1% with isolated instances of 0.2%.

3.185 In many cases, where numerical transgressions of the guidance have been identified, the percentage losses are disproportionate because of the low existing daylight levels at

the affected windows, and the actual daylight loss may not be perceptible to the occupier. On balance therefore, officers consider that the relatively limited losses outlined would not outweigh the benefit to the area of the proposed development and consider that, on balance, the scheme is acceptable in terms of its impact on daylight to adjacent premises.”

14. The officer’s assessment of outlook, which is relevant to Ground 1, is set out at paragraphs 3.192- 3.197 of the report:

“3.192 SPD Housing Policy 8 states that ‘The proximity of a new building or an extension to an existing building can have an overbearing and dominating effect detrimental to the enjoyment by adjoining residential occupiers of their properties’ and prescribes a method for assessment of outlook. ‘Although it is dependent upon the proximity and scale of the proposed development a general standard can be adopted by reference to a line produced at an angle of 45 degrees from a point 2 metres above the adjoining ground level of the boundaries of the site where it adjoins residential properties. If any part of the proposed building extends beyond these lines then on-site judgement will be a determining factor in assessing the effect which the extension will have on the existing amenities of neighbouring properties’. Where original rear gardens are less than 9 metres depth a measurement is taken from ground level at the boundary. Where there are existing circumstances, such as buildings which would be replaced in a redevelopment, it would be inappropriate not to have regard to these.

3.193 The properties which directly back onto the application site (nos. 48-72 Pennard Road) would be deemed to be most affected, as although the development would be visible from other properties, the impact on sense of enclosure decreases with greater distance.

3.194 The prevailing existing condition along the rear of the properties to Pennard Road is one of large meeting small, as the large volume civic architecture of the city fringe along The Green meets the suburban edge of the residential part of Shepherd’s Bush. The proposed development is in keeping with this prevailing condition in the area.

3.195 The stand of existing and proposed trees will also preclude any view beyond the rear line of the gardens. Consequently, the application of the 45% degree sense of enclosure test becomes somewhat redundant, as in reality the new hotel building will not be visible at all from this position. As a result the applicants have submitted an image of a sight line from closer to the rear of the house, which is considered a

more likely viewpoint. The image demonstrates that the sky view to the east will be limited by the tops of the trees – as is currently the case – meaning that the hotel will be obscured as the tree canopies grow and merge.

3.196 The impacts resulting from the proposed Hoxton Hotel are, in absolute terms, measurably less than those in relation to the Dorsett, The Walkabout or The Empire and are small in relation to precedent studies of residential properties enjoying such close proximity to all of the town centre facilities.

3.197 On balance, then, it is considered that the proposed building would not result in a significant loss of outlook to neighbouring properties, and as such it is considered that it complies with Policies DM G1, DM A9 and SPD Housing Policy 8.”

Relevant Legal Principles

15. The relevant legal principles are well established:

“41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a Court... the Courts must keep in mind that the function of planning decision making has been assigned by Parliament, not Judges but – at local level – to elected Councillors with the benefit of advice given to them by planning officers, most of whom are professional planners... they should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision making, consistent with the aims of the policy maker. ...

42. The principles on which the Court will act when criticism is made of a Planning Officer’s Report to Committee are well settled, to summarise the law as it stands:

(i) The essential principles are as stated by the Court of Appeal in R v Selby District Council ex parte Oxton Farms [1997] EGCS 60 ... they have since been confirmed several times by this Court.

(ii) The principles are not complicated. The Planning Officer’s reports to Committee are not to be read with undue rigour, but with reasonable benevolence and bearing in mind that they are written for Councillors with local knowledge... unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members follow the officer’s recommendation, they did so on the basis of the advice that he

or she gave... the question for the Court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the Committee's decision would or might have been different – that the Court will be able to conclude that the decision itself was rendered unlawful by the advice.

(iii) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – an advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a Committee astray by making some significant error of fact... or has plainly misdirected the members as to the meaning of a relevant policy... . There will be others where the officer has simply failed to deal with a matter on which the Committee ought to receive explicit advice if the Local Planning Authority is to be seen to have performed its decision making duties in accordance with the law... but unless there is some distinct material defect in the officer's advice, the Court will not interfere." Lindblom LJ in Mansell v Tonbridge & Malling BC [2017] EWCA Civ 1314.

