



Neutral Citation Number: [2016] EWHC 1006 (Admin)

Case No: CO/5370/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2016

Before :

MR JUSTICE GILBART

Between :

**THE QUEEN
(ON THE APPLICATION OF SPITALFIELDS
HISTORIC TRUST LIMITED)**

Claimant

- and -

MAYOR OF LONDON

Defendant

-and-

LONDON BOROUGH OF TOWER HAMLETS

First Interested

-and-

**BRITISH LAND PROPERTY MANAGEMENT
LIMITED**

Party
Second
Interested
Party

Richard Harwood QC ((instructed by **Richard Buxton**, Environmental and Public Law,
Solicitors of Cambridge) for the Claimant

Daniel Kolinsky QC (instructed by **Transport For London Legal**) for the Defendant

Russell Harris QC and *Robert Walton* (instructed by **King and Wood Mallesons LLP**,
Solicitors of London) for the Second Interested Party

The First Interested party did not appear and was not represented

Hearing dates: 26th April 2016

Approved Judgment

MR JUSTICE GILBART :

LIST OF ACRONYMS/ABBREVIATIONS

SHTL	Spitalfields Historic Trust Limited
BLL	British Land Property Management Limited
LBTH	London Borough of Tower Hamlets
GLA	Greater London Authority
TCPA 1990	Town and Country Planning Act 1990
LBCAA 1990	Planning (Listed Buildings and Conservation Areas) Act 1990
PCPA 2004	Planning and Compulsory Purchase Act 2004
MLO 2008	Town and Country Planning (Mayor of London) Order 2008 (No 2008/580)
NPPF	National Planning Policy Framework (March 2012)
LPA	Local Planning Authority

1. This matter relates to the procedure whereby the Mayor of London is able to direct that he will act as the local planning authority for a planning application and listed building consent application made to a London Borough, in this case Tower Hamlets.
 2. The site in question lies in the Norton Folgate area, which lies just to the east of Shoreditch High Street on the fringe of the City of London, and just to the west of Commercial Street. The London Borough of Hackney lies close by to the north across Shoreditch High Street as it bears north-eastwards. The Second Interested Party BLL wish to construct substantial development there, in the form of a mixed scheme of 26,030 sq m of Use Class B1 office floorspace, 3387 sq m of use Class A1/A3 floorspace and 45 residential flats. The Claimant SHTL has objected on several grounds to the proposal.
 3. This judgment will deal with the matters as follows:
 - (a) The statutory scheme of development control as it applies in London
 - (b) The relevant applications and the proposed development in question
 - (c) The history of the applications
 - (d) The case for the Claimant
 - (e) The case for the Mayor of London
 - (f) The case for BLL
 - (g) Discussion and Conclusions
- (a) *The statutory scheme of development control as it applies in London*

4. Applications are made in the usual way to the relevant London Borough as LPA and determined in accordance with the standard provisions dealing with the determination of applications: s 70 *TCPA 1990*, s 17 and 72 of *LBCAA 1990* and s 38(6) of *PCPA 2004*.
5. However there are provisions in s 2A-F *TCPA 1990* (as amended) and in the Order made pursuant to those provisions (*MLO 2008*) which relate to the way in which the Mayor of London is consulted about planning applications, or may take over their determination. The Mayor has the power under s 2A *TCPA 1990* to determine that he is to be the local planning authority for the purposes of determining the application. The circumstances in which he may do so are prescribed by the *MLO 2008* by virtue of s 2A (2) of the Act.
6. The effect of the provisions in the *MLO 2008* is that
 - i) as soon as an application of potential strategic importance (called by the Act a PSI) is received, the LPA must provide to the Mayor a copy of the application, together with any plans, drawings or other documents submitted with it (*MLO 2008 Article 4(1)*);
 - ii) the Mayor must, within six weeks, provide the LPA with a statement setting out whether he considers that the PSI application complies with the spatial development strategy, and his reasons for taking that view (*MLO 2008 Article 4(2)*);
 - iii) unless the Mayor has said that he does not wish to be consulted on the application in question, the LPA must not determine a PSI application without sending the Mayor copies of (*MLO 2008 Article 5*)
 - a) any representations made to the authority in respect of the application;
 - b) a copy of any report on the application prepared by an officer of the LPA;
 - c) a statement of the decision the authority proposes to make, and
 - d) if it proposes to grant permission, a statement of the conditions it proposes to impose, and of any planning obligation it proposes to enter into;
 - iv) the Mayor then has 14 days in which to notify the LPA that he is content to let it determine the application (*MLO 2008 Article 5((1)(b))*);
 - v) if the Mayor considers that a grant of a PSI application would be contrary to the spatial development strategy or prejudicial to its implementation or otherwise harmful to good strategic planning in Greater London, he may direct refusal within the 14 day period, having regard to criteria identified in the Order (*MLO 2008 Article 6*);
 - vi) by Article 7 of *MLO 2008* the Mayor may give to the local planning authority a direction under section 2A of the 1990 Act (that he is to be the planning authority) if he considers that—

- a) the development or any of the issues raised by the development to which the PSI application relates is of such a nature or scale that it would have a significant impact on the implementation of the spatial development strategy;
 - b) the development or any of the issues raised by the development to which the application relates has significant effects that are likely to affect more than one London Borough; and
 - c) there are sound planning reasons for issuing a direction.
- vii) In deciding whether to give a direction the Mayor must take account
- a) (not relevant to this application)
 - b) in relation to all applications, of the extent to which the council of the London Borough is achieving, and has achieved any other targets set out in the development plan which are relevant to the subject matter of the application (*MLO 2008 Article 7(3)*).
- viii) In giving a direction, his reasons must specify how those matters have affected his decision (*MLO 2008 Article 7(7)*);
- ix) Any such direction must be made within the 14 day period (*MLO 2008 Article 7(5)(a)*)
7. If he has directed that he is the planning authority, the Mayor will then hold a representation hearing pursuant to s 2F of *TCPA 1990* at which parties can appear. Article 9 of *MLO 2008* makes provision for disclosure and access to reports.
8. This was a PSI application both because it was in Central London outside the City of London and proposed a total floorspace exceeding 20,000 sq m, and also because it was proposed to exceed 30 metres in height (categories 1A and 1C in *MLO 2008 Schedule 1* which deals with "Large Scale Development. ")

