APP/X5210/Y/20/3248002
APPX/X/5210/W/3248002/3248/003

FORMER HAMPSTEAD POLICE STATION

CLOSING SUBMISSIONS
on behalf of the
LOCAL PLANNING AUTHORITY

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1. INTRODUCTION

1.1. In opening the inquiry, the Inspector identified the main issues between the LPA and the Appellant as follows:

(1) Whether the proposals represent sustainable development in relation to private car trips and air quality policy.

(2) Whether the proposals represent sustainable development in relation to neighbours regarding the effects of noise.

(3) Whether the Appeal Site is in an acceptable location for a school in relation to air quality.

(4) The effect on the architectural quality of the listed building.

1.2. Clearly, these issues need to be set in their wider policy context and the legislative and policy balance is addressed after these four issues in a final section of these submissions.

2. ISSUE 1 Whether the proposals represent sustainable development in relation to private car trips and air quality policy.

2.1. The key questions in relation to this issue are:

- What is the appropriate baseline? and
- Would the Appellant's transportation strategy for the relocated school work in practice?

Baseline

2.2. The environmental baseline is important when considering the acceptability of the effects of the Appeal proposals. There are two relevant legal concepts in play here: fall-back and abandonment. This is because the Appellant wants the environmental impacts of the proposals to be judged against a baseline which does not consist of the actual situation on the ground at present. It would, however, be meaningless to carry out the assessment on a purely theoretical basis of the (unmeasured) state of affairs in 2013. Ferguson relied in his Rebuttal on a former DfT guidance note, which has now been withdrawn. Given its status, it should not be given any weight; moreover, it did not support a purely theoretical approach, since it suggested that a component of assessment would be the trips which might *"realistically be generated by any **extant** planning permission or permitted uses."*

(Emphasis added) Similarly, he speculated on what might have happened if the site had not been sold[1] – but this is not what happened, as we know.

2.3. It is clear that the former use was sui generis; that the Site was declared surplus to requirements by the police and that occupation for this purpose ceased in 2013; that the Site was sold to the DFES in 2013 or 2014; and that the only body or bodies capable of resuming the former use would be the police[2], with or without the courts service. There is no evidence that there is a reasonable likelihood of the former use being resumed; indeed, a major part of the Appellant's case on heritage is that a new use needs to be found for the building. Caselaw on the materiality of fall-back establishes that there must be a finding of an actually intended use as opposed to a mere legal or theoretical entitlement: see R v SoSE ex p. Ahern [1998] JPL 351 and cases there summarised.

2.4. The former use of the Site pre-dated planning control. Such a use may be abandoned, it being a question of fact whether or not such an inference should be drawn. The test is objective, not a matter of subjective intention: see: Northavon DC v SoSE [1990] JPL 519; Hughes v SoSETR [2000] 80 P&CR 397. Many of the reported cases have involved private residences rather than buildings in public ownership and are therefore distinguishable because they did not involve the properties being declared surplus to requirements and transferred to other departments with different statutory

1 Ferguson Rebuttal para 2.8

2 Or possibly the police and the courts service, because this sui generis use was, when both parts were operational, actually a composite of two uses. However, the court function appears to have ceased sometime before the police station was vacated.

functions. This distinction is important and means that the factors relied upon from Hartley in the Appellant's Opening Statement are distinguishable. Given the particular facts here, i.e. that the building has been declared surplus by and transferred out of the ownership of the only bodies who could engage in the former use, the general guidance in Hartley needs to be read in context and applied in a fact-sensitive way, rather than mechanistically.

2.5. Criticism of process in the Opening Statement cannot, of course, affect the principle that the Appeal must be determined on a correct factual and legal footing. The emails alluded to by Byrne[3] do not demonstrate that there is any likelihood of the Site's becoming a police station and magistrates' court again. A local activist has expressed interest in the "cottage" at 26 Rosslyn Hill, but the email of 21st August 2019 from the Department for Education project manager states that *"the Met has said it won't buy it back"*. The idea put forward, moreover, is not that the cottage would become a police station, let alone a station + magistrates' court, rather that it would not have any public facing function and simply be a *"base out of which the PCs can do their work".* In any event, the trail goes cold at the beginning of 2020. This email correspondence does not justify a conclusion that the Metropolitan Police intend to restart the former use. At most, it shows that there is some community interest in including a low key element of policing at the Appeal Site or next door, but the former is predicated on the school's being in occupation (Burns to Learmond-Criqui 20th August 2019) and the latter is predicated on some body other that the Metropolitan Police buying 26

[3] Inquiry Doc 12 and see Byrne Proof para 3.29

Rosslyn Hill, a property which does not, in any event, form part of the Appeal Site[4].

2.6. For all these reasons, Hartley and the other cases cited in opening by the Appellant are distinguishable and the strict legal analysis of planning status is that the Site has a nil use.

2.7. LBC recognise, however, that is not desirable for this LB to remain vacant[5], therefore Burke and Sheehy considered what the traffic generation position would be under relevant policy for potentially suitable alternative uses; this would, in practical terms, mean car free forms of development. Policy would require residential or office uses in this location to be vehicle free which would mean that commuting peak journeys by car would be limited to disabled use and servicing. Ferguson sought to add in taxi trips, but he had made no such allowance for his client's office use and his final position was that such trips could not be totally excluded in either scenario, but would not be extensive.[6] These matters can be taken into account as material considerations, although their status is merely hypothetical. The only known facts are that the site is vacant, has been for several years and that there is no reasonable prospect of the former use reviving.

Sustainable development in relation to private car trips and air quality policy?

4 Had the planning evidence been given formally, there would have been XX on the point, but the position is quite clear from the documents

5 It was agreed in the SOCG, as the Appellants point out in their Opening, that a nil baseline would be inappropriate. What was not agreed was the proposition that the Kentish Town station or any other police station survey should form the baseline.

6 XX (MEQC)

2.8. Before rehearsing the evidence on the Appellant's hypothetical baseline, it is worth remembering that Ferguson, who seeks to rely on the former use for this purpose, opined that even survey-derived evidence from extant police stations *"will not yield accurate data"* – in other words, he is inviting us into a hypothetical exercise in which the hypothesis cannot be supported by firm evidence. Partly, he said, this was due to the complexity of the exercise and partly to structural changes in policing. Burke agreed, which is why he had drawn attention to factors which need to be considered when deciding what weight to place on survey data. To some extent, these two factors are connected. It is over simplistic just to point to *"cuts"* and suggest that contemporaneous surveys therefore underplay the historic situation. The LBC Infrastructure Study of June 2019 shows that there have been changes in staff deployment, with some functions being allocated more staff than previously. Kentish Town police station, which was one of those surveyed, is now the only one in the Borough *"providing full 24/7 counter service"*[7]. Thus, the functions of the Appeal Site, along with other stations, have been subsumed into Kentish Town. Ferguson said that floor area dictates traffic, but this is to oversimplify a comparison which he had, himself, characterised as *"extremely complex"*.

2.9. Burke considered the comparative availability of car parking and derived a factor of 30.4% to be applied to the Kentish Town traffic figures. Ferguson agreed the mathematics and the proposition that the amount of parking was relevant to the number of car trips. Accordingly, Burke's 2-way total of 51

[7] CD 06/17 pp.73-74

vehicle movements, ignoring the Kentish Town Section House, was agreed.[8] Burke did not seek to rely upon the West Hampstead survey, which was undertaken at the behest of HCRD.

