



Neutral Citation Number: **[2022] EWHC 1207 (Admin)**

Case No: CO/3690/2021

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 20/05/2022

**Before :**

THE HONOURABLE MRS JUSTICE THORNTON DBE

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**Between :**

**(1) VANBRUGH COURT RESIDENTS' ASSOCIATION**

**( an unincorporated association suing by its Chairman,  
Secretary and Treasurer)**

Claimant

**- and -**

**(2) LONDON BOROUGH OF LAMBETH**

Defendant

**- and -**

**(1) KANIN CORPORATION NV**

First Interested

Party

**- and -**

Second Interested

**(2) GREGORY O'CONNOR**

Party

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**James Neill** (instructed by **Leigh Day**) for the **Claimant**

**Matthew Dale-Harris** (instructed by **Lambeth Legal Services**) for the **Defendant**

**Kate Olley** (instructed by **Town Legal LLP**) for **Kanin Corporation NV**

Hearing dates: 30th and 31st March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 11:00am on Friday 20 th May 2022.

**The Hon. Mrs Justice Thornton :**

### **Introduction**

1. The Claimant brings this claim for judicial review of the decision by the London Borough of Lambeth, dated 17 September 2021, to grant planning permission for a roof level extension to a four-storey block of flats at Vanbrugh Court, Wincott Street, London, SE11 4NS, so as to provide sixteen additional residential units and five external lifts.

2. The Claimant is an association of leaseholders and tenants of Vanbrugh Court who objected to the extension during the planning application process (“the residents”). The core concerns raised by the residents related to the structural feasibility of the building to support the proposed extension. In particular, there was said to be no evidence assessing whether the existing building can support the extension or whether the residents will be required to vacate their flats during construction. The developers should have been required to produce a structural survey to address the issues.

3. The Defendant is the local planning authority for the area (“the Council”). The First Interested Party is the freehold owner of the site. The Second Interested Party is the applicant for planning permission (“the applicant”).

### **Grounds of challenge**

4. The Statement of Fact and Grounds raises the following grounds of challenge:

1) The Council failed to take into account a material consideration, namely the structural feasibility of the building to support the proposed development. Councillors on the Planning Committee were incorrectly advised that this was not a material planning consideration, and therefore failed to require a full structural survey in order to assess whether the development can be constructed without requiring residents to vacate their homes during construction (Ground 1).

2) Planning Officers failed to make further enquiries as to whether or not the proposed construction of the development will be achievable without the residents having to vacate (Ground 2).

3) The decision to grant planning permission is Wednesbury unreasonable, as it was based on an acceptance of the contention, on behalf of the applicant, that there will be no need to relocate residents during construction, despite the lack of a structural survey and despite a report commissioned by the applicant acknowledging the risk of greater structural work being required than assumed (Ground 3).

4) The Council misinterpreted Policy Q8 of its Local Plan, which states that the Council will seek to ensure that ‘ proposed building designs ’ are buildable. Members of the Planning Committee were erroneously advised that Policy Q8 only relates to questions of the ‘ buildability ’ of the detailed design of scheme, not the buildability of the scheme as a whole (Ground 4).

5) The Council failed to have regard to and/or misinterpreted paragraph 120(e) of the National Planning Policy Framework, which refers to support for ‘ upward extensions ’ where schemes are well-designed. The Council interpreted the reference to design as precluding consideration of structural integrity (Ground 5).

6) The implementation of the proposed upward extension carries an unacceptable risk to the existing properties within the building. On this basis, the decision to grant permission constitutes a

disproportionate interference with the rights of the residents under Article 8 of the European Convention on Human Rights (Ground 6).

### **Factual Background - the planning application process**

5. The planning application was submitted in July 2018.

6. The residents objected to the planning application by way of letter dated 26 October 2018 in which concern was expressed about the absence of a report from structural engineers as to the impacts of the additional storey on the existing building or any assessment of how construction was to be achieved whilst the residents still occupied the flats immediately below the building site. The proposed development was said not to be 'buildable' in the absence of a credible structural engineering report. It was also said that the application should not be considered without a construction management plan.

7. In January 2019, revisions to the planning application were submitted, including an updated report assessing the financial viability of the proposed development for the purposes of determining the appropriate provision of affordable housing. Previous reports on the topic were said to have underestimated the level of works and risks associated with undertaking a development above an existing block (§ 4.3). It was said that "developing over an existing building carries a considerable risk regarding the structure." The report proposed an increase in contingency costs to cover any necessary structural works. The report also addressed the risk of residents being required to vacate their homes during construction as follows:

"on the basis that the existing tenants of Vanbrugh Court have a well organised Tenant's Association ... we would expect there to be reasonable resistance to any disruption to the occupiers, especially regarding the top floor flats. We would therefore expect the developer to have to "decant" the occupiers of the top floor flats for the period of the construction works into similar accommodation locally and cover all expenses accordingly ."

8. The residents submitted a further objection, dated 7 February 2019, in which it was said that ' there is no evidence that the proposed development can be built safely either for itself or for the existing building on which it would rest...'. Reference was made to there being ' no structural information available' .

9. An additional and final objection was submitted in May 2020, in which reference was made to the financial viability report. In reliance on the report, it was said that ' an alarming aspect of the proposed development is the assumption that access to existing flats would be required for structural strengthening but no structural survey has been conducted and the revelation that the construction work will require the evacuation of the 27 existing top floor flats .'.

10. On 17 June 2020, the Council's Principal Planning Officer emailed the architects appointed on behalf of the applicant in the following terms:

"..... As you are aware this application has been subject to objection and one of the particular concerns is in relation to construction impact.

Whilst you have supplied a construction management plan we feel that it needs to be more detailed and address some specific concerns raised including the following;

1) Is the existing building structurally capable of accommodating a further storey? Do you have evidence to this effect?