16. The conclusions in an Officer's report, should not be laboriously dissected in an effort to find fault. There is no place in challenges to planning decisions for hypercritical scrutiny (*St. Modwen Developments Limited v Secretary of State for Communities & Local Government* [2017] EWCA Civ 1643).
17. The purpose of an Officer's Report is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is addressed to Council members who, by virtue of that membership, may be expected to have substantial local and background knowledge. Part of a planning officer's expert function in reporting to the Committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail (*R (o/a Peter Nicholson) v Allerdale Borough Council* [2015] EWHC 2510 (Admin) Holgate J).

The Claimant's submissions

18. *Ground 1 Misapplication of Policy 8:* On behalf of the Claimant, Mrs Paul submitted that the officer's report fell into error in not applying the general standard set down in the policy for assessing overshadowing. He fell into error because he mistakenly formed the view that trees would block any view of the hotel from any of the Penard

Road properties. In this respect the report appears to have simply copied information from an email from the Interested Party's agent which was factually wrong. The error was not trivial.

19. *Ground 2 Errors in relation to the assessment of daylight:* If it is to be applied the BRE report needs to be applied correctly, and it was not. The advice given to Councillors was significantly misleading. The Officer's report was wrong to adopt a sequential approach to the VSC and NSL criteria for assessing daylight. Councillors would have assumed that 52 and 74 Pennard Road were BRE compliant when they were not and would not have been aware that some of the properties which were (accurately) reported as failing the VSC guideline, also failed the NSL guideline, making the loss of daylight worse. There is no evidence before the Court that Members would have considered that the balancing exercise would have remained in favour of granting planning permission had they been correctly informed of the true scale of BRE transgressions by reference to the NSL guideline as well as VSC and the Court is not in a position to make such a planning judgment itself.

Submissions on behalf of the Defendant and the Interested Party

20. *Ground 1: misapplication of SPD policy 8:* Mr Ormondroyd and Miss Cook submitted that the challenge is misconceived because the officer's report does not disapply the general standard, which is not, in any event, a rule. The officer's report arrived at the view that the guideline was 'somewhat redundant' and the officer exercised his judgment, as he was entitled to do under the policy, including by assessing a more realistic viewpoint of the development from the houses. Councillors were not misled as to the effect of the tree screening. Some views would remain through the proposed planting. If this were not clear from the officer's report alone, it would have been clear from the image referred to in the relevant section of the report and the powerpoint presentation shown to Councillors.
21. *Ground 2 Daylight:* The error in the report in relation to 52 and 74 Pennard Road, which were wrongly said to achieve 'full BRE compliance' is accepted. The scale of the error, however, is small, amounting to 3 rooms in the two houses. All three rooms are assumed to be bedrooms, which are less important than living rooms. There are no floorplans in 52 Pennard Road which casts doubt on the applicability of the NSL criterion according to the BRE Guide. Members were not significantly misled because the officer's report was candid about the VSC breaches at 11 of the 36 properties. Given that application of the BRE Guide was not mandatory, the omission of the NSL results for these other properties cannot be characterised as an error but simply a question of the amount of information which should be provided to Councillors. Contrary to the Claimant's assertion, the NSL criterion results did not make the loss of daylight materially worse. Moreover Councillors were not dependent on the technical information but had useful comparators in the form of other developments in the locality. The BRE Guide was not express Council policy nor was it referred to in policy. The relevant local plan policies refer to a requirement of 'good neighbourliness'.

Discussion

Ground 1 – Unlawful Application of Policy 8

Background

22. Policy 8 of the Defendant’s Supplementary Planning Document provides as follows:

“Protection of amenities.