2.10. However, Burke did not base his case upon these comparative figures. This was partly in reliance on the LPA's legal submissions on baseline, partly because of the acknowledged difficulties of seeking to construct such a baseline retrospectively. Neither witness had visited the former police station / court when it was operational because the Site had been vacant for 7 years. Moreover, the characteristics of its traffic would have been very different from that proposed in the Appeal Scheme. With regard to the latter point, Ferguson agreed in XX that police transport movements would have been consistent, rather than peaky, a pattern which would have contrasted with that of a school. Grosz, the only witness who could remember the Site in its previous use, gave anecdotal evidence describing a situation which, since at least the turn of the century, had contrasted with conditions recorded in the Kentish Town survey. As he observed, Hampstead Police Station was not closed because it was busy, but because it was quiet. He recalled c.10 vehicle movements per day, plus the occasional horse, which indicates that Burke's calculation is extremely robust – greater by a factor of 5. Burke's contemporaneous local newspaper report from 2012 corroborated Grosz, referring to the decline of the station in the 2000s, as did photographs from 2008 and 2010 showing respectively 4 and 1 parked vehicles at the Site.

[8] Ferguson XX

2.11. Having regard to the *"complexity"* of the retrofit and the general impression of actual usage derived from the first hand evidence, if any weight is to be given to the former use as baseline, Burke's putative trip generation of 51 is to be preferred to Ferguson's 168. It must also be borne in mind that the pattern would have been very different, much more evenly spread than the proposed school's traffic movements.

Sustainable development in relation to private car trips and air quality policy?

2.12. The nub of the question is whether the good intentions of the Abacus Travel Plan would be carried out in real life. This matters because of the prevailing conditions in the area caused by the *"school run"* and because of the Camden Local Plan ("CLP") policies.

2.13. **Policy C2: Community Facilities** applies to *"youth facilities"*, including schools. Investment plans are supported taking account of the benefits they generate, but *"the Council will also balance the impact proposals may have on ... transport infrastructure"*. Supporting text[9] provides, under a heading, *"Managing the concentration of community uses and addressing the needs of all sections of the community"*:

> *"The scale and intensity of some community facilities, such as schools ... can lead to adverse impacts on residential amenity. This is principally related to the movement of large numbers of people at certain times of the day, impacts such as noise and air pollution and pressure on the transport system ... Hampstead and*

[9] CD 05/03 p.141, para 4.33

> *Belsize Park have a very high concentration of schools where significant issues exist concerning the 'school run'. We will refuse applications for new schools or the expansion of existing schools in these areas unless it can be demonstrated that the number of traffic movements will not increase".*

This is a specific locational statement in a recently adopted development plan; although not part of Policy C2, it flags a particular issue in this part of the Borough which must contribute to the balanced judgment called for under paragraph (e).

2.14. The Appellant's claim to be able to meet this objective relies entirely upon achieving a modal shift from the present arrangements, which centre around communal school buses, to non-vehicular modes for all trips. This is a very tall order, especially as some of the people whose behaviour is being confidently predicted are not even identified yet. The projected number of pupils is 210, with 24 staff, but the School has never yet been at full strength. Ferguson has, accordingly, factored up trips from previous surveys. The most recent survey of the school, which still only has 170 children on the roll, factors up to 32 car movements per day, although all the in-catchment dwellers are using the bus. When the school was based a few hundred metres south of the Appeal Site, the equivalent figure was 44. Servicing and some, unquantified, allowance for B1 needed to be added[10].

The data was collected by means of *"hands up"* surveys – i.e. children as young as 4 are asked questions about travel mode in assembly. Plainly, this

[10] Ferguson XX (MEQC)

is not material of great scientific accuracy[11] and, in any event, the current situation is very different from what it would be in future.

2.15. Turning to consider the reliability of the projected mode split, the starting position is that Ferguson agreed that, at full strength, there would be some 468 movements per day associated with the school plus 36 movements per day by people working in the former Magistrates' Court. This totals 504 movements per day plus the unquantified allowance for deliveries and visitors.

2.16. Instead of the school trips being made, as now, by means of a bespoke, communal bus service laid on by the school and supervised by staff, each family would have to make daily choices about mode for each of these movements, based on the vagaries and variables of family life. All the parents who spoke are currently availing themselves of the bus service. Even if their intentions to use non-car modes were to hold up in all circumstances, they cannot properly speak for others. Despite the School's *"ethos"*, the management is, ultimately, powerless to enforce the Travel Plan against parents. Importantly, there would be no personal condition. Great reliance was placed on the Abacus ethos, but in future the permission might be utilised by a different type of school.

2.17. Although those running the School find the buses inconvenient and resource-consuming, there are obvious advantages for parents, notably the security of entrusting young children to staff on a bespoke bus where there will also

[11] On one occasion, a few answers had recorded non-existent "trams" as the mode of transport

be supervision at the other end. Public buses, especially with current continuing health concerns, are a much less attractive proposition for unaccompanied children. If parents need to undertake and pay for a double journey to chaperone them, then the option of hopping in the car is likely to be tempting. Inquiry Doc.8 demonstrates that there is only limited bus lane provision, so the reliability will be no greater than for private cars, exacerbated by stops[12].

2.18. Ferguson's data on mode shares of other schools were drawn from STARS schools, none of which were in the Hampstead and Belsize area;[13] in Hampstead and Belsize wards, car ownership and use for work journeys are above average for LBC.[14] Four of his five schools were in areas with PTALs of 6a and 6b, whereas the Appeal Site has a PTAL of 4.[15] Of the other schools noted, only Torriano has a PTAL of 4. Ferguson had not interrogated the full list, only having asked about schools with 0-5% car mode shares. Burke based his 22% mode share prediction (i.e. 184 car movements per day) on Christ Church and New End primary schools. Whilst these schools are not required to have Travel Plans by planning controls, they are, respectively, silver and gold STARS accredited schools, so they have an active travel ethos, like the silver accredited Abacus. The gold award means that a school is in the top 10% of London schools, so Burke's choice of this one as a comparator for mode share predictions was fair. There are some differences,[16] but the number of car movements generated by applying this

12 Burke XX, RX
13 Ferguson Proof Tables 1 and 2 (paras 4.27, 4.29)
14 Inquiry Doc 6 Burke Clarifications
15 CD02/09 SOCG para 5.19
16 A nursery and 2 parking spaces

mode share - 184 - is well above 3 times the factored figure - 51 - for the former police station use and even further above Grosz's anecdotal estimate or Sheehy's reasonable alternative landuses.

2.19. The catchment area and bus pick-ups are such that the current arrangements favour families in the south; the opposite would apply with the Appeal Scheme, meaning that the morning trip to school would be uphill, not the most encouraging aspect, for some at least.[17] Some might well find the combination of the hill and, say, rainy days, coupled with other domestic responsibilities such as younger children or trips on to work, too much of a juggle and opt for the car. Ferguson's car parking surveys[18] show that there is some spare capacity; although provision is not generous, there is enough to strengthen the temptation to hop in the car, leading to congestion at the school if spaces could not be found, as he agreed in XX. A "*CLEAR"* area is to be created at the Rosslyn Hill entrance by the removal of parking spaces and this could prove convenient for drivers wanting to *"stop and drop"*[19]. Ferguson described the existing pedestrian environment as *"of very high quality"*, but Froment's photographs illustrate congestion at the corner of Rosslyn Hill and Downshire Hill. Ferguson claimed that these conditions were *"unique"*, but Froment disagreed and Ferguson could not speak with first-hand knowledge[20].