2) Will it be necessary for the existing residents to decant into other accommodation during construction due to excessive noise and disturbance and any other reasons?

...

We firmly believe that without answers to these questions in advance, then Members are unlikely to make a decision.”

11. A representative of the applicant spoke to the Planning Officer by phone and followed up with an email on the same day, of which the relevant extracts are as follows:

“...From our initial observations, it is considered that the existing building should be structurally capable of accommodating the proposed lightweight steel-framed storey on top by means of a steel frame spanning between the existing parapets to transfer the loads to the external brick walls. This system has the added benefit of potentially not affecting the existing roof in any way, as the metal frame would be above and detached from the existing roof, which will also reduce the noise disturbance to existing residents on the floors below. It is the intention of the developer to adopt this system if further investigation of the existing structure allows it.

[It is important to note that as in any other construction project we will need to secure Building Control approval before works proceed on site, and the structural design will of course be part of that approval.]

...Considering our response to your first question above, it is highly unlikely that residents of the top floor will need to vacate their premises during construction, and we confirm that the Design Team will work towards that goal. However, should the existing roof require some localised repairs during the works, it may be necessary to temporarily relocate the affected residents for a limited time.”

#### The Officer's Report

12. The Officer's Report is dated 30 June 2020, with an addendum produced on 10 July 2020. It recommends the grant of planning permission. The Executive Summary states that residential use of the site is acceptable and the proposed extension is considered to represent a high-quality attractive development of appropriate scale for the surrounding context. There will be no harm to the nearby conservation area. Amenity impacts of the development on residential properties within the existing building and surrounding residential properties include some loss of daylight and sunlight, but the losses are negligible to minor. The proposed development will not result in any undue sense of enclosure or unacceptable loss of outlook from neighbouring properties. The scheme will comply with transport policies. The summary concludes that ‘ Officers consider that the proposal would be in compliance with the development plan. There are no material considerations of sufficient weight to dictate that the application should be refused .’

13. Sections 1 – 7 of the Report set out details of the application site, surrounding area, proposal, consultations and policies. Section 8 contains the Officer's assessment of the application. Section 8.5 considers the amenity impacts on neighbouring occupiers including daylight, sunlight and overshadowing. It also includes a section on the Construction Management Plan, during the course of which the Officer comments as follows:

“8.8.4 The applicant has submitted a draft Construction Management plan (CMP) providing details about the construction logistics/methods which has been reviewed by the Council's Transport Officer

.....

8.8.9 In addition, the applicant has stated that the existing building should be structurally capable of accommodating the proposed lightweight steel-framed storey on top by means of a steel frame spanning between the existing parapets to transfer the loads to the external brick walls. This system has the added benefit of potentially not affecting the existing roof in any way, as the metal frame would be above and detached from the existing roof, which will also reduce the noise disturbance to existing residents on the floors below. It is the intention of the developer to adopt this system. It is highly unlikely that residents of the top floor will need to vacate their premises during construction, and we confirm that the Design Team will work towards that goal.

....

8.8.11 On this basis officers recommend a condition (Condition 4) for the submission and approval of a final Method of Construction Statement covering each of the above matters. Subject to a Method of Construction Statement being secured by condition, it is considered that the proposed construction works would not result in an unacceptable level of harm to highway safety or the amenity of surrounding properties”

The Planning Committee meeting

14. The Planning Committee meeting took place (virtually) on 14 July 2020. The Planning Officer gave a presentation to Committee members including a summary of his Report and addendum. Following discussion, Members voted unanimously in favour of the proposal. The minutes of the meeting record that:

“Vanbrugh Court

The Planning Officer gave a presentation which included a summary of the report and subsequent addenda. Members were advised of the key material planning issues for consideration

...

Following the officer’s presentation, the objectors raised the following concerns:

- Vanbrugh Court Residents Association was united in opposing the unreasonable and speculative application which breached planning rules and legal rights of residents to peaceful enjoyment of their homes.
- Resident engineers stated that it was not possible for a steel frame base to be used across the building and stay within the stipulated 3.1m extra height. The applicant’s agent had previously concluded the same, but now was proposing the removal of the roof and decanting all top-floor residents.
- Residents were concerned that no structural survey had been undertaken.

...

Officers then provided the following information in response to questions from members:

- If the proposal could not achieve compliance with Building Regulations, the applicant would likely need to seek amendment to the planning consent if permission were granted. A revised application would be submitted to the Local Planning Authority for its consideration.

The Committee considered points raised by speakers and information provided by officers in conjunction with the report before making the following observations:

- Members understood that the structural impacts were outside planning consideration and they struggled with the scale of the project, as it would have a significant impact to residents' amenity.
- A Member was cautious of construction works above existing buildings but understood the extent that Building Regulations covered the construction of the extension and alteration of the building and was satisfied that the scheme must comply with these regulations.
- Members expressed concern that there had not been a full structural survey, the time it would take to resolve and how the asbestos removal would affect the timeline."

The grant of planning permission

15. The decision notice grants planning permission for " erection of a roof extension to the existing 4 storey building to provide 16 additional residential units, including the provision of 5 external lifts, cycle storage, disabled parking spaces, additional refuse and recycling storage, new entrance ramps, together with associated site works, PV panels, and hard and soft landscaping ".