(b) The relevant applications and the proposed development in question

9. The application site consists of a collection of smaller development sites within a parcel of land defined by Shoreditch High Street/Norton Folgate to the west, the railway cuttings emanating from Liverpool Street Station to the north and Commercial Street to the east. The site contains a variety of buildings of different types and ages, some of which are said to be derelict and dilapidated. It includes disused industrial buildings, a building used from time to time for exhibitions and shows, some A1 retail uses and offices uses. There is a listed structure on site, namely the cobbled surface of Fleur de Lis Street. Similar cobbled surfaces on nearby streets are also listed. There are also listed buildings in the vicinity. The application site lies directly within the Elder Street Conservation Area. Parts of the site fall within the scheduled ancient monument of the Priory and Hospital of St Mary Spital. Parts of the site lies within an area of Archaeological Importance.

10. It is well served by public transport, for the site lies within 500 metres of Liverpool Street Station and within 1.2 kilometres of five other underground stations. There are also bus routes on Shoreditch High Street and Commercial Street. Surrounding land uses include retailing with office use above, retailing with residential uses above, mixed offices and retail with residential uses above, and predominantly residential buildings. There are very substantial commercial developments within the City of London to the north and large developments to the south-east and south. Planning permission exists, or has been applied for, for several substantial developments, generally of mixed use, in the area running along Bishops Gate through Shoreditch High Street and towards London Borough of Hackney.
11. There were two applications. One sought planning permission for the development, and the other sought listed building consent for works to the cobbled Fleur de Lis Street. The test in s 72 *LBCAA 1990* was relevant, both because of the listing, but also because of the Conservation Area designation:

“(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

(2)The provisions referred to in subsection (1) are the Planning Acts and.....”

as were the policy guidance tests for dealing with heritage assets in the National Planning Policy Framework (NPPF) and in the statutory London Plan.

12. The Applicant for permission (BLL) had prepared an application which encompassed and drew upon a great deal of material relating to the heritage assets of the area, and addressed matters of urban design in considerable depth. A number of new buildings were proposed to replace some of the buildings on site, but some buildings were to be retained. The material supporting the application contended that there would be a “mix of refurbishment, extension and redevelopment of buildings and improvements to the public realm for commercial led uses.”

(c) The history of the applications

13. In 2014 BLL sought discussions with GLA about its proposals for the site. A meeting was held on 9th May 2014 to discuss them. It was attended by, among others, officers from both the GLA and LBTH. An assessment was then issued in July 2014 by the Senior Manager of Development and Projects at GLA to BLL, which “sets out our advice and matters which will need to be fully addressed before the application is submitted to the local planning authority” but properly recorded that the advice of officers was not a formal response or decision by the Mayor and any views or opinions expressed were without prejudice to the Mayor’s formal consideration of the application. The assessment is a detailed one covering some 73 paragraphs, and addressing the following topics:
 - i) the principle of development in relation to the London Plan;
 - ii) issues relevant to housing;

- iii) issues relating to urban design, including the ground floor layout, form, massing and architecture, and heritage;
 - iv) inclusive access;
 - v) transport, including the payment of a community infrastructure levy to help implement the London Plan, particularly Policies 6.5 and 8.3 towards the funding of Crossrail;
 - vi) energy.
14. The applications were submitted to LBTH on 18th December 2014, accompanied by much supportive material. An Environmental Statement was also submitted. While not all of it has been provided to the Court, that which has been submitted in evidence shows that this was a scheme into which a great deal of effort had been put, not least in its development and consideration of the approach to be adopted to using the existing buildings and spaces, and to building design.
15. The proposals excited some support, but a great deal of objection. In the case of the Claimant SHTL it made a detailed objection on 11th March 2015, in the form of a letter to which was attached a report from a planning consultant specialising in urban design and conservation issues. His assessment was also a substantial and detailed one, which addressed the following:
- i) site description;
 - ii) relevant local planning policy, including Conservation Area policies;
 - iii) an evaluation of the proposals, in which he looked at the proposals for demolition of buildings in detail, including those which had some features retained, archaeology, new buildings, questions of scale, building footprint, public realm and permeability (i.e. the provision of access to the public), and sustainability;
 - iv) the balance of harm against public benefits, including employment, the provision of housing, heritage gains and new public realm;
 - v) the optimum viable use for consideration under paragraph 134 of NPPF;
 - vi) previous schemes for the development of the site;
 - vii) conclusions.
16. On 6th February 2015, LBTH had sent a copy of the application to the Mayor. On 18th March 2015 the Mayor sent LBTH a letter under *MLO* Article 4(2) enclosing a report made to the Deputy Mayor. That report concluded that the proposal complied with some of the policies in the London Plan but not others. The principle of the development was “strongly supported.” Further work was suggested on the following topics:
- i) mix of uses;