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17 Inquiry Doc.7 Elevations of the bus pick-ups. See Shakespeare on the *"whining schoolboy……..creeping unwillingly like snail to school".*

18 CD 01/43 TA Table 1

19 Burke X (Inspector)

20 XX (MEQC)

2.20. Burke did not accept that DfT's Tempro and NTEM data meant that one should confidently predict reductions in traffic movements on Rosslyn Hill. As he summarised, in XX, DfT have data about future development growth and car registrations, which are still increasing in Outer London; *"they are the experts, and they assume increase"*. As to increased impacts on the poor air quality on Rosslyn Hill, Burke noted that the car trips which he believed the Appeal Scheme would generate would be likely to add to existing peaks; the CLP identifies an existing problem with the school run and these trips would exacerbate harmful idling in peak traffic and congestion around the school. This is highly relevant to the balanced sustainability assessment required by Policy C2 (e) and the relationship between car traffic and air quality about which LBC's members expressed their concerns in RfR1.

2.21. The Appellant relies absolutely upon its proposed Travel Plan and the school's ethos. Burke accepted in XX that the Appellant had done all that it could in terms of proposing management and mitigation and that there is no "technical" highways objection in NPPF terms. However, he did not regard the results as acceptable, either in terms of the Framework or CLP Policy C2 because he considered the projected mode shift and share to be *"optimistic in the extreme"*[21]. In his view, even with all the planned measures, there were likely to be increases in car traffic at the peak times, leading to idling in traffic. Air quality is dealt with below in detail; suffice it to say here that the Appeal Site is located on a busy road within an AQMA. It is plainly not sustainable

[21] Burke XX, RX

to locate a school here, adding to the existing issues with the school run in this area, which are highlighted in the CLP.

3. ISSUE 2 – Whether the proposals represent sustainable development in relation to neighbours, having regard to the effects of noise.

3.1. The general policy objectives at national, strategic (i.e. London) and local levels are to promote good health and quality of life through the effective management of noise. The Noise Policy Statement for England ("NPSE") describes what it means by " *health and quality of life"* in the following terms:

> *"2.12 The World Health Organisation defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, and recognises the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being.*
> *2.13 It can be argued that quality of life contributes to our standard of health. However, in the NPSE it has been decided to make a distinction between „quality of life" which is a subjective measure that refers to people's emotional, social and physical well being and „health" which refers to physical and mental well being.*
> *2.14 It is recognised that noise exposure can cause annoyance and sleep disturbance both of which impact on quality of life. It is also agreed by many experts that annoyance and sleep disturbance can give rise to adverse health effects. The distinction that has been made between „quality of life" effects and „health" effects recognises that there is emerging evidence that long term exposure to some types of transport noise can additionally cause an increased risk of direct health effects. The Government intends to keep research on the health effects of long term exposure to noise under review in accordance with the principles of the NPSE."*

3.2. NPPF 170 calls for planning decisions to *"contribute to and enhance the local environment by……preventing new and existing development from contributing to……..or being adversely affected by* ***unacceptable*** *risk from or adversely affected by levels of ……...noise."* (emphasis added). As

Jarman agreed, this judgment about acceptability is to be made by reference, not only to scientifically derived standards, but having regard to *"all relevant factors."*

3.3. These policy objectives feed through into the recently updated NPPG which adopts the NPSE concepts of Observed Adverse Effect Levels - No, Low and Significant ("N/L/SOAEL") - **but does not attempt to put figures on them**. Instead, the concepts are expressed qualitatively as follows:

Response	**Examples of outcome**	**Increasing effect level**	**Action**
	Lowest Observed Adverse Effect Level		
Present and intrusive	Noise can be heard and causes small changes in behaviour, attitude or other physiological response, e.g. turning up volume of television; speaking more loudly; where there is no alternative ventilation, having to close windows for some of the time because of the noise. Potential for some reported sleep disturbance. Affects the acoustic character of the	Observed Adverse Effect	Mitigate and reduce to a minimum

	area such that there is a small actual or perceived change in the quality of life.		
Response	**Examples of outcome**	**Increasing effect level**	**Action**
	Significant Observed Adverse Effect Level		
Significant Observed Adverse Effect Level Present and disruptive	The noise causes a material change in behaviour, attitude or other physiological response, e.g. avoiding certain activities during periods of intrusion; where there is no alternative ventilation, having to keep windows closed most of the time because of the noise. Potential for sleep disturbance resulting in difficulty in getting to sleep, premature awakening and difficulty in getting back to sleep. Quality of life diminished due to change in acoustic character of the area.	Significant Observed Adverse Effect	Avoid Present and very disruptive Extensive and regular changes in behaviour, attitude or other physiological response and/or an inability to mitigate effect of noise leading to psychological stress, e.g. regular sleep deprivation/awakening; loss of appetite, significant, medically definable harm, e.g. auditory and non-auditory

3.4. This qualitative rather than numerical threshold approach is important, in the light of the Government's stated intention to keep long term health effects under review and given the Appellant's stress, in XX of Fiumicelli and the oral evidence of Jarman, on the absence of scientific research on dose response in respect of intermittent, sudden, unpredictable and high pitched noises. NPPG[22], however, identifies as relevant factors:

- how the noise from a new noise making source relates to the existing sound environment, for non – continuous sources of noise;
- the number of noise events and the frequency and pattern of occurrence of the noise; and
- the spectral content of the noise (whether it contains particular high or low frequency content) and the general character of the noise (whether it contains particular tonal characteristics or other particular features).

3.5. If we did not know otherwise, we might have been forgiven for thinking that those words had been written with this case in mind. Of course, they are general guidance, but several important points emerge when we think about them.

3.6. Firstly, they suggest a common sense approach to assessment by the planning decision maker – this is planning, rather than technical acoustic guidance.

[22] Para 006

3.7. The second point derives from the first and it is that Government Planning Guidance does not rule in or out any particular approach to measuring, predicting, describing or evaluating such noise characteristics. Nowhere does guidance specify, for example, as Jarman said in RX, that Lamax measurements should not be applied to sudden noises made by people or to noise generated during the day time. His suggestion that a 5min Laeq sufficed failed to engage with Fiumicelli's accurate technical description of the sudden screams and shouts of young children playing as *"variable, impulsive – i.e. going straight to the peak."*[23] When describing those kinds of noises, which do not have any build up, a 5 minute measure will still tend to smooth them out, even within a relatively short period, so the Laeq is not as good a descriptor as the Lamax, which describes the maxima, as opposed to the equalised average noise levels. The practical issue about such noise, as Fiumicelli went on, is that those peaky characteristics add to the impact for people hearing them. If noise is of an "anonymous" character, such as the bland hum of traffic, the brain reacts differently from its response to sudden noises, especially if the noise also has emotional content, as in the case of children's play. This last point was verified, from the expert psychological perspective, by Grosz.