16. Condition 4 provides that:

"No development shall commence until full details of the proposed construction methodology, in the form of a Method of Construction Statement, have been submitted to and approved in writing by the Local Planning Authority. The Method of Construction Statement shall include details regarding:

- a) The notification of neighbours with regard to specific works and a named contact point
- b) Advance notification of road closures;
- c) Details regarding parking, deliveries, and storage;
- d) Details regarding dust mitigation
- e) Details of measures to prevent the deposit of mud and debris on the public highway;
- f) Details of coordination with surrounding developments and their construction timelines;
- g) Details of measures to protect the street trees during the demolition and construction periods;
- h) Details of delivery times, with strategies to minimise disruption to the local road network particularly during peak hours and avoid conflicts with pedestrians and traffic at the beginning and end of the school day; and
- i) Any other measures to mitigate the impact of demolition and construction upon the amenity of the area and the function and safety of the highway network."

### **Legal framework**

17. By the end of the hearing, the legal framework was common ground.

Material considerations

18. A local planning authority must determine an application for planning permission in accordance with the development plan unless material considerations indicate otherwise (s. 38(6) of the Planning and Compulsory Purchase Act 2004 and s. 70(2) of the Town and Country Planning Act 1990).

19. Material planning considerations are not defined by statute. Their scope is broad. Any consideration which relates to the use and development of land is capable of being a planning consideration. A consideration will be 'material' if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other (Cooke J in Stringer v Minister of Housing and Local Government [1971] 1 All ER 65 at p77 & R (On Application of Kides) v South Cambridgeshire District Council [2003] P & CR 19.)

20. The correct legal approach to establishing whether a consideration is material in a given case is set out by the Supreme Court in R(Friends of the Earth v Transport Secretary) [2021] PTSR 190. There are three categories of consideration, namely 1) those expressly or implicitly identified by the statute as considerations to which regard must be had, 2) those identified by statute as considerations to which regard must not be had and, 3) those to which the decision-maker may have regard if, in his judgment and discretion, he thinks it right to do so.

21. In relation to the third category of consideration, there is a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process but there will be considerations that are so obviously material to the decision that they must be taken into account [§116 -117]. The test whether a consideration within this third category is 'so obviously material' that it must be taken into account is the familiar Wednesbury irrationality test [§119].

22. The third category of consideration may be sub divided into two types of case. In the first case, a decision maker may not advert at all to a particular consideration falling within the category. If so, then unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category but decide to give the consideration no weight. The question again is whether the decision-maker acts rationally in doing so. This stems from the related principle that, in normal circumstances, the weight to be given to a particular consideration is a matter for the decision-maker. In this context a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight ( Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759, 780 (Lord Hoffmann) [120 - 121]).

#### Overlapping regulatory regimes

23. Where regulatory control regimes overlap, a local planning authority is entitled to place reliance upon the effective operation of the other regulatory regime(s) in determining an application for planning permission. However, it cannot simply ignore the issues in question. It must assess them sufficiently so as to be able to satisfy itself that the other regulatory regime is capable of regulating the relevant issues. If it is not satisfied, then consent must be refused. The existence of the other regulatory regime is a material planning consideration, to be weighed in the balance ( Gateshead MBC v Secretary of State for the Environment 1995 Env. LR 37 at [44] & [49] and R(Bailey) v Secretary of State for Business, Enterprise & Regulatory Reform [2008] EWHC 1257 (Admin) at §13)).

#### Duty of sufficient inquiry

24. A public body has a duty to carry out sufficient inquiry prior to making its decision, in particular by asking the right question and taking reasonable steps to acquaint itself with the relevant information to enable the question to be answered correctly ( Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 at 696). It is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken. The court should only intervene if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. The court should establish what material was before the authority and only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient ( R (Balajigari) v Home Secretary [2019] 1 WLR 4647, at [70]).

#### The Court's review of Planning Officer reports

25. The reports of Planning Officers to a Planning Committee are not to be read with undue rigour but with reasonable benevolence, bearing in mind they are written for Councillors with local knowledge. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the Members followed the officer's recommendation, they did so on the basis of the advice that the Officer 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 on 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 Members in a material way so that, but for the flawed advice it was given, the Committee's decision would or might have been different that the Court will be able to conclude that the decision itself was rendered unlawful by that advice. Where the line is drawn between advice that is significantly or seriously misleading in a material way and advice that is misleading but not significantly so, will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it ( Mansell v Tonbridge and Malling District Council [2017] EWCA Civ 1314 at [42]).

#### Interpretation of planning policy

26. A planning authority must proceed upon a proper understanding of policy. Interpretation of policy is a matter for the Court, but the Court should guard against excessive legalism in the planning system and resist over-complication of concepts that are basically simple. 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 ( Tesco Stores Ltd v Dundee City Council [2012] PTSR 983, [17-22], Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865, R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council [2020] P.T.S.R 22, Barwood Strategic Land II LLP v East Staffordshire Borough Council [2018] P.T.S.R. 88).

#### **The policy framework**

27. Paragraph 120(e) of the National Planning Policy Framework provides as follows:

"Making effective use of land

119 Planning policies and decisions should promote an effective use of land in meeting the need for homes and other uses, while safeguarding and improving the environment and ensuring safe and



healthy living conditions. Strategic policies should set out a clear strategy for accommodating objectively assessed needs, in a way that makes as much use as possible of previously-developed or 'brownfield' land.

120 Planning policies and decisions should:

...

e) support opportunities to use the airspace above existing residential and commercial premises for new homes. In particular, they should allow upward extensions where the development would be consistent with the prevailing height and form of neighbouring properties and the overall street scene, is well- designed (including complying with any local design policies and standards), and can maintain safe access and egress for occupiers."

28. Policy Q8 of the Lambeth Local Plan provides that:

"Policy Q8 - Design quality: construction detailing

a) When negotiating schemes the council will seek to ensure that proposed building designs and submitted details are buildable and visually attractive. Poorly-detailed and undeliverable built forms will be resisted.

b) When considering the details of proposals the council will:

i) resist 'value engineering' approaches which dilute the design quality and integrity of approved schemes; and

ii) seek construction detailing that is unified, visually attractive, robust and maintenance free."