- ii) the amount of affordable housing;
 - iii) the massing of buildings relating to one block (number S1) and its relationship to Blossom Street and the wider Conservation Area;
 - iv) the proposals were broadly supported in heritage terms but some detailed changes were sought to the detailing and articulation of western façade of the same block;
 - v) some blue badge parking bays were sought to be included;
 - vi) more work was required on verifying energy savings;
 - vii) there needed to be more disabled car parking, and the submission of a car parking management plan.
17. On 21st July 2015 the Strategic Development Committee of LBTH considered the applications, having before it an officer's report which considered the proposals and made recommendations. The professional officers recommended approval of both applications. It too was a long and thorough report covering some 77 pages, and dealing with all the issues raised by the applications, and summarising the consultation responses, including that of the Claimant SHTL.
18. The Committee resolved that it did not accept the officers' recommendation, and that it was minded to refuse the planning and listed building applications due to concerns over
- i) an insufficiency of housing within the scheme, and the proportion of affordable housing being too low (the planning application);
 - ii) the impact of the scale and massing of the proposal on the setting of the Elder Street Conservation Area, both generally and because of the S1 block (both applications).
19. On 27th August 2015, the matter was considered again. The Committee maintained their reasons for opposing the proposal.
20. On 28th August 2015 the Claimant SHTL wrote to the Mayor urging him not to issue a direction on the application (i.e. that he be the planning authority). Its reasons for so arguing were that
- “(1) the decision has been taken entirely properly and reasonably by the Local Planning Authority. There are sound planning reasons for the refusal, namely
- The scheme causes substantial harm to the character and appearance , and setting, of designated heritage assets, contrary to national, regional and local policies;
 - The proposals fail to provide sufficient public benefits to outweigh the harm caused.

- The proposals fail to provide an adequate amount or proportion of affordable housing.

(2) The proposals are not of a nature or of a sufficient size that will have a significant impact on the implementation of the special development strategy or objectives of the London Plan. Compared for example, with the Bishopsgate Goods yard site, the amount of floorspace proposed on the Norton Folgate site is small. The issues raised are local matters, not of London-wide or strategic importance.

(3) The development site, although close to both the City of London and the London Borough of Hackney, will not have significant effects on these adjoining boroughs. No comments, either for or against the proposals, were received from either.....and this shows the lack of significant cross-boundary effect.”

21. Having then referred to the weight of objections (and also noting that there was some support from English Heritage (now Historic England)), it argued that the harm caused by the development had to be balanced against the public benefits which it was claimed it would achieve. It argued that SHTL had put forward a preferable scheme, which was viable and deliverable. It concluded by asking that the Mayor not become involved “in a role of arbitration on this site”, drawing attention to the ability of the applicant to have recourse to an appeal to the Planning Inspectorate.
22. LBTH gave written notice on 9th September 2015 of the resolutions to refuse passed by LBTH on 27th August 2015. That letter was received by the GLA on 10th September 2016.
23. On that date at 10.48 am, an officer of GLA, now identified as Mr James Keogh, a strategic planner at GLA and the case officer, sent an email to BLL’s consultants (a firm with the minimalist, not to say low level name of dp9 (sic)) as follows

“Hi (name redacted)

Yes the report will advise that the application has a significant impact on the implementation of the London Plan and a significant effect on more than one borough and there are therefore sound planning reasons for the Mayor to intervene in this case, as per the powers of the (MLO 2008). The Mayor will make a final decision on this following the meeting on the 23rd.”

24. On 23rd September 2015 the mayor directed LBTH that he be the local planning authority for the planning and listed building consent applications. He did so in the following terms:

“Having now considered a report on this case, reference....., I hereby direct (under article 7 of the above Order and the powers conferred by Section 2A of the 1990 Act) that I will act as the local planning authority for the purposes of determining the above planning application and the application for Listed Building Consent. My reasons are as follows, as set out in detail in the attached report:

- a) The development would have a significant impact on the implementation of the London Plan.
- b) The development has significant effects on more than one borough.

c) There are sound planning reasons for my intervention.

I must also have regard to targets identified in development plans. As set out in the report, I recognise that Tower Hamlets has a good historic record in assessing and permitting planning applications for office floorspace, both across the Borough as a whole and within its portion of the CAZ. Notwithstanding this, recent trends have seen a decline in the delivery of new office floorspace within the Borough and I note that the Council is currently falling below its target for the provision of employment floorspace with a net loss of 27,073 sq.m of approved office floorspace as identified in its Annual Monitoring Report (2012-13). I also note that employment levels within the Borough currently fall short of the indicative employment projections as forecast in Table 1.1 of the London Plan. As highlighted in the report, it is likely that recent challenges to delivering office floorspace and employment growth are linked to broader economic trends and within this context, it is important that strategic office development in suitable but finite CAZ and City Fringe locations such as this are delivered in order to support London's globally competitive business cluster while promoting growth.

In due course I will notify you of the date of the representation hearing and I will consult you on any draft planning obligation. I would be grateful if you provide me, as soon as reasonably practicable, any information relevant to the application and the application for Listed Building Consent, which has not already been provided. In due course I will notify you of the date of the Representation Hearing and I will consult you on any draft planning obligation."

25. Appended to that letter of direction was the report referred to within it. It is a substantial document, which I shall seek to summarise, but will in some parts have to cite directly.
26. It described the proposal the subject matter of the application, and, under the heading of "Strategic issues," having referred to the resolution by LBTH to refuse the application, said that the mayor must consider whether the application warranted a direction under Article 7 of *MLO 2008* that the Mayor take over determination of the application. It continued

"Having regard to the details of the application, the matters set out in the committee report and the Council's draft decision notice, the development has a significant impact on the implementation of the London Plan, has a significant effect on more than one Borough, and there are sound planning reasons for the Mayor to intervene in this particular case and issue a direction under Article 7...."
(passages underlined are those in bold font in original)

and recommended that such a direction be made. It then recited the history of the application, including the recommendation of LBTH officers and the resolution of LBTH.

27. The Report then set out the terms of the tests in Article 7. At paragraph 10 it noted that parts (a) and (b) of Article 7 relate to the impact an application would have on the Mayor's policies and the geographical extent of the impact, then continuing

“whilst (c) deals with the reasons for the mayor’s intervention, having regard to the Council’s draft decision on the application. These tests are intended to ensure that the Mayor can only intervene in the most important cases.”