3.8. These details matter because policy and guidance require a judgment by the decision maker as to the category into which the development effects fall - LOAEL or SOAEL; and a judgment about whether or not *"unacceptable"* harm will be caused to amenity and quality of life (CLP Policy A1); and about

[23] Evidence in X

the prevention of existing development *"being put at an unacceptable risk from, or being adversely affected by, unacceptable levels of ….noise pollution"* (NPPF 170(e)). NPPG[24] states that *"the subjective nature of noise means that there is not a simple relationship between noise levels and the impact on those affected."* Thus, Fiumicelli said, the impacts on established residents are likely to be felt more severely than by the occupants of new dwellings which are built in the vicinity of an established school. Development plan and national policy, by adopting the tests just set out, clearly recognise the planning relevance of protecting existing residents and they respond with protective policy. Moreover, in the case of new development moving into the sphere of an established noise source, policy now applies the Agent of Change principle to the design of the incoming development, to forestall problems, but this is a different process, so it is not appropriate to borrow standards for such situations and apply them to the Appeal Scheme, which involves noisy activities being introduced just metres from existing homes[25]. The effect of a proposal upon the character of the area is a familiar planning concept and new noise is one obvious aspect. It is meaningless to point to other locations where schools and residential property are near each other and seek to draw the inference that the development proposed here is, therefore, satisfactory, for reasons explored by ED-R with Jarman in XX.

3.9. Therefore the judgment is not to be reached on the basis of a rigid application of figures, rather by reference to a *"melting pot"*[26] of factors. Assessment

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24 Para. 30-006 – 2019- 0722

25 Fiumicelli RX on Table B (Proposed Developments likely to be Sensitive to Noise) of Appendix 3 to the LBC Local Plan

26 Inspector, during XX of Jarman by MEQC

must reflect the context in order to be sound, as Jarman accepted in XX. This approach accords with that of CLP **Policy A1 Managing the impact of development** which is cited in RfR 2.

3.10. These points might seem too obvious to require restating, but they matter very much in this case, for several reasons.

3.11. Firstly, there is no standard or guidance nationally, regionally or locally which applies to playground noise. Because of this, the noise assessor needs to construct an assessment method which adequately takes account of all relevant factors, including the existing noise environment, the characteristics of the noise to be introduced and the effects of likely changes. The Appellant's Noise Assessment did not achieve this and Jarman's attempts to justify its approach in retrospect, having heard Fiumicelli's evidence, were highly technical unconvincing. Moreover, he agreed with Fiumicelli that, given the nature of the development proposal, these three factors are *"very relevant*".

3.12. The main points of technical difference revolved around whether or not the Appellant's noise assessment and evidence did, in fact, properly have regard to these three highly relevant factors. This matters, but only insofar as the Inspector will need to decide about the weight to afford to the Noise Assessment in order to inform his own judgment on whether the predicted noise falls into the LOAEL or SOAEL category and, if the latter, whether the effects are *"acceptable"* within the policy context of seeking sustainable development.

3.13. In the absence of guidance or standards relating to playgrounds, the Appellant's Noise Assessment had simply taken thresholds from the CLP for Entertainment Noise. This approach had several drawbacks. Firstly, the types of landuse are plainly very different. The guidance covers both customer noise and music, plant and vehicle noise. It does not contemplate the specific features of children's play - unpredictable and high frequency vocal noises - nor the particular psychological response of adults to hearing children squealing, shouting, crying, shrieking. These are noises which are not "anonymous" but which will draw the attention of the hearer in ways quite different from the noises generated by entertainment venues – amplified or non-amplified music, the buzz of conversation as adults queue to enter premises and the sounds of vehicle movements and plant[27]. Locationally, in the Borough of Camden, such venues are likely to be in town centre settings rather than a residential side street like Downshire Hill. Referring back to the NPPG 006 factors, these characteristics come within the second, third and fourth bullet points highlighted above.

3.14. Secondly, CLP Table D, which deals with customer noise associated with entertainment premises, applies to gardens only, not inside dwellings. Both receptor locations are relevant in this case. Jarman relied on the NR curves on p.350 of Appendix 3 in relation to indoor criteria. However, the introductory words make clear that these guidelines relate to the non-human elements of Entertainment noise, as follows: *"**For entertainment and plant noise** rating curves should be measured……"* (emphasis added). As Fiumicelli

[27] Jarman XX (MEQC)

explained[28], NR curves are a metric conventionally applied to plant, such as air conditioning units, and they are not applicable to noise from people (dealt with, for Entertainment uses, in Table D) and certainly not to children's play; specifically,[29] they are not a proxy for assessment of the frequency effects of children's high pitched voices in the overall judgment about significance of Observed Acoustic Effect Level. Quite apart from the general problem of following guidance intended for different landuses, it is therefore wrong to use NR curves as a threshold between LOAEL and SOAEL in this case. Fiumicelli agreed that windows tend to attenuate high better than low frequency noise, but the differences in spectral content proposed here, he said, are *"quite extreme"*, which will affect attenuation.

3.15. Thirdly, the text in Appendix 3[30] requires the Laeq and Lamax metrics to be used, but Jarman's assessment does not feed LAmax measurements into the assessment of predicted noise effects and what he says the predictions mean in terms of LOAEL or SOAEL and acceptability.

3.16. Lamax readings were taken and reproduced in the Noise Assessment for the play and sports grounds at Camley Street and for the proposed playground

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28 XX and RX

29 Fiumicelli Proof 4.13 – 4.19; XX, RX, commenting on Tables 6 and 2 of the Noise Report, which can be compared with each other, revealing that the frequency levels of 1 or 2 KHerz band of children's play / PE., if compared to the ambient baseline at the Appeal Site, display different frequency characteristics. He explained that, if the measurements were to be plotted on a graph, the peaks would be in different places, the Appeal Site showing a "ski slope" curving down decay of sound, as opposed to the different pattern of children's play, where the shape would resemble a "slightly offset humpback bridge" because of peaks of high frequency sound which would stick out and dominate the listener's experience of the noise environment. The different patterns are accounted for by the predominant noise component being road traffic in the existing baseline as opposed to the noise of children's play in the proposed (with development) case.

30 P. 349: *"Appropriate metrics must be used to measure and assess the noise impact including LAeq and LAmax metrics and appropriate frequency spectrum".*

at the rear of the Appeal Site. Comparison shows that the play and PE activities at the school's current location produce Lamax readings ranging from the mid 80s to high 90s as opposed to mid 50s to low 80s at the rear of the Appeal Site.[31] Jarman was sure that the peaks of sound at Camley Street were attributable to children in the playground[32]. In RX, he was taken to the Lamax readings for the front of the Appeal Site on Rosslyn Hill, which contained a number of Lamax events above 90 and even 3 above 100. The RX evidence merely serves to highlight the difference, established in XX, between the current steady and relatively quiet environment at the rear of the Appeal Site, on the one hand, and the noise produced by children at play in their current school site or the noise of busy Rosslyn Hill at the front of the Appeal Site on the other. These differences are relevant to the NPPG assessment criteria concerning relationship of a new noise source to the existing environment and the number, frequency, pattern, spectral content and general character of the proposed noise, relative to the receiving environment. By leaving consideration of the Lamax data out of the assessment stage of his work, Jarman had omitted critically important inputs, and therefore reached a judgment about acceptability and Observed Effect Levels (LOAEL or SOAEL) which was incomplete and awry. In truth, the evidence of Lamax shows that the effect of the proposal would bring about a change in character for residents on the quiet Downshire Hill side street which would make it more akin, in terms of noise environment, to the busy main road setting of Rosslyn Hill. Clearly, duration of the noise is relevant

31 CD 01/30 Noise Assessment Report Fig. 19\0084\TH\01 and 03
32 RX

and this would not be a 24/7 effect, but the Lamax data is at least indicative of the scale of change during use of the playground.