In order to protect the amenity of neighbouring occupiers, new development and extensions to existing buildings should accord with the following guidance:

(i) The proximity of a new building or an extension to an existing building can have an overbearing and dominating effect detrimental to the enjoyment by adjoining residential occupiers of their properties. Although it is dependent upon the proximity and scale of the proposed development, a general standard can be adopted by reference to a line produced at an angle of 45 degrees from a point two metres above the adjoining ground level of the boundaries of the site where it adjoins residential properties. On sites that adjoin residential properties that have rear gardens of less than 9 metres in length, this line should be produced at 45 degrees from a point at ground level on the boundary of the site where it adjoins residential properties. If any part of the proposed building extends beyond these lines, then on site judgement will be a determining factor in assessing the extent which the extension will have on the existing amenities of neighbouring properties.”

Analysis

23. An officer’s report should be read benevolently, fairly, as a whole and on the understanding it is written for Councillors with local knowledge (*Mansell v Tonbridge BC* [2017] EWCA Civ 1314). Having set out the wording of Policy 8, the officer identified the existing prevailing condition along the rear of the properties on Pennard Road as one of ‘large meeting small’. At paragraph 3.195 he considered the general standard:

“3.195 The stand of existing and proposed trees will also preclude any view beyond the rear line of the gardens. Consequently, the application of the 45% [sic] degree sense of enclosure test becomes somewhat redundant, as in reality the new hotel building will not be visible at all from this position. As a result the applicants have submitted an image of a sight line from closer to the rear of the house, which is considered a more likely viewpoint. The image demonstrates that the sky

view to the east will be limited by the tops of the trees – as is currently the case – meaning that the hotel will be obscured as the tree canopies grow and merge.”

24. I do not accept Mrs Paul’s submission that the officer fell into error in this paragraph. As Mrs Paul accepted, policy 8 makes clear that the general standard is not an inflexible rule and may be departed from, provided the officer exercises an on-site judgment about the impacts of the deviation on existing properties. Mrs Paul also accepted that the officer must be taken to have accepted that the general standard could not be met in the present case. There is in my judgment nothing unlawful about the officer’s exercise of judgment in concluding that the overlooking is acceptable despite non compliance with the general standard. The officer explains his reasons for his judgment - the general standard is of limited help; the presence of trees limits the sky view; the prevailing existing condition along the rear of the properties is one of large meeting small and the impacts of other local buildings are greater.
25. Mrs Paul took me to an email from the developer’s advisors, dated 17 August 2017, which acknowledged infringements of the general standard but went on to refer to a line of new tree planting, which *‘in reality renders this approach redundant i.e the sky view to the east will be limited by the tops of the trees meaning that the hotel will be visible in any event’*. Mrs Paul suggested that the Officer had simply cut and pasted the content of the email into his report. I do not accept the submission. The email refers to the general standard as being ‘redundant’ whereas the Officer’s report refers to the standard as being ‘somewhat redundant’, which demonstrates to my mind the exercise of independent judgment on the point.
26. Mrs Paul suggested that the officer could not have made a proper judgment as his site visit had not extended to visiting properties on Pennard Road. I do not accept that submission. An adverse inference that a decision maker misunderstood something will not readily be drawn and should only be drawn where all other known facts and circumstances point overwhelmingly to a different conclusion (*South Bucks DC v Porter (No 2)* [2004] 1 WLR 1953). The email correspondence before the Court indicates the officer was concerned about amenity impacts. He had visited the site and had photographs of the surrounding area. There is no evidence before the Court to suggest that the officer, a planning professional, was not capable of making a judgment as to whether it was necessary to visit individual houses on Pennard Road in order to understand the implications of the development for their amenity.
27. A drawing relied upon by Mrs Paul as erroneously showing a tree screening the Claimant’s property was not before Councillors when they resolved to grant planning permission. The power-point presentation to Councillors did not indicate any trees in front of the Claimant’s property. Nor do I accept there is any inconsistency between the Officer’s analysis in paragraphs 3.50 - 3.52 with paragraph 3.195 of his report. Contrary to Mrs Paul’s submission, the Officer is aware that some of the trees will remain.