28. It then addressed the Policy Test in Article 7(1) (a), concluding that there would be significant impacts on the implementation of the London Plan with respect to London’s economy and London’s transport for the reasons set out in the following paragraphs (13)-(24). They read as follows:

“London’s economy

13 London is a world city with a key role in the global economy. As such, it fulfils functions and attracts investment that other cities in the United Kingdom — and in Europe — do not. It has a distinctive role to play in the spatial development of the country and continent as part of a polycentric network of cities and urban areas, and the Mayor recognises the importance of ensuring London does this in ways that promote sustainable success at European, national and city region levels. He recognises the importance of this to the continued prosperity and well-being of London and its people (London Plan, paragraph 2.7).

14 Projections within the London Plan suggest that, despite changes to the economy in recent years, the total number of jobs in London could increase from 4.9 million in 2011 to 5.8million by 2036 - growth of 17.6 per cent or an additional 861,000 jobs over the period as a whole. Chapter one of the London Plan makes clear that this growth is fundamental to London’s endurance as a national and international economic driving force, and crucial to meet the needs of a growing and changing population.”

15 London Plan Table 4.1 establishes the demand for office based jobs and floorspace up to 2031. Within the Central Activities Zone (CAZ) and the north of the Isle of Dogs there is expected to be a demand for 177,000 office jobs (58% of total office based employment growth), and up to 3,070,000 sq.m of office floorspace. Paragraph 2.46 of the London Plan states “*It will be important to ensure an adequate supply of office accommodation and other workspaces in the CAZ/Isle of Dogs suitable to meet the needs of a growing and changing economy. The projected increase in office-based employment in the CAZ/Isle of Dogs could create significant demand for new office space.*”

16 The London Plan states that the City Fringe opportunity area provides particular scope to become a business hub of major international significance and should nurture the employment, business and creative potential of the digital-creative sectors while ensuring supporting the provision of suitable levels of commercial floorspace, supporting uses and related infrastructure to meet the needs of this growing cluster. Table 1A.1 within the London Plan indicates that the City Fringe opportunity area has capacity to provide 70,000 new jobs by 2031.

17 The application site forms part of the CAZ, and is situated in a distinctive part of the City Fringe opportunity area, on the boundary of the City of London and the London Borough of Hackney and in an area where sites typically a context of existing built form and heritage assets. The whole site falls within the Elder Street Conservation Area, and as such any new development opportunities need to protect the significance of the conservation area itself and a number of heritage assets, including listed buildings that are within the vicinity of the application site. Nevertheless, given the proximity to the City of London, and the location's high public transport accessibility, the site has employment generating potential which reaches beyond the Tower Hamlets borough boundary. The consultation draft "City Fringe Opportunity Area Planning Framework (2014) identifies the application site as a key site within the inner core area where demand for employment floorspace is highest. The potential net additional demand across the opportunity area between 2013 and 2023 is forecast at between 288,000 sq.m and 385,000 sq.m.

18 This application provides 34,807 sq.m of office floorspace which includes 5,604 sq.m of Co-working/Small and Medium Enterprise (SME) space and 18,772 sq.m of 'grow—on' space; 1,440 sq.m of small business space; 1,126 sq.m of retail space, 3,566 sq.m of restaurant/café uses and 553 sq.m of drinking establishment. The proposals include an uplift of 27,100 sq.m in B1 office space across the development site which will provide a platform for significant job regeneration and contribute to London Plan targets.

19 The application would, therefore, broadly accord with the strategic aspirations for the site expressed within the consultation draft City Fringe Opportunity Area Planning Framework need to ensure adequate office capacity to meet future demand. It would generate employment and contribute to increasing the offer presented by the CAZ, serving to increase London's world city status, a key economic policy objective of the London Plan. In addition, the provision of significant office floorspace on this site, within the CAZ, would ensure a major development site would fulfil its potential, as part of a finite number of opportunities within the City Fringe, to meet CAZ priorities.

London's Transport

20 The Mayor recognises that transport plays a fundamental role in addressing the whole range of his spatial planning, environmental, economic and social policy priorities. It is critical to the efficient functioning and quality of life of London and its inhabitants (London Plan, paragraph 6.2). ‘

21 London Plan policies 6.4 and 6.5 identify that the implementation of Crossrail is the Mayor's top strategic transport priority for London over the plan period. London Plan paragraph 6.21 states-that Crossrail is essential to the delivery of the strategic objectives of the London Plan given that demand for public transport into and within central London is nearing capacity. The employment growth expected up to 2036 will further increase this demand, and unless this is ~ addressed, continued development and employment growth in central and eastern London will be threatened. In particular, Crossrail is critical to supporting the

growth of the financial and business services sectors in central London and in the Isle of Dogs, where there is market demand for additional development capacity.

22 The funding arrangements for Crossrail announced by Government make clear that the project will not proceed without contributions from developers. A funding agreement between the Mayor, Transport for London and the Government envisages that a total of £600,000,000 might be raised towards the cost of the project from developers, as follows:

- £300,000,000 from use of planning obligations or any similar system that might replace them; and
- £300,000,000 from the Community Infrastructure Levy. '

23 The site falls within the Central London Contribution Area for Crossrail, as defined by the Mayor's supplementary planning guidance Use of Planning Obligations in the Funding of Crossrail, which acts in support of London Plan Policy 6.5. Within the Central London Contribution Area a charging level of £137 per sq.m is applied to new office floorspace, £88 per sq.m for new retail floorspace and £60 per sq.m for new hotel floorspace.

24 The application includes an uplift in office and retail floorspace at the site, and gives rise to a £4,374,570 contribution towards Crossrail. The applicant remains in discussion with the Council on Section T06 contributions. Therefore, the application has the potential to contribute towards the delivery of Crossrail, thus helping to deliver the Mayor's principal transport policy priority within the London Plan."

29. It then addressed the second test, of whether there would be significant effects on more than one Borough. It stated at paragraphs 25- 31:

"25 There are significant economic and transport effects on more than one borough for the following reasons.