3.17. Even without the nuances required to do justice to NPPG guidance, on a straight application of the noise thresholds for Entertainment uses of the CLP, Jarman predicted exceedances of Table D “Amber” (LOAEL to SOAEL”) levels in 4 locations in neighbouring gardens and exceedances at “Red” (SOAEL) at one location. At its highest, the predicted noise level is more than 3dB higher than the SOAEL threshold level in the Local Plan. Fiumicelli points to increases of 5 – 17dB from the ambient level in gardens of 47dBA; 10dB represents a doubling of sound and 17 dB is therefore 3 or 4 times the ambient level. The indoor position would be worse on the upper floors, because of the absence of effective noise screening, either existing or as a result of potential mitigation. Recommended noise levels in the appropriate British Standard 8223 would be exceeded with windows open. Weekend community use had not been assessed. These admissions must be set in the context of all the factors set out above which mean that the Appellant’s simplistic approach tends to downplay the realities of what it would be like living with this level and kind of noise intrusion. Jarman accepted that changes in behaviour would be necessary: keeping windows shut, not having coffee at the same time as the children’s break periods (i.e. coffee time – between the hours of 10.15 and 1pm), sleeping or resting if necessary during the day - as it is for some people - in a room on the other side of the dwelling or not during break periods, holding professional consultations on the other side of the building or with the windows shut. Whilst intermittent, these changes in behaviour would be permanent for

neighbouring residents. Using the terminology of the NPSE, such a change in characteristics is clearly calculated to *"annoy"* neighbours and therefore diminish their *"quality of life"* and Grosz gave detailed evidence about this, both as a neighbour and as an expert psychologist. The change in quality of life would not just be *"small"* (NPSE/NPPG LOAEL descriptor); the more accurate description would be *" quality of life diminished due to change in acoustic character of the area"* – i.e SOAEL, where the guidance says that this level of noise should be *"avoided"*. The NPSE, NPPF and CLP Policy A1 objectives of protecting the quality of life of neighbours would not be met, which would not represent sustainable development.

3.18. The only physical mitigation on offer is an intrusive noise barrier, not the originally planned 4m baffle, but a 3m one, because of the adverse visual effects which residents considered unacceptable in the "Hobson's Choice" with which they were presented. In fact, this mitigation would only achieve an imperceptible 1dB improvement and nothing at all above first floor level[33]. The only other mitigation comprises conditions limiting the times at which the playground may be used. This would mean that all outdoor PE lessons would have to be undertaken offsite. Conditions would not cover drop off and collection times, when there would obviously be noise, once again, of children who are likely to be excited and exuberant; these events had not been measured or predicted as part of the Noise Assessment[34]. Therefore the only way of *"avoiding"* the incidence of these effects would be to refuse

[33] Jarman XX (MEQC, ED-R)
[34] Jarman (Insp X)

planning permission, since, by common consent[35], there is no further mitigation which could be applied to achieve sustainable development in terms of acceptable living conditions for neighbours.

4. ISSUE 3 Whether the Appeal Site is in an acceptable location for a school in relation to air quality.

4.1. The starting point for consideration of this issue is the development plan; attention must also be paid to the emerging New London Plan, which is at an advanced stage. These documents set out relevant locational and design principles pertaining both to the location of the Appeal Site and the proposed use of most of the site as a primary school.

4.2. Published London Plan ("LP") **Policy 7.14 Improving Air Quality**, para B(a), provides that proposals should *"minimise increased exposure to existing poor air quality and make provision to address local problems of air quality (particularly within Air Quality Management Areas (AQMAs) and where development is likely to be used by large numbers of those particularly vulnerable to poor air quality such as children….."* Reasoned justification[36] states that *"Increased exposure to existing poor air quality should be minimised by avoiding introduction of potentially new sensitive receptors in locations where they will be affected by existing sources of air pollution (such as road traffic …..) Particular attention should be paid to development proposals such as……schools….."*

35 Fiumicelli and Jarman XX
36 CD 05/01 para. 7.51

4.3. The Appeal Site lies within an AQMA and the proposal is for a primary school, so the policy is plainly engaged.

4.4. The draft New London Plan Intend to Publish Version includes **Policy S3 Education and childcare facilities** which provides that:

> *"Development proposals for education and childcare facilities should:……locate entrances and playgrounds away from busy roads, with traffic calming at entrances".*

Supporting text adds that: *"Facilities should be located away from busy roads, with traffic calming at entrances, to benefit from reduced levels of air pollution, noise and road danger. Where possible, natural features such as trees, greenery, forest schools and spaces for food growing should be incorporated into playgrounds and school sites, recognising both the health and educational benefits these can provide. Healthy and safe routes to education and childcare facilities, should be considered through the design process."* It is therefore clear that the purpose of the locational policy about entrances and playgrounds is to remove children from exposure to poor air quality. There is no dispute about the fact that Rosslyn Hill, where the main entrance to the school would be located, is a *"busy road"*[37]. Policy S3 is not subject to the Secretary of State's Direction[38] so it is reasonable to suppose that the New London Plan will contain the policy in this form; it is therefore entitled to considerable weight. Moreover, this enhanced policy is coming forward notwithstanding the generally encouraging projections for future air quality owing to vehicle emission regulation and policy interventions by the

[37] Burke proof paras 1.3-1.5; Ferguson XX (MEQC)
[38] CD 02/09 SOCG para 4.7 and Table

Mayor and others via initiatives such as Low Emission Zones. The Appellant laid much stress in Kearney's evidence and XX of Bull on these optimistic signs[39], but the policy context is, if anything, being reinforced and certainly not relaxed. Kearney described the Policy S3 approach as *"prudent"*[40].

4.5. CLP policies A1 and CC4 similarly seek to protect the quality of life of occupiers of developments, including in respect of fumes, and provide that developments which introduce sensitive receptors, such as schools, in locations of poor air quality will not be acceptable unless designed to mitigate the impact.

4.6. There is plenty of science and regulation underpinning these policies. The pollutant in issue here is N02. Bull rehearsed this important background to the development plan policies, noting, particularly that:

- the Committee on the Medical Effects of Air Pollutants and the Government's Clean Air Strategy identify no lower threshold where there are no health effects, young children being an especially vulnerable group;
- a study reported in The Lancet found that children in London exhibited a loss of c.5% in lung function as a result of exposure to N02, noting also that N02 is a marker for other traffic related pollutants;

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39 Though Bull pointed out in his answers that care should be taken in interpreting the monitoring results for Fitzjohn's Road in the LBC July 2020 AQ Annual Status Report for 2019 (Inq Doc 15). This is the nearest monitoring location to the Appeal Site but was used in the AQ Assessment by the Appellant for verification only. It is not a proxy for the Appeal Site and it should not be used as though it were. N02 levels were shown to have fallen there, but no explanation is given.