Ground 2 – Errors in relation to daylight

Background - the BRE Guide

28. The BRE Guide is intended to provide advice on site layout planning to achieve good sunlight and daylight within buildings and in open spaces between them. The advice given is not mandatory but designed to help, rather than constrain, the designer.
29. Section 2 of the BRE Guide is headed ‘Light from the Sky’. The section begins by explaining that the quantity and quality of daylight inside a room will be impaired if obstructing buildings are large in relation to the distance away. The distribution of light in the room will be affected as well as the total amount received.
30. Obstruction of daylight can be quantified in a number of ways. The amount of daylight entering a room with a wide obstruction opposite is proportional to the angle of visible sky, measured from the centre of the window. The amount of skylight falling on a vertical wall or window can be quantified as the vertical sky component (VSC). The maximum value for a completely unobstructed vertical wall is almost 40%.
31. Section 2.2 of the Guide considers how to safeguard daylight to existing buildings in the event of new development.

“2.2.1 In designing a new development or extension to a building, it is important to safeguard the daylight to existing buildings. A badly planned development may make adjoining properties gloomy and unattractive

2.2.2 The guidelines given here are intended for use for rooms in adjoining dwellings where daylight is required, including living rooms, kitchens and bedrooms. Windows to bathrooms, toilets, storerooms, circulation areas and garages need not be analysed...

2.2.3 Note that numerical values given here are purely advisory. Different criteria may be used based on the requirements for daylighting in an area viewed against other site layout constraints. Another important issue is whether the existing building is itself a good neighbour, standing a reasonable distance from the boundary and taking no more than its fair share of light.”

32. If a proposed building is tall or close enough to fail a preliminary assessment,

*“a more detailed check is needed to find the loss of skylight to the existing building. Both the total amount of daylight and its distribution within the building are important.” (2.2.5)
(underlining is Court’s emphasis)*

33. Any reduction in the total amount of skylight can be calculated by finding the VSC at the centre of each main window:

“2.2.7 If this VSC is greater than 27% then enough skylight should still be reaching the window of the existing building. Any reduction below this level should be kept to a minimum. If the VSC, with the new development in place, is both less than 27% and less than 0.8 times its former value, occupants of the existing building will notice the reduction in the amount of skylight. The area lit by the window is likely to appear more gloomy and electric lighting will be needed more of the time.”

34. Where room layouts are known:

“2.2.8 Where room layouts are known, the impact on the daylighting distribution in the existing building can be found by plotting the ‘no sky line’ in each of the main rooms. For houses this would include living rooms, dining rooms and kitchens; bedrooms should also be analysed although they are less important. ..The no sky line divides points on the working plane which can and cannot see the sky..Areas beyond the no sky line, since they receive no direct daylight, usually look dark and gloomy compared with the rest of the room, however bright it is outside...

2.2.9 If, following construction of a new development, the no sky line moves so that the area of the existing room, which does receive direct skylight, is reduced to less than 0.8 times its former value this will be noticeable to the occupants, and more of the room will appear poorly lit. This is also true if the no sky line encroaches on key areas like kitchen sinks and worktops.

2.2.10 The guidelines above need to be applied sensibly and flexibly.”

35. A summary of the advice given in section 2 states that:

“Summary

2.2.21 If any part of a new building or extension, measured in a vertical section perpendicular to a main window wall of an existing building, from the centre of the lowest window, subtends an angle of more than 25° to the horizontal, then the diffuse daylighting of the existing building may be adversely affected. This will be the case if either:

- The VSC measured at the centre of an existing main window is less than 27%, and less than 0.8 times its former value*
- the area of the working plane in a room which can receive direct skylight is reduced to less than 0.8 times its former value.” (underlining is Court’s emphasis).*

Analysis

36. The question for the court is whether, on a fair reading of the officer's report as a whole, the officer materially misled Councillors on the impacts of daylight at the properties on Pennard Road. Where the line is drawn between an officer's advice that is significantly or seriously misleading and advice that is misleading, but not significantly so, will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. The Court should not interfere unless there is some distinct and material defect in the officer's advice (*Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314).
37. Moreover, in looking at the officer's report the courts should not impose too demanding a standard. Part of a planning officer's expert function in reporting to a committee is to make an assessment of how much information to include in the report to avoid burdening the committee with excessive and unnecessary detail (*Morge v Hampshire County Council* [2011] UKSC 2 per Baroness Hale; *R(London Borough of Town Hamlets v Rainbird* [2018] EWHC 657 (Admin)). Nevertheless, it seems to me, to be relevant context that the BRE Guide is a technical document and may not be familiar to Councillors, unlike planning policies, with which they can be expected to be more familiar.