Economic effects

26 London Plan Policy 2.10 makes clear that the distinct offer of the CAZ, which comprises the boroughs of the City of London, Westminster, Camden, Islington, Hackney, Southwark, Lambeth, Kensington and Chelsea and Tower Hamlets is based on the rich mix of local as well as strategic use forming the globally iconic core of one of the world's most attractive and competitive business locations.. The implication of this is that the value of the CAZ is worth more than the sum of its constituent part, and to support London's world city it must act as unified economic zone.

27 London Plan Table A.1.1 identifies that the City Fringe opportunity area provides particular scope to support London's critical mass of financial and business services and clusters of other economic activity.

28 The cross-borough nature of these strategic functions is borne out by the pooling of associated London Plan targets for growth, as highlighted above, across the CAZ and City Fringe opportunity area respectively.

29 The site is within the City Fringe opportunity area, which straddles four boroughs (City of London, Hackney, Islington and Tower Hamlets) and forms part of the CAZ, which straddles ten boroughs (Camden, City of London, Hackney, Islington, Kensington and Chelsea, Lambeth, Southwark, Tower Hamlets, Wandsworth and Westminster) which collectively form a globally recognised core, and one of the world's most attractive and competitive business locations. The site lies on the edge of the borough boundary with the City of London and Hackney and provides particular scope to support London's critical mass of financial and business services and clusters of other economic activity.

30 The provision of high quality office floorspace in this key City Fringe location complements the offer within the CAZ, and supports an internationally competitive business cluster. ___ Development at this site, and the jobs and office floorspace it would deliver has a clear relationship with the other City Fringe opportunity area and CAZ boroughs in ensuring that the Zone as a whole continues to maximise the strategic employment function of London to support 32- world city role.”

30. The Claimant SHTL concentrates its fire on the report’s treatment of the first two criteria in Article 7. It is not necessary to set out the passages in the report dealing with the third criterion (whether there were sound planning reasons for intervening). In summary, at paragraphs 32-38, the report addressed it. It concluded that the proposal would support the strategic objectives of the CAZ in the London Plan, through delivering high quality large scale office floorspace in “an important yet constrained location” and contribute towards meeting London Plan projections for office space demand and employment growth within the zone.
31. The report also considered that the proposal was consistent with the objectives of the London Plan for the City Fringe opportunity area in which the site fell. The report concluded at paragraphs 37-8:

“37 The principle of providing a high—quality, office-led mixed use development on this CAZ site, within an opportunity area, is strongly supported in strategic planning terms. Due to the constraints to large-scale office development in City Fringe locations, suitable development opportunities, on appropriate sites, must be promoted. The provision of a significant amount of high quality office accommodation in this location would help to meet the future demands of the business and financial sector, and will enable London to maintain and expand its world city role, in accordance with national, regional and local policies. The proposal would also contribute towards meeting employment targets within the CAZ and City Fringe opportunity area.

38 Failure to promote appropriate development could potentially impact upon: the economic health of the Central Activities Zone as whole.”

32. The report then turned to “matters which the Mayor must take account of” as required by Article 7(3) of the Order. While the housing proposed did not fall within the parameters of category 1a of the Schedule to *MLO 2008*, the provision of housing, and especially the 30 % of it being affordable housing, was welcome. Under Article 7(3) (b) targets with respect to employment and offices were relevant, but housing figures were also addressed.
33. The report then set out the targets for offices, employment and housing. The performance against those targets was considered in some detail. The conclusion at paragraph 48 was

“Consideration of performance against development plan targets

48 Based on the above information, Tower Hamlets Council has a good historic record in assessing and permitting planning applications for office floorspace in the Borough and the CAZ area, and the Borough has seen a good level of recent employment growth to offset a proportion of the losses during 2008-09. Notwithstanding this, recent trends have seen a decline in the delivery of new office floorspace both borough-wide and in the Borough's portion of the CAZ, and the Council's latest self—assessment within its Annual Monitoring Report (2012-13) finds that performance with respect to providing additional employment floorspace (including Bl [a] office) is currently off target with a net loss of 27,073 sq.m of approved office floorspace. It is also noted that employment levels within the Borough would currently fall short of the indicative employment projections forecast within Table 1.1 of the London Plan. It is likely that recent challenges to delivering office floorspace and employment growth are linked to broader economic trends, and within this context it is particularly important that strategic office development, in suitable but finite CAZ and City Fringe locations, is delivered to support London's globally competitive business cluster and promote growth.”

34. The report then addressed the mix of uses, heritage, urban design, inclusive access, energy, and transport. It is unnecessary to rehearse the report. None of those topics revealed reasons to refuse the applications.
35. The report then set out the various representations received. There was support from some local residents, but it was noted that 550 had signed a petition of objection, much of the objection was directed towards the effect on the Elder Street Conservation Area. There was also support from Historic England, but objections from the Georgian Group and the Society for the protection of Ancient Buildings.
36. The Claimant SHTL's objection was reported as follows

“92 The Spitalfields Trust raised objections for reasons summarised below:

- The proposals would conflict with Tower Hamlets Core Strategy Objectives S022, S023 and Policy SPTO relating to the protection and conservation of heritage assets and their context.

- The proposals would conflict with the Elder Street Conservation Area Appraisal. The - development would be detrimental to the conservation area because of the high level of demolition, particularly between Blossom Street and Norton Folgate, and would include inappropriate scale of new buildings, damage to the setting of listed buildings and historic views and the replacement of finely grained incremental development with larger blocks.
- The proposed land use is a poor balance between large floor plate office uses and smaller uses which define the character of the existing site.
- The proposals fail to reuse existing buildings and will result in a high level of demolition, including substantial excavation. The proposals will cause substantial harm to heritage assets including the loss of the historic fabric and plan-form and substantial harm to the character and appearance of the conservation area.
- Proposed employment uses would be mostly Grade A offices. The high cost of construction is unlikely to result in cheap rented accommodation for start-up businesses or small firms.
- The proposals conflict with the NPPF and do not deliver the 'optimum viable use'.
- The current proposal is more/damaging than the 2011 consented scheme and should be considered on its own merits."