40 XX (MEQC)

- Public Health England has suggested using the spatial planning system to reduce exposure to pollution including interventions which separate people – especially children - from pollution;
- having regard to his audit programme for schools, the Mayor has made a commitment in his Environment Strategy to *"reducing exposure of Londoners to harmful pollution across London – especially at priority locations like schools";*
- the Environmental Protection UK / Institute of Air Quality Management have jointly issued guidance stressing the importance of the planning system's role and strongly encouraging that developments where particularly sensitive people are likely to be present, such as schools, should *"generally be sited 100m or more away from busy roads in areas where pollution concentrations are high"*.

4.7. There is therefore an impressive body of expert opinion underlying extant and emerging development plan policy to the effect that schools should not be developed on or near to busy roads and should be carefully designed to prevent access in such locations.

4.8. The expert witnesses had taken fundamentally different approaches to policy, research and guidance. Kearney was reluctant to engage in discussing the wider context in XX. While it had not been put to Bull that merely complying with guidance to achieve an acceptable internal environment by means of mechanical ventilation would meet concerns about children's health, Kearney's approach to planning policy, he explained in XX,

was that the locational policies set out above only apply where there is short term exceedance of Air Quality levels under the Regulations. He relied on his client's proposals to regulate the internal environment mechanically. Plainly, such mitigation does not deal with the external environment, as Kearney agreed, but he was not prepared to consider the significance of the primary school years in terms of children's physical development, saying that he has no qualifications in public health and that he had simply assessed whether or not there would be short term exceedances. Fortunately, Bull has a PhD in public health engineering and, has contributed to professional good practice guides on air quality and landuse. He was therefore well placed to advise the inquiry about the public health regulation and learning which the Mayor and other policy makers have accepted and seek to implement. As a matter of planning policy interpretation and application, Kearney's approach is untenable for the following reasons:

- neither extant nor emerging development plan policies or supporting text expressly limit their application as suggested;
- on the contrary, the policies set out locational principles which are backed up by science and collective professional opinion;
- limiting the policies in the way contended for by Kearney would render them ineffective because any premises which could be mechanically ventilated would, on his approach, be policy compliant; when the Inspector asked him why the policies are framed as they are, he simply reasserted his position without engaging with the obvious point.

Bull's patently highly expert evidence on this fundamental matter of approach should be accepted in preference to Kearney's. It is quite clear that the Appeal Scheme does not accord with development plan policy in this very important respect.

4.9. The effects of non-compliance have not been mitigated by design. Four out of the seven year groups would have their entrance and exit via the Rosslyn Hill door. Kearney pointed out that it is set back from the road, but, even if the actual doorway lies just beyond the zone of NO2 exceedance, children would be walking through that zone for up to 200m of their journey to / from school, regardless of mode of travel. Because of the noise constraint, outdoor PE lessons, which the head teacher would prefer to hold in the playground,[41] would have to be held offsite, necessitating a walk along streets, albeit mostly not through areas of exceedance. The New London Plan mitigatory design aspirations for playgrounds as places for trees, greenery, forest schools and spaces for food growing would not be met; the General Arrangement drawing shows limited areas for shrub planting, as the CGIs illustrate[42]. Moreover, the projected route to / from school[43] involves walking / cycling / scooting for 200m along Rosslyn Hill and comparison with Bull's Figures 2, 6 and 7 shows the correlation with areas where the NO2 annual mean objectives of 40 micrograms /cubic metre are exceeded.

4.10. In policy terms, then, the answer to the Inspector' s Question is: No.

41 Briody XX (MEQC)
42 CDs 01/145-6
43 Ferguson proof para 6.80

4.11. A number of modelling and other technical matters were explored in detail in the oral expert evidence. Bull explained that, whilst he did not claim short term, hourly exceedances of N02 levels, there is cause for concern because the annual exceedances are, of course, made up of average values throughout the year. Therefore, whilst he agreed that there is no breach of NPPF 181 in terms of compliance with limit values, he did not consider that the Appeal Scheme complies with *"national objectives for pollutants"*, as the paragraph also requires. This is because paragraph 170 states that planning decisions should contribute to and enhance the local environment by preventing new development from being put at unacceptable risk from or being adversely affected by unacceptable levels of air pollution and paragraph 180 requires decisions to ensure that new development is appropriate for its location. Neither national nor development plan policy requires a comparison of the proposed and current situations; this was a point which emerged in XX of Bull, but was not supported by any evidence of such an assessment having been undertaken by Kearney. This hare was, apparently, set running by the anecdotal evidence of Soboliewski, talking about the children's current travelling arrangements. It was wholly unsupported by any measurement of the bus stops or any technical details of the internal environment of the school buses; importantly, for example, Bull said that some vehicles have activated carbon filters, but no specifics about the buses or the internal environment at Camley Street were put to him because they were not contained within the evidence base. Policy does not call for comparison of the sort being suggested by RTQC and Bull rightly rebuffed the contention. This was, in reality, a late attempt by the Appellant

to create a smokescreen to distract attention from the obvious and significant failure to comply with the development plan. The ideas floated in this way do not amount to *"other material considerations"* of any weight because they relate to technical matters of which there is no evidence whatsoever.

4.12. There are three pieces of evidence of the condition of the Appeal Site or its immediate environs: Kearney's modelling, GLA modelling and Kearney's monitoring. Kearney's monitoring was done by placing diffusion tubes at the site. Bull rejected suggestions that the LBC data for Fiztjohn's Avenue established that Kearney's modelling was over predicting for various reasons: firstly, because it has not been established that the locations are identical; secondly, because Kearney's figures and the Fitzjohn's Avenue figures are in the same ballpark at 42 – 46 micrograms per cubic metre; thirdly, because Kearney's modelling requires a verification factor of 2.5288 for his Scenario 1 – i.e. a factor of 252% is required to get it to the right level, and none of the claimed robustness factors disposes of that requirement; his sensitivity modelling requires an even greater verification factor of 3.1850[44]; a further element of uncertainty is introduced by the funnelling or canyon effect illustrated on Bull's Fig.4 – in essence, air quality patterns around buildings in dense urban environments are complex, modelling is not calculated to capture them well and, for reasons just explained, Kearney's sensitivity appraisals are subject to even higher levels of uncertainty than his base projections. Lastly, Kearney's monitoring was undertaken for 3 months whereas good practice guidance says that there should ideally be 12 or at

[44] Kearney proof p.12 first para and final page of Appx 2

least 6 months of data; Kearney was unable to put forward any justification for the shorter timescale.

4.13. Having considered not only the development plan position but also the technical evidence, the clear answer to the Inspector's Question remains: No.

5. ISSUE 4 The effect on the architectural quality of the listed building ("LB")

5.1. The issue as briefly formulated in the Inspector's opening summary is, of course, a shorthand reference to the statutory duties under the Planning (Listed Buildings and Conservation Areas) Act 1990 which apply to both appeals. S.16(1), which applies to the LB appeal, provides:

> *"In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."*

S.66, which applies to the planning appeal, expresses the obligation in similar terms. Therefore the focus of statutory concern is architectural and historic interest.