29. The accompanying text provides that:

"10.26 The council recognises that in the realisation of buildings their design quality can often be compromised by poorly-considered detailing and inappropriate materials.

10.27 Failure to deliver good design at construction stage often robs schemes of their quality and results in poorly-considered detailing which can be visually unattractive and difficult to maintain. Common issues include: no consideration being given to roof drainage, parapet gutters and down pipes being unsympathetically placed as a result; integrated detailing being substituted for stick-on ornamentation which looks insubstantial, does not weather well and is vulnerable to damage; unattractive soffits, poorly placed meter boxes, boiler flues and gas pipes; and inadequate weathering detailing on cills, parapets and mouldings.

10.28 The council will normally request, as a condition of approval, detailed drawings including section of all external construction detailing 1:20 scale. See also CABE's document 'Protecting Design Quality in Planning' (2003)."

### **Submissions of the parties**

30. On behalf of the residents, it was submitted that the issue of structural feasibility was relevant because of the consequential impact on the use of their flats should construction require greater internal structural intervention works than assumed by the applicant. This includes the amenity impact should it be necessary to vacate their flats during construction. A proper and full understanding of the structural capability of the building at the point of determining the planning

application was therefore necessary. The issue is capable of being a material planning consideration. However, the advice given by Officers to Councillors in the Officer's Report; the addendum to the Report and at the Committee meeting was that structural feasibility was not, in principle, even capable of being a material planning consideration and thus no structural survey was required. That was plainly wrong. It was precisely the kind of flaw in advice identified in R(Copeland) v London Borough of Tower Hamlets [2010] EWHC 1845 (Admin) as rendering a decision unlawful. It was fundamentally misleading to suggest that structural feasibility of this particular proposal was not capable of being a material planning consideration, and on this basis, that no structural survey was required prior to the grant of permission. The consequence of the advice was that members were misled by being asked to rule out as a consideration the question whether or not the building was in fact structurally capable of supporting the development in question without much more extensive works than was originally envisaged.

31. If, contrary to the Claimant's primary case, Officers did consider the issue to be legally capable of being a material consideration but decided to attach no weight to it, then it was unreasonable to have done so. On the evidence, there was a clear link between structural issues and the risk of residents having to vacate, including the written objections and representations at the Committee meeting. The repeated questioning of officers at the meeting on the topic showed that Members were on the right track but were ultimately diverted by the misleading advice from Officers that structural considerations were not a material consideration due to the existence of other control regimes. The Council's planning officer had expressly raised the issue with the applicant. In response, the applicant said that it was unlikely but still possible that " it may be necessary to temporarily relocate the affected residents for a limited time. " The applicant's own viability experts had identified significant structural risks posed by this development. The building control regime could not prevent or limit a situation where, in order to implement that structurally sound solution, residents would need to leave their homes for a considerable period of time in order to enable those works to be safely implemented (Grounds 1-3).

32. The advice given to members of the Planning Committee during the meeting was that Policy Q8 of the Lambeth Local Plan did not relate to the question of structural feasibility but rather to questions of detailed design. The advice constituted a clear misinterpretation of Policy Q8. In addition, the Council failed to have regard to and/or misinterpreted paragraph 120(e) of the NPPF which refers to support for "upward extensions" where schemes are well-designed. The Council interpreted this reference to design as precluding consideration of structural integrity. The reference to 'well designed' refers not just to the external appearance of upward extensions but to their structural design. There is nothing in the NPPF which suggests that design is distinct from structural design. At no point did the Officer's report identify the design aspect of this part of the NPPF or refer to it. If this was because Officers considered that issues of design precluded matters of structural integrity, then that constituted a misinterpretation of the policy (Grounds 4 - 5).

33. On behalf of the Council it was submitted that the residents' submissions on Grounds 1 - 3 elide the question of whether the building could support the proposed extension with the potential risk of impacts on residential amenity from residents being required to vacate their flats during construction. The Council did treat the risk of harm to amenity from residents having to vacate as a material consideration. The Council's conclusion, that any such risk did not require the application to be refused or a full structural survey provided, can only be impugned on a Wednesbury standard which is not met. As regards Ground 4 - 5; Policy Q8 is, on its face, a planning design policy directed at 'construction detailing'. Similarly, paragraph 120(e) of the NPPF is concerned with design, which, in

NPPF terms, is distinct from structural design which is left to the building control regime. There is nothing in paragraph 120e) which suggests a different approach should apply to upwards extensions.

## **Discussion**

### Introduction

34. At the hearing, Counsel for the residents helpfully clarified the grounds advanced in the Statement of Facts and Grounds as follows. Grounds 1 – 3 form the core of the residents’ case against the Council; namely failure to treat structural feasibility as a material consideration (Ground 1); failure to make sufficient inquiries about structural feasibility (Ground 2) and the decision not to require a structural survey was Wednesbury unreasonable (Ground 3). Ground 2 (the alleged failure of the Council to make sufficient inquiries about structural feasibility) is an alternative to Ground 1 (the Council failed to treat structural feasibility as a material consideration) if the residents fail on Ground 1. Ground 3 may be dealt with as part of Ground 2 because the alleged failure to require a structural survey is part and parcel of the Council’s alleged failure to make sufficient inquiries into structural issues. Ground 6 (a disproportionate interference with the Article 8 rights of the residents) falls away if the Court finds for the Council on Ground 1. This is because the requisite balancing of competing interests of the individuals and the community as a whole required under Article 8 of the European Convention on Human Rights will, in effect, have been discharged via the domestic planning process and the Council’s consideration of material planning considerations ( Lough v First Secretary of State [2004] EWCA Civ 905).

### The Council’s decision making

35. To resolve the issues arising in this claim, I assess the decision-making process chronologically, considering each stage of the planning application process and the submissions on behalf of the residents about each stage of the process.