Error in applying the BRE methodology

38. In considering the impact of a proposed development, in accordance with the BRE Guide, the Council were not free to adopt any interpretation of the Guide that might be adopted within the limits of rationality. Written documents normally fall to be construed objectively in their context by the court, including documents promulgated by an authority or other institution (*R(London Borough of Town Hamlets v Rainbird* [2018] EWHC 657 (Admin) at paragraph 81).
39. The officer's report, which is based heavily, if not exclusively, on the GIA report, applies the BRE methodology as follows:
- “3.164 When reviewing the daylight results for each property, the methods would normally be considered sequentially; VSC and NSL. In the first instance, therefore, the VSC results should be considered.*
- 3.165 If all the windows in a building meet the VSC criteria, it can be concluded that there will be adequate daylight. If the windows in a building do not meet the VSC criteria, the NSL analysis for the room served by that window needs to be considered. If neither the VSC nor NSL criteria are met, then average daylight factor (ADF) results should be considered.”* (underlining is Court's emphasis).
40. This is not what the BRE Guide provides:

“Both the total amount of daylight and its distribution within the building are important.” (2.2.5)

...

Summary

2.2.21 If any part of a new building or extension, measured in a vertical section perpendicular to a main window wall of an existing building, from the centre of the lowest window, subtends an angle of more than 25° to the horizontal, then the diffuse daylighting of the existing building may be adversely affected. This will be the case if either:

- The VSC measured at the centre of an existing main window is less than 27%, and less than 0.8 times its former value*
- the area of the working plane in a room which can receive direct skylight is reduced to less than 0.8 times its former value.”*

41. In my judgment the officer’s report is flawed by misapplication of the BRE methodology. By virtue of the error Councillors were given scant information on NSL compliance (daylight distribution). Councillors would probably not have understood that failing to meet the guideline for the distribution of daylight within a building is a separate distinct reason why daylight might be adversely affected and the need to form a judgment on the implications of any non compliance with the Guide. I do not accept Mr Ormondroyd’s submission that the NSL results were simply additional detail. The BRE Guide is clear that both the total amount of daylight and the distribution of light within a building are important.

Consequence of the error

42. Mr Ormondroyd contended that any errors in the report did not cross the threshold for unlawfulness because the report acknowledged the VSC transgressions at 11 of the 36 properties and the errors in reporting 52 and 74 Pennard Road as BRE compliant only affected four rooms in the two houses.
43. In my judgment however it is necessary to look more broadly at the consequences of omitting the NSL results. The results of the VSC and NSL assessments for the properties on Pennard Road are to be found in an appendix to the GIA report. The existing position is compared with the proposed position post development and the loss is calculated and expressed as a percentage. For the purposes of assessing deviation from the NSL criteria by reference to the numerical data in the GIA report I have treated a loss of greater than 20% as a deviation from the NSL benchmark which provides that there will be a noticeable reduction in daylight if the area of the existing room which does receive direct sunlight is reduced to less than 0.8 times its former value. This is the approach taken in Miss Cook’s skeleton argument.

44. A review of the GIA appendix demonstrates that none of the 22 properties complying with the VSC criteria show breaches of the NSL guideline. Accordingly the misapplication of policy and failure to assess the NSL results would have had no material impact on the decision making in this regard.
45. However, the data demonstrates that the NSL guideline will be exceeded at numbers 52, 54, 56, 58, 60, 68, 70 and 72 Pennard Road. In some cases, the scale of the transgression appears to be significant (when compared with the guideline value of 20%). The impact in rooms at 58 Pennard Road is 45.69 % and 38.42%. The figures are 46.97% and 43.54% at 62 Pennard Road; 64.72%; 45.75% and 41.71% at 64 Pennard Road; 48.06% and 36.91% at 66 Pennard Road; 31.59% and 24.79% at 72 Pennard Road. Yet these transgressions and any explanation of their significance, or otherwise, was not drawn to Councillor's attention.
46. Moreover, it not just the case that NSL transgressions were not drawn to the attention of Councillors. Where it existed NSL compliance was drawn to the attention of Councillors. For number 54 Pennard Road, the report states:

“in addition the NSL assessment demonstrated that the room achieves full BRE compliance”.
47. For number 72 Pennard Road:

“the room served by this window shows full BRE compliance to the No Skyline methodology”.
48. For Bush Green House:

“When we compare all the windows within Bush Green House against the second daylight methodology (NSL) the three windows serve three rooms that all show full compliance to the BRE guidelines for NSL”.
49. The officer's conclusions on daylight do not mention the NSL results.
50. The Defendant and Interested Party sought to explain away the omission of the NSL results on the basis that the BRE Guide provides that floor plans are necessary to properly assess the impact on daylight distribution and these were only available for a limited number of the properties. I am not satisfied that this reasoning justifies the omissions. The BRE Guide is not as prescriptive as suggested in this respect by the Defendant and Interested Party. The Guide refers to calculating daylight distribution where room layouts are known and the GIA report states that it is normal practice to make reasonable assumptions as to internal layout. The GIA report recorded NSL deviations against results in unknown rooms. In my view it was misleading to simply ignore the results (unless they were compliant). What should have happened, it seems to me, is that Councillors were informed about the NSL exceedances but told that much might depend on the use of the rooms in question.
51. Mr Ormondroyd submitted that there are material differences between the present case and the case of R(Tower Hamlets) v Rainbird [2018] EWHC 657 (Admin) in which John Howell QC, sitting as a Deputy High Court Judge, quashed a planning permission

on grounds of errors in the application of the BRE Guide. The differences were said to include more egregious errors in the officer's report and the BRE Guide being expressly incorporated into the relevant local plan policy in *Rainbird*. I do not accept the submissions. If the Council chooses to apply the BRE guide it must do so properly. Whether or not an officer's report is seriously misleading requires a fact sensitive analysis. Comparisons with the reports of officers in other cases does not assist the Court in this respect.

52. In my judgment, in light of the evidence set out above, Councillors were significantly misled because:
- a) They were not told that a reduction in the distribution of daylight is a separate distinct reason why daylight in the Pennard Road properties may be adversely affected.
 - b) They were not informed that the NSL results were indicating losses in daylight distribution in the Pennard Road properties, some of which appear significant, although much might depend on the use of the rooms in question.
 - c) In contrast, where it existed, NSL compliance was drawn to their attention as a reason for them to take comfort in the overall reduction in amount of daylight at the relevant properties.
 - d) Councillors were not therefore in a position to form a judgment on the impacts of daylight distribution at properties on Pennard Road or aware that they needed to do so.
53. None of this appears to be the fault of the planning officer who simply repeated the analysis put before him in the GIA report.
54. The question then arises whether the decision making would have been different had the errors in the officer's report not occurred. It is sufficient for the Claimant to show merely that it might have done. Separately I must consider whether the Court is required to refuse relief under section 31 of the Senior Courts Act on the grounds that it appears to the Court to be highly likely that the outcome of the application would not have been substantially different if the conduct complained of had not occurred. In order to refuse relief I must be satisfied that it is highly likely that the outcome would not have been substantially different for the claimant.
55. I am not satisfied that the decision would necessarily have been the same. The main objections to new development in the borough relate to loss of sunlight, daylight, outlook and privacy. A number of properties on Pennard Road were already reporting deviations from the VSC guideline. Had Councillors been made aware of a separate distinct reason why daylight at the Pennard Road properties might be adversely affected by the development they may have sought more information about the implications for the Pennard Road properties and requested further revisions to the design. Alternatively they might not have done. It is a matter of speculation. It cannot however be said that they would necessarily have come to the same conclusion. For the same reasons, it does not appear to me to be highly likely that the outcome would not have been substantially different if Councillors had been made aware of a separate

distinct reason why daylight at the Pennard Road properties might be adversely affected by the proposed development.

Conclusion

56. For the reasons given above, the misleading nature of the officer's report, in so far as it reported on the impacts of the proposed development on daylight at the Pennard Road properties, was material. The decision to grant planning permission was unlawful and the planning permission granted by the Council will be quashed.