37. At paragraph 101 the report referred to the letter sent by the Claimant to the Mayor. It said in paragraph 104 that the representations from the Claimant SHTL had been included in the summary of objections at an earlier paragraph (82). In the summary at paragraph 106, it was stated that

"106 The statutory and non - statutory responses to the Council's consultation, and those representations made directly to the Mayor, do not raise any material planning issues of strategic importance that have not already been considered at consultation stage, and/or in this report. The local implications of the consultation responses have been considered by the Council, however should the Mayor take over and determine this application, in acting as the local planning authority, the Mayor would also need to consider the local implications of the representations."

38. At paragraph 109 it was concluded that

109 Having regard to the details of the application, the matters set out in the committee reports and the Council's draft decision notice, the development has a significant impact on the implementation of the London Plan, has a significant effect on more than one borough, and there are sound planning reasons for the Mayor to intervene in this particular case and issue a direction"

39. As noted above, the Mayor endorsed the report. He did so after a meeting with the Senior Managers, which was closed to the public (a matter established from an email of 10th September 2015 from the GLA to dp9). A Freedom of Information Request

also established that the Mayor had had regard to the Stage 1 and 2 reports, and “had access to the application documents and other underlying documents.”

40. After he had taken over the determination of the planning application, he held a hearing at which various parties appeared (including the Claimant) and resolved to grant permission, subject to BLL entering into a s 106 obligations. As at the date of the hearing no permission had been issued. The Claimant has sought to persuade the Secretary of State to “call in” the application under s 77 *TCPA 1990* but the Secretary of State has declined to do so.

(d) *The case for the Claimant*

41. Mr Harwood QC argues the following grounds

i) Ground 1

The Mayor failed to have regard to a material consideration, namely the letter from the Claimant SHTL of 28th August 2015;

Ground 2

- ii) The Mayor’s conclusion on the first criterion was vitiated by misinterpretation of the first criterion in Article 7, his taking into account irrelevant matters but failing to have regard to relevant matters, and was inadequately reasoned;

Ground 3

- iii) A similar ground with regard to the second criterion in Article 7;

Ground 4

- iv) The officer’s report was not an objective assessment. The officer had made up his mind before considering the referral from LBTH, as shown by the email referred to above.

42. Mr Harwood started with his Ground 4. He said that the officer was required to address the applications neutrally and without prejudgement, relying on Sedley J in *R (Wm Morrison Supermarkets Ltd) v Teesside Development Corporation* [1998] JPL 23@44. Here, the officer had told BLL that the report would recommend that the Mayor determine the application before the officers had had any opportunity to consider the referral by LBTH. It was impossible to imagine that the officer had read the relevant documents, including all the representations on the scheme. While the officer would have had knowledge of the scheme, he would not have seen the representations. They are included in the list of material which must be sent under Article 7 of *MLO 2008*.
43. There is no witness statement saying that he had read it by that stage. The fault is not cured by his writing a long report later. In any event this one missed out the reference to the letter from the Claimant SHTL. Mr Harwood pointed out that the procedure was that the report was not published before the Mayor considered it in a closed meeting.

44. As to Ground 1, Mr Harwood says that the report never suggests that anyone had taken the point on whether the criteria were met. The report wrongly stated that the effect of the SHTL letter had been summarised (see paragraphs 82 and 106 of the Report). There is no evidence that the Mayor had seen or had regard to the letter, and the answer to the FOI request shows that he did not do so.
45. The letter was important because it raised significant objections to the use of the criteria to pass the determination from LBTH to the Mayor, who was therefore unaware that the matter was in issue. He was not told that SHTL argued that the criteria were not met, and in particular that the lack of any representation from Hackney London Borough Council or the City of London Corporation showed that there would not be significant cross boundary effects.
46. As to Ground 2 Mr Harwood argued that, if one took the total proposed office development in the CAZ and the North of the Isle of Dogs, the development would amount to less than 1% (27,100 m² in the scheme, as compared to up to 3.07 million m² in the London Plan for the period 2011-2013) . In the City Fringe Area, the floorspace would amount to between 7 and 9.4% of the additional floorspace proposed in a 10 year period. The report does not say why the implementation of the London Plan would be significantly affected by the scheme. The City Fringe Opportunity Area Planning Framework, referred to in the report, is only Supplementary Guidance and irrelevant for the purposes of the Article 7(1) (a) of *MLO 2008*.
47. So far as the asserted effect on London's transport, this related entirely to the fact that there would be a contribution to Crossrail. The contribution would be less than 1% of the proposed developer contribution, and Crossrail was under construction and would be completed with or without the development and its contribution. In his pre action response the Mayor had contended that this was

“an additional point rather than a point which impacts on his primary analysis of the significance in land use terms of the proposed development”

which was a “mischaracterisation” of his report and suggests that the Mayor doubted the lawfulness of this part of his reasoning. Paragraph 19 (set out above) of the report does not grapple with the point properly.

48. As to Ground 3, the report did not identify the effects of the scheme on other Boroughs, and never addressed whether the impact would be significant. The fact is, as pointed out by the Claimant SHTL in its letter, that neither adjoining Borough had made any representations, which one would have expected them to do had there been a significant effect anticipated on either Borough.

(e) The case for the Mayor of London

49. Mr Kolinsky argued that the scheme under the *MLO 2008* gave a limited timescale (14 days) for the Mayor to decide that he was going to exercise his Article 7 power. It was also relevant that the professional officers in the GLA would have been aware of applications of potential strategic importance because of the Stage 1 process under Article 4.