#### i) The concerns expressed by residents

36. It is apparent from the written objections advanced on behalf of the residents during the application process that they were expressing the two concerns set out below. On their behalf, it was suggested at the hearing that they had raised a third concern, namely the risk of flats being left empty during construction. However, a review of the correspondence indicates that this point was not raised in correspondence. As was conceded by the end of the hearing, the Council could not be criticised for failing to address this concern.

37. The two concerns being expressed were as follows:

- i) whether the extension could be built safely on top of the existing flats (i.e. whether the building could support the weight of the extension); and
- ii) whether residents might have to leave their flats during construction because of any necessary structural work.

38. For the purposes of this challenge, the issues are distinct. This is because, as was common ground, the question of whether the existing roof was capable of safely supporting the proposed extension was primarily a matter for the building control regime and not the planning regime (Building Control Regulations 2010 (SI 2010/2214)). Thus, there is no requirement under the Town and Country Planning Act 1990 or the Town and Country Planning (Development Management

Procedure) (England) Order 2015 (SI 2015/595) for structural surveys to accompany planning applications.

39. As per the legal authorities, the existence of the building control regime was a material planning consideration, to be weighed in the balance. It was open to the Council to place reliance upon the effective operation of the regime in determining the planning application, provided it satisfied itself that the building control regime was capable of regulating the relevant issues ( Gateshead MBC v Secretary of State for the Environment 1995 Env. LR 37) .

40. Contrary to the apparent suggestion in the residents' skeleton argument, there is no difference in the position in relation to roof level extensions, as confirmed by the permitted development rights in relation to upward roof extensions which came into force after the date of the decision under scrutiny. Development consisting of works for the construction of up to two additional storeys of new dwelling houses immediately above the existing topmost residential storey on a purpose built detached block of flats is permitted development (Class A of Part 20 of the Town and Country Planning (General Permitted Development) (England) Order (SI 2015/596)). There is no requirement for any structural information in relation to prior approval applications unless the existing building is 18m or more in height, in which case the consideration is limited to the fire safety of the external wall construction (paragraphs A.2(1)(i) and B(2)(i)). In any event, this point was not pursued in oral argument.

41. In contrast, the concern that residents might need to vacate their homes during construction raises an issue of amenity and the acceptable use of the land in question. It was common ground that this question is (and was) legally capable of being a material planning consideration. It falls into the third category of material consideration set down in R (Friends of the Earth) v Transport Secretary [2021] PTSR 190; namely those considerations to which the decision-maker may have regard if, in his judgment and discretion, he thinks it right to do so.

42. Accordingly, the primary issue between the parties under the first ground is a factual question as to whether or not the Council treated the issue of the residents having to vacate their homes as legally capable of being a material consideration. The residents contend that the Council had not done so, whereas the Council contends that it turned its mind to the question but decided to give the issue no weight and did not therefore require the applicant to furnish a structural survey to consider matters further. As was common ground, it only becomes necessary to consider the rationality of the Council's position in this regard if the Court agrees with the Council that the Council did treat the question as legally relevant but gave it no weight. If the Council treated the question as legally irrelevant, then its decision would be unlawful.

ii) The financial viability report produced on behalf of the applicant

43. In support of its (secondary) case that the particular circumstances of the planning application under scrutiny meant a structural report was necessary, such that it was irrational of the Council not to have required one, the residents placed heavy reliance on the content of a report prepared on behalf of the applicant which purported to identify the potential for structural risks posed by the development (see paragraph 7 of the factual background above). However, the report in question was a financial viability assessment prepared by financial advisors, directed to the question of affordable housing required for the development. The report was not based on structural information specific to the development but on the authors' broad experience of developments. In particular, it was not based on the specific information about structural issues provided to Officers in response to their email of 17 June 2020 (see paragraph 10 of the factual background above and below). Moreover, as the Council explained in pre-action correspondence, the report in question was reviewed by the Council's own

viability advisors who did not consider that the proposed contingency for expenditure on temporary relocation of the residents was justified. Accordingly, I do not consider it provides material support for the residents' case.

iii) Planning Officers' communications with the applicant for planning permission

44. Planning Officers raised both the 'pure' structural feasibility of the proposed development (i.e. the safety angle) and the prospect that residents may have to vacate their homes during construction with representatives of the applicant for planning permission as follows (see paragraph 10 of the factual background). Officers specifically asked whether the existing building was structurally capable of accommodating a further storey and whether it would be necessary for residents to decant into other accommodation during construction (email dated 17 June 2020, set out at paragraph 10 of the factual background above). The email inquiry demonstrates that Officers were engaging with the concerns raised by residents, including the risk of them having to vacate their homes during construction.

iv) The response from representatives of the applicant for planning permission

45. In response to the queries raised by Officers, representatives of the applicant explained that, on the basis of initial observations, the existing building should be structurally capable of accommodating the proposed extension. Accordingly, the existing roof would not be affected by the extension and consequently, it was 'highly unlikely' that residents of the top floor would need to vacate their premises during construction (see paragraph 11 of the factual background above). The email exchange (and phone conversation) between Officers and representatives of the applicant demonstrate Officers conducting the inquiries required by Gateshead. The response received from those inquires provided evidence that it was 'highly unlikely' that residents would be required to vacate their homes.

46. The residents sought to place reliance on the statement by Officers in the email of 17 June that 'We firmly believe that without answers to these questions in advance, then Members are unlikely to make a decision', to submit that Officers were clearly of the view that structural issues were significant. However, this submission seeks to elevate one sentence in an email into the status of advice by Officers or a stated position on their behalf. In reality, the sentence is no more than part of the rough and tumble of engagement between Officers and applicants in which the Officers were (successfully) pressurising the applicant for a response.