5.2. Because of the full listing description, there is substantial agreement between the three experts on the significance and interest of the designated heritage asset. Whilst the building is of considerable architectural quality, it is also significant because of the important story which it tells about the development of the justice system at an interesting turning point on the threshold of modernity. The work of a specialist architect, John Dixon Butler,

it is, in the words of the listing, *"an early example of a combined police station and courthouse, and possibly the first to provide facilities for dealing with juvenile suspects……"* The interior was *"intricately planned to provide separate areas for the different primary functions of the building, with careful consideration of the requirements of the various parts; the hierarchy of spaces is expressed in the internal detailing, and the stairs, in particular, reflect the status and character of the different areas; the high status of the courthouse is manifest in the internal joinery and plasterwork, and the courtroom has an extensive scheme of panelling and furniture; the police station is plainly detailed internally, but has architectural features, such as the rounded angles of the walls, and its plan form, which reflect its function."* Although, as noted at the Heritage RTS, use by the police service over the years of the twentieth century took its toll, in terms of removal of some internal features, the listing description also notes that *"the general planning has survived".*

5.3. Having identified the significance of the LB, it is then necessary to make a proper assessment of whether the proposals would lead to harm and, if so, to articulate the level of such harm. There is a fundamental issue to resolve, because the Appellant's case is that the Appeal Scheme would *"overall enhance the LB"*[45] whilst the LPA's and HCRD's written and oral evidence concludes that there would be harm. In reaching a conclusion on this issue, it is necessary, in order to discharge the statutory obligations, to consider all the heritage effects of the proposals. Historic England's "Making Changes

[45] CD 02/1 Statement of Case para 3.57.

to Heritage Assets" [46] provides helpful guidance. The document draws attention, for the purposes of understanding the *"particular significance of the affected assets and the impact upon that significance in each case"*, amongst other things, to the layout, plan form, materials and construction and external detailing, including street furniture and internal fittings. The Note further counsels that *"in normal circumstances…..retention of as much historic fabric as possible, together with the use of appropriate materials and methods of repair, is likely to fulfil the NPPF policy to conserve heritage assets in a manner appropriate to their significance…..It is not appropriate to sacrifice old work simply to accommodate the new";* it is preferable for new work to be reversible. On adaptation to new use, the guidance recognises that some degree of compromise in use may assist in retaining significance, continuing: *"The plan form of a building is frequently one of its most important characteristics and internal partitions, staircases (whether decorated or plain, principal or secondary) and other features are likely to form part of its significance……Proposals to remove or modify internal arrangements, including the insertion of new openings or extension underground, will be subject to the same considerations of impact on significance (particularly architectural interest) as for externally visible alterations……Small-scale features, inside and out, such as ….. chimney breasts…..will frequently contribute strongly to a building's significance and removing or obscuring them is likely to affect the asset's significance."*

[46] Advice Note 2 2016 Section 3

5.4. Extensive quotation from this document, which is obviously very familiar to the Inspector, is apt because these parts deal with both the fundamentals and the details of approach to repurposing LBs. Yet the DAS and Heritage Statement ("HS") submitted with the application do not refer to the HE document. Inattention to these important principles of conservation practice has led to a scheme which, instead of making compromises in order to preserve significance, as suggested in the Advice Note, does quite the opposite.

5.5. As Baxter pointed out, the assumption that anything which was not present when the building was brand new is insignificant, is wrong in principle. It is highly relevant that this building remained in use for the purposes for which it was designed for about a century. Although it has been vacant for several years, it remains possible to "read" in the plan form and some of the features what the building was for and the different designs and fit-outs for its distinct but related purposes. Thus, the magistrates' court is still obviously a public space, with a degree of grandeur not replicated in the more utilitarian police and custody facilities. The workaday nature of the latter is part of the LB's historic interest and remaining architectural features, such as the cells and the specially designed, tiled walls with their rounded corners, speak of the architect's understanding of the task in hand and of his experience and skill in designing appropriate structures in response. There is broad agreement about the significance of these important features and of the internal staircases because of their role in revealing the interior workings of the building's plan form.

5.6. When it comes to the external stairways, however, the Appellant's HS and DAS simply refer to removal of *"the modern accretions and additions"*. Baxter clarified during the RTS that he does not object to removal of the external staircase as such, but he profoundly disagrees with the characterisation of this alteration as a heritage advantage. The original architect's drawings include the external bridge and stairs and their continuation in position, even though materials have been replaced, helps to reveal the function and planning of the LB whereby prisoners could be moved from the cells to the magistrates' court without having to go outside – with increased risk of escape – or via the officers' married quarters. The presence in situ of stairs, even with replacement of materials, also reveals the history of the building's evolution, as the Inspector observed during the RTS. Whilst it is difficult to see how these stairs and bridge could be retained with any modern use, their removal should certainly not be characterised as a benefit. Just because they are inconvenient to the contemporary architect does not mean that it is beneficial in heritage terms to remove them.

5.7. This issue of the external stairs illustrates the general approach. The Appellant rightly stresses the importance of LBs being in appropriate uses. In this case, however, there is no evidence of a use-seeking process having been undertaken for heritage, or, indeed, any other purposes. The building was acquired by the DFES, presumably with educational use in mind, in 2014. Watt pointed out that other Dixon Butler buildings in the Metropolitan Police District have been put to different beneficial uses. Indeed, although the school is the driving force of the project, the Appeal proposal for the

magistrates' court does not comprise educational use; the history of this aspect of the scheme is described by Baxter as a *"chain of negative reasoning"* because the office use was, apparently, conceived to allay residents' fears about potential growth of the school in future, up to the 420 pupil capacity proposed in the earlier planning application. Yes, it is a new use, but No, it does not preserve significance. The scale of the strip-out comprised in this part of the proposal cannot sensibly be described as preservation of significance unharmed[47]. The combined effect of mass removal of fixtures and fittings from the police station and stripping away of much of the courtroom furniture would be to obscure the different design approaches noted above which say so much about this early example of an integrated justice centre and the physical expression of status accorded to the different parts of the system. All traces of the cutting-edge provision for juvenile offenders would be lost.

5.8. It is admitted in the HS that *"the application proposals will directly affect the significance of the LB through changes to its built fabric".*[48] These changes cannot possibly be regarded as preservation, let alone beneficial change, but there is no recognition and weighing of the harm. Rather, the assessment races on to note the advantages of what it portrays as a *"wholly appropriate use"* without evaluating whether the degree of physical change – loss of historic features and construction of extensions / alterations – constitutes too great a compromise. The minor internal renovations and re-use of the Stable

47 South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141 per Lord Bridge at page 150 quoted in Barnwell.

48 CD 01/25 para 5.11

Block do not outweigh the degree of strip out taking place in all parts of the main building and the Stable Block.