50. He then argued that the words in the *MLO 2008* must be given their ordinary meaning. In a context such as this, statutory language triggers an exercise of judgment by the decision maker on whether the criterion in question is met: *R (S Yorks Transport) v Monopolies and Mergers Commission* [1993] 1 WLR 23 (HL) @32-3 per Lord Mustill. Matters of judgment are for the planning authority: see *Tesco v Secretary of State for Environment* [1995] 1 WLR 759 9HL) @780 per Lord Hoffman. In cases of call in by the Secretary of State, a challenge on the grounds of perversity is well nigh impossible- per Sullivan J (as he then was) in *R(Persimmon Homes Ltd) v SSCLG* [2007] EWHC 1985. He also referred to the well known words of Sir Thomas Bingham MR (as he then was) in *Clarke Homes Ltd v Secretary of State for Environment and E Staffs DC* [1993] 66 P & CR 263 at 271-2 about the importance of a down to earth reading of decision letters.
51. Mr Kolinsky argued that on a fair reading of the documents it was plain that the Mayor understood the applicable criteria, exercised his planning judgment to decide that they were met, and explained his reasons. He contended that the structure of the report was such that the criteria in Article 7 were addressed in detail, and the report then went on to consider other matters.
52. At one point Mr Kolinsky QC was suggesting that the Mayor was not required to have regard to all the letters received. After I had invited him to take instructions, I was told that the Mayor's practice was to have regard to all representations received.
53. On Ground 1 although Mr Kolinsky had argued in his skeleton that the letter from the Claimant SHTL had been had regard to in the report, he modified that position in oral argument. He contended that the relevant point is not whether a particular person had addressed the point of the criteria, but whether the matter was addressed properly in the report and by the Mayor. It was plain that the report dealt with the issue of the significant impact of the development on the implementation of the London Plan. If there was an error in paragraphs 104-106 about the letter, it was not significant.
54. As to Ground 2, Mr Kolinsky submitted that the Mayor had set out reasons which were comprehensive on the question of the impact on office development. He gave reasons why the contribution the development would make would be important.
55. So far as Crossrail was concerned, Mr Kolinsky submitted that it was proper to take account of Crossrail in the way in which it was argued. When pressed by the Court to explain why, given the fact that Crossrail was being built anyway, Mr Kolinsky obtained and put in policy 6.5 of the London Plan, which is a statutory Development Plan for the purposes of s 38 *PCPA 2004* and s 70 *TCPA 1990*. That Policy states that

“A In view of the strategic regional importance of Crossrail to London's economic regeneration and development, and in order to bring the project to fruition in a suitably timely and economic manner, contributions will be sought from developments likely to add to, or create, congestion on London's rail network that Crossrail is intended to mitigate. This will be through planning obligations.....

B the Mayor will provide guidance for boroughs and other partners for the negotiation of planning obligations requiring, where appropriate, developers to contribute towards the costs of funding Crossrail, having regard to

- a
- b
- c strategic and local considerations
- d the impacts of different types of development in particular locations in contributing to transport needs, and
- e economic viability of each development concerned.

C In addition, the Mayor has produced guidance on the Use of Planning Obligations in the Funding of Crossrail which should be taken into account in the handling of planning applications. The guidance includes

- a criteria for identifying developments in respect of which Crossrail contributions should be required in accordance with national policy guidance
- b standard charges and formulae for calculating fair and reasonable contributions to be sought and guidance on how these should be applied to specific localities and different kinds of development
- c

D The Mayor will, when considering relevant planning applications of potential strategic importance, take account of the existence and content of planning obligations supporting the funding of Crossrail among other planning considerations.

E"

- 56. Mr Kolinsky submitted that the contribution to Crossrail was a material factor indicating strategic significance. But he also submitted that the issue of the strategic importance due to the office and employment question was independent of the Crossrail argument.
- 57. As to Ground 3 he submitted that the officer's report and the Mayor were perfectly entitled to conclude that the effects would not be limited to LBTH. He was entirely entitled to consider what was happening nearby in adjoining Boroughs. The fact that the other Boroughs were silent on the issue was not important. What mattered was the planning judgement of the Mayor.
- 58. As to Ground 4, the email was sent by one officer. The report was signed by four officers, of whom he was the most junior. In any event, given the history of the application, that officer had considerable knowledge of the application and the issues it raised long before then. There had been pre application meetings in May and July 2014; the application had been made in December 2014; the Stage 1 report had been

published in March 2015; he knew of the LBTH officer's report and its rejection by LBTH in July and August 2015, and had received submissions from the Claimant on 28th August 2015.

59. It was not unlawful for there to be contact between the officer and the developers. The Mayor then exercised his own independent judgement.

(f) The case for British Land Property Management Limited (BLL)

60. Mr Harris QC and Mr Walton submitted a skeleton. However, in the event I did not call on them. Their case essentially reflects that for the Mayor.

(g) Discussion and Conclusions

61. I start by looking at the Report and the Mayor's conclusions, in the context of the criteria in Article 7. Subject only to what it said about Crossrail and the SHTL letter, I consider that the report is impossible to criticise. It is thorough, addresses all material planning considerations, and reaches a well reasoned conclusion.
62. So far as the attacks mounted by the Claimant on the treatment of the two criteria (a) and (b) in Article 7 are concerned, my conclusions are as follows.
63. The argument that the development would not have a significant impact on the implementation of the spatial development strategy is one without any merit. The Report gave ample reasons why it would affect implementation, and significantly so. The principal argument of the Claimant, that the percentage difference it would make to the overall CAZ figure was small, is of limited significance. In any large conurbation, but especially the capital City, individual developments can be important but make not much arithmetical difference to the overall supply. Much more significant is the effect on the City Fringe Area. It is no answer to say that the target was only identified in supplementary planning guidance, for that is carrying forward the policy in the London Plan. As the report pointed out at paragraph 16, the London Plan had identified the City Fringe area as giving particular scope for employment creation in the digital-creative sector, together with other uses. If the Mayor chose to give weight to the role of the site within the City Fringe, that was a matter for his judgment. There is nothing about it which failed to meet this criterion. Indeed, given the policy support for the proposal set out in the report at paragraphs 12-19, one could safely say that it would be difficult in the extreme not to consider that the criterion was satisfied.
64. So far as Crossrail is concerned, there can be no doubt that the funding of Crossrail is capable of being a material planning consideration, which was not disputed by the Claimant. It is also plain from policy 6.5 in the London Plan that it is important that developments which fulfil the relevant criteria should be expected to fund it. But the question posed by the criterion is not whether it is a material planning consideration, but whether the development would have a significant impact on the implementation of the London Plan. The fact is that Crossrail is under construction anyway. It follows that the Crossrail contribution can only be taken into account as a "significant impact" if one treats a receipt by Crossrail, made in accordance with declared policy as significant, when its absence would have no effect on the construction or opening of Crossrail.