47. The residents also pointed to the final sentence of the applicant's response to the Officers' queries, namely that 'should the existing roof require some localised repairs during the works, it may be necessary to temporarily relocate the affected residents for a limited time' as further evidence of the significance of the issue. I do not accept the weight placed on the sentence in this regard. The sentence is simply an acknowledgment that the future inevitably carries uncertainties.

v) The officer's report

48. The Officer's Report to Councillors recorded the applicant's explanation (set out in the email exchange considered above) that the existing building should be capable of accommodating the extension and that it was 'highly unlikely' that residents would be required to vacate their homes. Officers went on to recommend a condition for the submission and approval of a final Method of Construction Statement covering amenity impacts. On this basis, Officers advised that the proposed construction works would not result in an unacceptable level of harm to the amenity of surrounding properties (see paragraph 13 above).

49. The question of whether residents might have to vacate during construction is raised and addressed in Section 8 of the Officer's report which sets out his assessment of the application. Having raised the topic, the report records the evidence that any such decanting is highly unlikely. It cannot be said, therefore, that Officers treated the risk of impact on residential amenity as legally immaterial. On the contrary, Officers engaged with the applicant on the specific issue and addressed the point as part of the assessment of the application. Similarly, on the basis of the evidence before Officers more generally on structural issues (i.e. that the building should be structurally capable of accommodating the extension) it cannot be said that it was irrational for Officers to adopt the view that a structural report was unnecessary and structural issues could be left to the building control regime.

50. On behalf of the residents, it was submitted that the report was misleading in omitting the final sentence of the applicant's response in the email exchange, that 'should the existing roof require some localised repairs during the works, it may be necessary to temporarily relocate the affected residents for a limited time'. I am not, however, persuaded that this omission can be said to have misdirected Members in a material way so that, but for the flawed advice given, the committee's decision would or might have been different. The statement does not detract from the applicant's primary position that it is 'highly unlikely' that residents will be required to vacate. It is no more than an acknowledgment that the future cannot be guaranteed.

51. The residents relied heavily on the comments of Officers in the Report and addendum in response to objections to the proposed development; as follows:

'Representation: "Host building is structurally unable to support an additional storey"

"The structural feasibility of the development of this additional storey would be assessed by Building Control and is not a material planning consideration. In addition, the applicant states that the building would be capable of accommodating this addition." ('Representation 1').

Representation: "there is no structural survey carried out for the feasibility of the proposed roof addition."

Officer response: "This is not a material planning consideration and would be assessed by the Councils Building Control Officers ('Representation 2').

52. However, the submissions on behalf of the residents in this context tended to elide the two concerns, as to 1) structural safety and 2) amenity impact of the residents having to vacate their homes. As expressed, the representations above are directed at the question of 'pure' structural integrity. Other representations cover amenity issues, as for example as follows:

'Representation: "The construction period would negatively affect those that work from home and the elderly who spend most of their time in their homes."

Officer Response: "This matter is discussed at section 8.7 of this report. In summary a condition (condition 4) is recommended to ensure the submission and approval of a Method of Construction Statement which will need to detail measures to protect the amenity of surrounding properties."

Representation: "The construction period would negatively affect those that work from home and the elderly who spend most of the time in their homes. This is not detailed in section 8.7 of the report."

Officer response: "A condition (Condition 4) is recommended to ensure the submission and approval of a Method of Construction Statement which will need to detail measures to protect the amenity of the

surrounding properties. The details required to safeguard surrounding neighbouring properties is outlined in this section.”

53. Of particular note; one of the representations makes specific reference to residents having to vacate their flats: “ The proposals would require vacating top floor flats”. The Officer does not respond by saying that this is not a material planning permission. Instead, the response is: “ The applicant does not propose vacating of existing flats ”.

54. Moreover, the representations relied on by the residents must be read in the context of the Officer’s assessment of the application (in section 8 of the report). As explained above, this section of the report demonstrates that Officers addressed the amenity impact of residents having to vacate their homes. Their assessment of the position in this regard was built, in turn, on information sought specifically from the applicant on structural matters. Officers had been told that the building was capable of supporting the proposed structure and consequently it was highly unlikely that residents would need to vacate during construction.

55. Turning then to the specific representations relied on by the residents. Read in the context explained above, there is, in my judgment, nothing objectionable in the statement in Representation 1 that structural issues are dealt with by the building control regime. In any event, whilst referencing the building control regime, the Officer nonetheless goes on to consider the position in the specific circumstances of the present application, observing that, ‘ In addition, the applicant states that the building would be capable of accommodating this addition.’ This statement undermines any suggestion that structural issues were not treated as legally material. I accept that Representation 2 is expressed more starkly but, read in context, it is no more than a repeat of the position that, in the context of this particular application, structural issues can be left to building control. The Officer’s response to issues which are the subject of other areas of overlapping control is similar:

Representation: “ construction will cause damage and water infiltration to top floor unit”.

Officer response: “This is not a material planning consideration. This would be covered by the Construction (Design and Management) Regulations 2015 to ensure the development is built safely and to required standards.”

Representation: “Construction will cause damage to the external fabric of the building.”

Officer response: “This is not a material planning consideration. This would be covered by the construction (Design and Management) Regulations 2015 to ensure the development is built safety and to required standards.”

Representation: “Condition 45 (boiler flues) does not ensure a boiler flue for the existing flats is provided...” utilities and boiler flues.”

Officer Response : “ These are detailed construction design element which would follow and be addressed in any Building Regulation submissions.”

vi) The Planning Committee meeting

56. In summary, the minutes of the Planning Committee meeting and the unofficial transcript record the following advice given by Officers to Councillors:

(1) Officers had explored structural issues with the applicant who had explained that there would be an engineering solution which would not compromise the structure of the building.