5.9. Thus, the changes to the Rosslyn Hill elevation – a *"key element of significance"* – are described as being necessary for equal access purposes. Baxter describes the scale of change, which would adversely affect the external appearance of the *"key"* frontage and detract from the usability of rooms on the Lower Ground floor by removal of light and aspect, albeit limited to the area. There would be losses of existing railings, interference with the retaining brick arches, concealment of the lower ground-floor windows and their fine, rubbed brick-heads, demolition of the stone front steps and their replacement in a new position in pre-cast concrete, dismantling and re-siting of the distinctive blue police lamps and the insertion of new steel supports and covering over of most of the area. Removals from the rear elevation have been considered above, but these would be followed by the construction of a 2-storey extension and attachment of a canopy to the rear, obscuring the views of that functional face of the building, which is not insignificant just because it is not grand. He profoundly disagreed with the HS suggestion that *"the package of works proposed will enhance the external appearance"*, and he was right to do so. NPPF 194 reminds us that *"Any harm to, or loss of, the significance of a designated heritage asset …… should require clear and convincing justification."* Whether or not these interventions are clearly and convincingly justified in heritage terms by the securing of a new use is an important question and it is not to be answered by glossing over the recording and analysis of interventions and labelling them enhancements. Given the

extensive loss of plan form[49] and features of historic interest inside, the scheme would significantly impair the coherence, intelligibility and appreciation of the building. Opening it up to limited public access – limited because of the constraints imposed by the care needed to safeguard children and the proposal for the former magistrates' court to be in commercial rather than community use – would be a benefit and the Council's witnesses acknowledged it as such, but the heritage cost must be properly considered. It is also essential to evaluate the benefit realistically; the drastic changes to the interior in the revised building would rob it of much of the physical story which it might otherwise still be able to express.

5.10. It is obvious that the scale of physical changes to the LB would deprive it of much of its significance and therefore cause it harm. Without any evidence that other obvious future uses, such as residential[50], office and community uses not requiring the creation of large teaching spaces, have been considered at all, the justification is not sound. It is not robust to excuse this degree of harm on the basis that the new use is beneficial in principle and, because the demands of that use occasion destruction of original and other fabric and features of significance, that the net heritage balance is a positive one. There is no legal point at issue here, as suggested by the Appellant's team in opening, because the claimed benefits of the conversion scheme are not positives; rather, they are harmful or, at the very highest, elements of them are neutral. The suggested LB consent salvage condition, whilst

49 Set out and forensically analysed in Baxter's proof, Section 11
50 In part, the historic use because the police station included married quarters

appropriate in the event that the appeals are allowed, is not adequate mitigation for what would be lost.

5.11. Statute, caselaw and NPPF all require a proper assessment of the effect of a proposal upon heritage significance. Last year's amendments to NPPG advise that "*Within each category of harm (which category applies should be explicitly identified), the extent of the harm may vary and should be clearly articulated*"[51]. Baxter did this in his proof, concluding that, because of the degree of loss of historic fabric and plan form, the harm which members found to be less than substantial is as high as it could be without crossing the threshold into substantial harm. The implications of this conclusion for the planning balance are dealt with in the final section of these submissions.

6. Planning balance

6.1. The planning appeal is to be determined, pursuant to s.70 Town and Country Planning Act 1990 and s.38(6) Planning and Compulsory Purchase Act 2004, in accordance with the development plan unless material considerations indicate otherwise.

6.2. S.38(6) PACPA 2004 is not engaged in the LB appeal.[52] Clearly, development plan, national and other relevant policy/draft policy are material considerations, but the important statutory provision is s.16(2) LBCAA 1990, which provides:

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51 Paragraph: 018 Reference ID: 18a-018-20190723

52 Because s.16 LBCAA 1990 does not require regard to be had to the development plan and s.22 places the inspector in the shoes of the Local Planning Authority in this respect.

> *"In considering whether to grant listed building consent for any works the local planning authority or the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."*

The same obligation applies in relation to the planning appeal by virtue of s.66 LBCAA 1990.

6.3. These submissions have demonstrated a clear breach of a key locational and design policy of the development plan, LP Policy 7.14B(a) and its almost published successor, Policy S3. CLP Policy CC4 also presumes against the introduction of schools into areas of poor air quality unless designed to mitigate the impact; as noted above, there has not been mitigation by design because it is impossible to change the Site's location on a busy road in an AQMA and access for many of the children would be immediately off this road, which would form part of the journey to school for all. The policies are specific to the proposed school use and are backed by Mayoral strategy and all manner of evidence base. This failure to accord with the development plan is very serious, given the importance of the issue. In truth, it is a knock-out blow for this proposal because it evidences a fundamental locational flaw which policy exists to prevent. The advantages claimed by the Appellant for providing educational choice and quality are fatally undermined by choosing to locate a school in the wrong place.

6.4. LBC further submits that the effects of the proposals on the LB would not preserve the LB or features of special architectural or historic interest which it possesses. Caselaw establishes that a finding of harm to a LB is a

consideration of *"considerable importance and weight."* [53] The conclusion which LBC asks you to draw in relation to the LB is a rounded judgment, taking account of the advantage of securing a new use for the building and facilitating some public access to it; for reasons set out above, however, the price in terms of destruction of the significance held and exhibited by the fabric of the building is so extensive that harm would result, at a high level of less than substantial harm. This harm must be carried into the overall planning balance with the weight which attaches to it by virtue of the statutory presumption, the relevant development plan policies and NPPF paras 193, 194 and 196. And this is the position, even if the Inspector rates the level of harm as being less than Baxter's *"as high as it can be short of being substantial harm"* assessment.

6.5. CLP Policies **C2 Community Facilities** and Policy A1 **Managing the impact of development** call for judgments about acceptability of impacts on neighbouring residents and areas and the text of the Plan highlights this particular area as one already suffering the effects of an over concentration of schools. Social and economic benefits and needs are to be balanced against the environmental quality of life needs of existing residents.

6.6. The most up to date statement[54] of Government policy on the provision of choice of school places in NPPF 94 enunciates the importance of choice and requires LPAs to *"give great weight to the need to create, expand or alter schools through the preparation of plans and decisions on applications".* An

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53 Barnwell Manor Windfarm Ltd v. East Northamptonshire DC, English Heritage, The National Trust and the Secretary of State for Communities and Local Government [2014] EWCA Civ 137

54 A Coalition Government policy statement published in August 2011 but which is still extant.

earlier policy statement urges LPAs to say *"Yes"* to state-funded schools *"wherever possible".* A paraphrase of this policy statement became a Leitmotiv of RTQC's opening and cross examinations, but, read in full, this statement of policy does not mean that the other principles of spatial planning are to be overridden. In particular, it does not mean that London's published and emerging spatial policy for schools, which the Secretary of State has recently had the chance to disapprove or qualify if he had so wished, is to be set aside. This little exercise in policy analysis demonstrates the need for a properly nuanced assessment of benefits, such as Sheehy undertook in his proof. There are some outright pluses – creation of employment floorspace, construction jobs, retention of educational jobs and economic support for the high street. Other benefits come with a corresponding public interest price tag – a permanent home for the school would be provided, but in the wrong place, in terms of air quality environment for the children, noise creation for the neighbours and exacerbation of a documented problem in the area with the school run. Community use of the building out of school hours would give rise the same problems. Measures in the Travel Plan and s.106 / CIL payments are mitigation for development impacts rather than outright public benefits. And although the disused LB would be brought back into use, the destruction of plan form and loss of fabric would deprive the building of much of its heritage significance, which BREEAM excellence would never restore; similarly, limited public access and the salvage condition is a very poor second best to the preservation of features of historic and architectural interest in situ.

6.7. All in all, the public benefits are all marred and outweighed by the policy conflicts which reveal that this is the wrong proposal for this building, in the wrong location. The proposed school would neither be new or expanded in capacity. Therefore the weight to give to NPPF 94(a) in this case is less than it would be in cases of new, expanded or altered schools. This is not a case where the planning answer should be *"Yes"*, for all the reasons set out above and accordingly, LBC respectfully submits that the Appeals should be dismissed.

MORAG ELLIS QC
29. x. 2020