65. In my judgment one cannot do that. It would have no discernible impact on the implementation of the London Plan, whether granted or refused. All it would do is have some effect on the overall receipts position of Crossrail, and I was presented with no evidence that that would have any effect at all on the implementation of the project. I emphasise that that does not deprive it of materiality. It could be a perfectly proper reason for refusal if the developer were to refuse to enter into the relevant planning obligation.
66. But all that having been said, it is very hard indeed to see how the criterion would not have been met even if the Crossrail point had been omitted. If one approached it on the basis that there would be a payment to Crossrail (as the report did) then the Crossrail question is at worst neutral in the balance. The arguments on the effect of the development on the implementation of policies and employment were enough to meet the criterion with ease.
67. As to the question of the cross boundary effects, the site lies within the immediate vicinity of both the City of London and of Hackney. There can be no question that there will be some effects. It was for the report and the Mayor to consider if they would be significant. The report did so at paragraphs 26-31. Even if one discounts the Crossrail point in paragraph 31, there are ample reasons otherwise which are given in the report to justify the assessment of the effects as significant, and the report and the Mayor were perfectly entitled to reach the planning judgment that they would occur. Given the force of the argument about the creation of a cluster and the role of the City Fringe (see paragraphs 26-30), I consider that the decision on this criterion would inevitably have been the same without the Crossrail point.
68. It follows from the above that Grounds 2 and 3 must fail.
69. As to Ground 1, it was unfortunate that the officer wrote his report in such a way as to give the impression that the letter of 28th August 2015 had been addressed in the report, when, given the terms of paragraphs 82, 104 and 106 it is unlikely that it was. But, as Mr Kolinsky points out, the issues raised by the SHTL at paragraphs (2) and (3) (see paragraph 20 above) had actually been addressed, and comprehensively so, in the report. In my judgment it is very hard to see how the points taken by SHTL would have led to a different decision.
70. As to Ground 4 it was unwise of the officer to send the email he did. But when one looks at the report that was actually written it is a very full and comprehensive one, which deals with all the objections to the development very fairly. In the real world of planning control, prospective developers are encouraged to talk to planning authority officers in advance of the making of an application, and during the process after it has been made. I accept Mr Kolinsky's submission that the officer was very well aware of the issues relevant to the application because of the history of the matter. *R (Wm Morrison Supermarkets) v Teesside Development Corporation*, relied on by Mr Harwood is an extreme example, where the then Planning Authority was also responsible for actively promoting development. For those of us who were engaged in this area of the law at the time when Development Corporations were active, that tension between roles was far from uncommon. The facts described by Sedley J are far removed from those that obtain here, and one must winnow out the points of principle from a judgement where the judge was confronted with a planning authority

(and officers) which and who had so obviously departed from a disinterested approach. The question of principle posed by Sedley J was this:

“Has the respondent Corporation in seeking to carry out its functions departed from its duty of objectivity and approached the Asda planning application in an unacceptably partisan way?” (at 39).

At page 46, after considering the then Respondent’s treatment of planning policy, by which it sought to justify exceptions to policies on the location of new superstores, Sedley J went on to say

“the corporation had allowed its regeneration function to dominate, if not to dictate, the performance of its planning function, its officer and advisers, without in any way forfeiting their professionalism, had lent themselves to this task. The result was that in neither quarter - the Corporation nor its advisers - was a balanced appraisal made of the case for *not* breaching policy. The entire exercise was weighted towards justifying the departure.”

71. He then referred to his conclusion in *R v Sec of State for the Envt ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 [1997]1 PLR 8 (a challenge to the approval by the Leeds Development Corporation of a retail development (on this occasion for a Wm Morrisons superstore) where the approval was alleged to have been vitiated by the personal interest of the members of the Corporation), that ([1997]1 PLR 8 @25F-G)

“the decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined by the adoption of an inflexible policy or by the effective surrender of the body’s independent judgment.”

72. In the instant case the report is not written in such a cast of mind, and it would be wrong to say that it was unacceptably partisan. While there can be no doubt that the officer’s professional judgment was that the proposal was to be welcomed in terms of achieving the aims and objectives of the statutory London plan, he dealt very comprehensively with all the arguments relating to the development, including those adverse to it. There is nothing wrong in professional officers forming an opinion on the merits: indeed it is one of the reasons why they are employed. So the real case for the Claimant is to complain that he had formed his view before assimilating the objections.
73. In any event, the objections to the principle of development (many of which focussed on heritage and conservation issues) did not go to the question of whether the Article 7 criteria applied. The arguments about the effects of the implementation of the Plan or of cross boundary effects were the same whatever view one took about the conservation or heritage aspects.
74. In fact, he was aware of the arguments against the proposal, having been aware of what happened within LBTH. Given the very clear case that the proposal conformed with the statutory Plan (not challenged before me) I consider it to be highly unlikely that the arguments being put forward again would have affected his view on whether the criteria for determination were met.

75. I must therefore also refer to section 31(2A) of the *Senior Courts Act 1981* as amended by *Criminal Justice and Courts Act 2015*, which reads

(2A)The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application,

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B)The court may disregard the requirements in subsection (2A) (a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C)If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.”

76. In my judgment the test in section 31(2A) of the Act is met.

77. For the foregoing reasons, this application is therefore dismissed.