(2) In the experience of Officers, construction solutions could generally be found.

(3) Officers were aware that they had not required a full structural survey but did not consider it necessary at this stage.

(4) Structural matters were questions for the Building Control regime and if building regulations approval could not be secured then the extension could not be built or the applicant would likely need to seek amendment to the planning consent if permission were granted.

(5) The structural soundness of the building was beyond material considerations and Members should focus on the planning considerations around the effect of the additional storey on residential amenity .

(6) Construction impacts could be addressed under Condition 4, which secures the submission of a method of construction statement to protect residential amenity and construction hours could if necessary be controlled under the Control of Pollution Act regime.

(7) There are a number of steps that the applicant would need to take in order for them to deliver the scheme. Planning is the first step looking at the principle of building on top of the existing Vanbrugh Court and whether an additional fifth floor on this building is acceptable against existing design policies. The actual issue of structural integrity will be passed on and dealt with by building control colleagues.

(8) Whilst this was a full application, the Government was proposing to introduce a permitted development right for upward extension, whereby the principle of the development would be accepted and local planning authorities would need to consider the acceptability of the particular scheme, including the impact on the amenity of existing neighbours, including noise and dust. Issues around structural integrity would be controlled under building regulations.

57. In my judgment, there is nothing misleading or irrational about the advice. Read as a whole and fairly, it demonstrates the inquiries made of the applicant in relation to structural issues and an expression of the view, entirely consistently with Gateshead, that in the particular circumstances of the application, 'pure' structural issues could be left to the building control regime. Impacts on residential amenity could be addressed via Condition 4.

58. The residents suggested that it was apparent that several members of the Committee repeatedly raised concerns about the lack of structural survey specifically in the context of whether residents might be required to vacate their homes during construction, but were advised by officers that structural ■ issues were not a material planning consideration and were matters that could be dealt with under the separate statutory regimes of Building Control or the regime under the Control of Pollution Act. The extracts relied on for these submissions include the following advice by Officers:

'Officer: there's a technical solution for practically every construction dilemma and they do, these solutions do fall outside the realm of planning. They are really building control matters.'

...

Officer: I mean ultimately if they can't secure building regulations approval for this they can't build it so there are other regulatory regimes that will ensure the structure is CF and structurally sound and all those other things. In planning terms they are beyond your material consideration...

" Members understood that the structural impacts were outside planning consideration ...." '.



59. However, the residents' submissions ignore the underlying factual reality of this planning application which is that the applicant had identified a structural solution which, it was said, should ensure there are no material structural impacts and it is therefore correspondingly 'highly unlikely' that residents will be required to vacate their homes. As is apparent from comments by Officers during the meeting, the applicant's position chimed with the professional experience of the Officers that engineering solutions could, and would, be found. The material relied on by the residents to suggest that the Council should not have accepted the applicant's position without further investigation is not, in my judgment, sufficient to displace the Officer's professional experience and the information provided by the applicant. Their submission in this regard rested heavily on the financial viability assessment produced on behalf of the applicant, which was not based on any structural information specific to the application but on the general experience of financial advisors (not structural engineers).

60. Counsel for the residents sought to rely on the decision in Copeland v LB Tower Hamlets [2010] EWHC 1845 (Admin). The case concerned a challenge to the grant of planning permission for change of use to a fast food takeaway. It was common ground that the proximity of the premises to a local secondary school, and thus the potential impact on the school's attempts to encourage healthy eating, was capable of being a material consideration. The question for the Court was whether the Claimant could establish that the Planning Committee considered the issue was not capable of being a material consideration. On the facts, the Court decided Councillors had been advised that such a matter could not be a material planning consideration:

"In my view the difficulty with Mr Harwood's submission is that it flies in the face of the plain words of paragraph 7.4 of the officer's report. When the application for planning permission came before the members of the planning committee councillors were specifically advised that such matters could not be material planning considerations.

The subsequent correspondence of the council with the claimant's solicitors underlines the emphatic nature of the advice being given on 1 April to the planning committee. The view within the council was that it was "not a matter going to the character of the use of land." (§30/31)

61. In Copeland , the fact that Councillors had discussed the issue at the Planning Committee meeting did not assist the defendant Council given the discussion had taken place against the backdrop of clear advice from Officers that the issue was not a material planning consideration:

"In any event, what they and Councillor Heslop said cannot, in my judgment, be taken to represent the basis of the committee's decision. The fact is that this discussion and the decision which followed took place against the background of the advice in the officer's report, that the matter was not a material planning issue which could have weight. It seems to me that the discussion - in particular Councillor Heslop's intervention - was an indication that members were in fact concerned about the point and might, if directed it was open for them to do so, have given it weight in the planning decision." (§34)

62. In the present case, the facts are different. For the reasons set out above, the decision-making documentation demonstrates that the potential risk of the residents having to vacate their homes during construction was treated as legally capable of being a material consideration. However, Officers decided to attach no weight to the issue. The decision to attach no weight to it cannot be impugned as irrational. Information provided by the applicant indicated that the risks were hypothetical; a position corresponding with the professional experience of Officers, who were also

aware of the availability of the building control regime to deal with the detail and safety of the structural design.

63. The facts of the present case are more analogous with the case of R(Hayden) v Erewash Borough Council [2013] EWHC 3527. In that case, the Claimant sought to challenge the grant of planning permission for a 2-storey extension to an adjacent, detached, house. Both houses were situated above a coal seam in a former coal mining area. The Claimant was concerned that construction work might cause structural damage to his home. His argument that the local authority had erred in failing to have proper regard to the question of ground stability was rejected by the Court. The authority had not said that stability of the land was not, in principle, capable of amounting to a planning consideration. Rather, it was not considered significant on the facts of the application because the concerns could properly be addressed through the Building Regulations and the Party Wall Act.

64. On behalf of the residents, it was submitted that the building control regime cannot prevent or address a situation where it becomes necessary for residents to leave their homes in order to implement a structurally sound solution. However, on the facts of the present case, this is a hypothetical concern because the scenario is considered 'highly unlikely'. The logic of the residents' submission is that planning permission should have been refused on the basis of a speculative eventuality. There was, in this regard, force in the submission on behalf of the Council that it might have been vulnerable to legal challenge had it acted on such a hypothetical basis. During the course of the hearing, the Court inquired of the parties as to the caselaw on whether unfounded public concern could constitute a material consideration. In response, the Court was provided after the hearing with an extract from the Planning Encyclopaedia addressing the issue, to the effect that unfounded public concern can constitute a material consideration in some circumstances. However, this analysis takes matters no further in this case because Officers engaged with the concerns of the residents. The challenge is, in effect, to the weight attached by Officers to the matter, which is not a matter for the Court.

65. In conclusion, it follows that, on my assessment of the decision making, Officers treated the question of whether residents might have to vacate their homes during construction as legally capable of being a material consideration. However, they decided to attach no weight to the matter, on the basis of information from the applicant that the scenario is 'highly unlikely'. Further, in the circumstances of this case, the Council's decision to rely on the response from the applicant about structural issues, and not to require a structural survey, was entirely reasonable. Having made the inquiry, the applicant's response chimed with the professional experience of Officers that a technical solution could be found. The material relied on by the residents to the contrary does not provide material support for their case. The building control regime was available to regulate structural issues for the reasons explained above. The provision of a structural survey was not 'so obviously material' that the decision not to take one into account was irrational.

66. Further, in the circumstances, the Tameside duty of inquiry adds nothing further to the analysis for the reasons explained by the Divisional Court in R( Plantagenet Alliance) v Secretary of State [2014] EWHC 1662:

"The test for a Tameside duty is one of rationality, not of process. The Tameside test can be formulated as follows: Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable

steps to inform him or herself of the same? ... In short, the Tameside information must be of such importance, or centrality, that its absence renders the decision irrational.” [139]

67. In any event, I do not accept the residents’ criticisms in this regard. Officers made specific inquiries of the applicant and were entitled to rely on the responses received, which accorded with their professional experience. The material relied on by the residents to suggest otherwise does not provide the support sought for it.

68. Accordingly, grounds 1 – 3 fail.

69. Turning to Ground 4: I am not persuaded that Officers misinterpreted Policy Q8 of the Lambeth Local Plan. The relevant advice by Officers during the Planning Committee meeting was as follows:

‘Officer:...just going back to Policy Q8, it was really written with regard to the discharge of conditions for applications, so that we’re negotiating schemes, that we have some comfort that the construction detail and that is the external construction detailing is robust and well detailed and deliverable. Often we get fanciful forms in architectural submissions that are very difficult to detail. So really Q8 is more about external appearance construction detailing than it is about structural integrity?’”

70. Counsel for the residents sought to rely on the reference in the policy to the Council seeking to ensure that ‘ proposed building designs and submitted details are buildable’ in order to submit the policy should be read as referring to building design in its wider sense so as to include structural elements. However, as Counsel acknowledged during the hearing, the heading of the policy is ‘ Design quality: construction detailing.’ It is apparent from a reading of the policy of a whole that it is directed at construction detail which turn out not to be deliverable or lead to poor quality outcomes (“ When negotiating schemes the council will seek to ensure that proposed building designs and submitted details are buildable and visually attractive. Poorly-detailed and undeliverable built forms will be resisted”). The examples given in the explanatory text in 10.28 include unattractive soffits and poorly placed meter boxes which confirm this interpretation because they relate to external detail, not structural integrity.

71. Similarly, it cannot be said that the Council failed to have regard to paragraph 120e) of the NPPF. The Officer’s Report addresses the precursor to paragraph 120e), namely paragraph 118a) as it was raised as an issue in representations from adjoining occupiers. The concern was expressed as:

“Contrary to NPPF paragraph 118(a) as the development would not be consistent with the prevailing height and form of neighbouring properties and the overall street scene. The upward extension will create an ugly interruption in the skyline and will be unsightly when viewed in the context of its surroundings”.

72. The Officers’ response is:

“Paragraph 118 of the NPPF refers to effective use of land and sets out 5 points (points a to e) that planning polices and decisions should do to promote and effective use of land. Under point (e) which is most relevant to this site, there is support for “upward extensions” to utilise airspace of existing residential premises where this is consistent with the prevailing height and form of neighbouring properties.

The proposed roof addition is considered in keeping within the existing context of surrounding building heights and would not interrupt the skyline.”

73. The residents further submit that the paragraph 120 e) of the NPPF was misinterpreted. It includes a reference to 'well designed' which refers not just to the external appearance of upward extensions but to their structural design. There is said to be nothing in the NPPF which suggests that design is distinct from structural design. I am not persuaded by the residents' submissions in this regard. Design occupies a separate chapter of the NPPF, during the course of which there is no reference to structural integrity. Design in NPPF terms is distinct from structural design which is left for the building control regime. There is nothing in the NPPF 120 e) or its predecessor which suggests a different approach should apply to upward extensions. If the reference to design in paragraph 120 e) was considered to extend to structural integrity, then the effect would be to start to import the building control regime into the design policies when the general position is that structural issues are not normally within the scope of the planning application process. The residents' interpretation amounts to an unrealistic approach to the NPPF framework.

74. Accordingly, Grounds 4 and 5 fail.

75. Ground 6 does not arise given the conclusions reached on Ground 1.

### **Conclusion**

76. For the reasons explained above, the claim fails.