

Neutral Citation Number: [2016] EWCA Civ 814

Case No: C1/2016/2236

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (QUEEN'S BENCH)
MR JUSTICE SUPPERSTONE
CO/5231/2015**

Royal Courts of Justice
Strand, London, WC2A 2LL

11/08/2016

B e f o r e :

**LORD JUSTICE BEATSON
and
LORD JUSTICE SALES**

Between:

**THE QUEEN
on the application of
LENSBURY LIMITED**

Appellant

- and -

**RICHMOND-UPON-THAMES LONDON
BOROUGH COUNCIL**

Respondent

**Christopher Lockhart-Mummery QC (instructed by Howes Percival LLP) for the
Appellant
Daniel Kolinsky QC for the Respondent**

Hearing date: 4th August 2016

Lord Justice Sales:

1. This is an appeal from the order of Supperstone J (reflecting his judgement [2016] EWHC 980 (Admin)) in proceedings brought by the Appellant seeking judicial review of the grant of planning permission by the Respondent ("the Council") for a development at Teddington Weir, Teddington Lock, Teddington on the River Thames. Teddington Lock is in an area designated as Metropolitan Open Land ("MOL") and is in a conservation area. The proposed development is for the installation of a 3-turbine hydro-electric generation facility to replace a section of the existing weir. This would involve the construction of a plant room above the turbines. The judge dismissed the claim for judicial review.

2. The application for planning permission was submitted on 2 September 2014. It came before the Council's planning committee on 15 April 2015. The Council's planning officers prepared a report for that committee meeting ("the April report") which set out a detailed assessment of the application and the policy context, with a recommendation for approval. It is common ground that, so far as is relevant for these proceedings, this report is to be taken to set out the reasons of the planning committee for granting planning permission for the development.
3. At the meeting on 15 April 2015 the planning committee called for further examination to be carried out, in particular in relation to the question of noise. Those further matters were resolved to the satisfaction of the Council by September 2015 and on 17 September 2015 the planning permission in question in these proceedings was granted.
4. At first instance and in this appeal the Appellant submits that the Council failed to comply with its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") in that it failed to have proper regard to provisions in the development plan. The Appellant also advanced other grounds below which were dismissed by the judge and in relation to which there is no appeal.

Legal and policy framework

5. Section 38(6) of the 2004 Act provides that:

 "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."
6. In this court, as below, the relevant legal principles in relation to a claim of breach of this duty were not in issue. The judge helpfully sets them out at paras. [18]-[22]:

 "18. In *City of Edinburgh Council v Secretary of State for Scotland* [1977] 1 WLR 1447, Lord Clyde stated at 1459-1460 (in relation to the Scottish version of s.38(6) of the 2004 Act):

 "In the practical application of section 18A it will obviously be necessary for the decision maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it...

 ... in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. ... The precise procedure followed by any decision maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."
19. In *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, Lord Reed stated (at para 22):

“Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations.”

(See also *R (Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 WLR 2367 at para 33, per Richards LJ).

20. Recently in *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) Patterson J stated (at para 27):

“It is axiomatic that the decision maker does not have to deal with each and every policy that has been raised by the parties during an appeal. That is not the Claimant’s case. Rather, it is submitted a finding of compliance or conflict with the development plan and the basis for it needs to be made so that the decision maker can proceed to undertake the planning balance in an informed way. I agree. Such a step is not just form. Rather, it is an essential part of the decision-making process, so that not only the decision maker but also the reader of the Decision Letter is aware and can understand that the duty imposed under section 38(6) has been discharged properly by the decision maker.”

21. The judge added (at para 30) that the decision maker has to make a decision on the right basis:

“That does not mean a mechanistic approach of judging the proposals against each and every policy that may be prayed in aid of a development or against it, but an evaluation of main policy areas within the development plan that are relevant to the proposal to be determined and an assessment of how the proposal [fares] against them. That can be shortly stated and the process to be followed is for the individual decision maker. But it needs to be clear at the culmination of the decision-taking process what the eventual judgement is against the development plan as a whole. Only by carrying out that exercise can the next step of evaluating the planning balance be properly undertaken.”

22. An overall conclusion that the development proposed is in accordance with the development plan can be implied from a fair reading of a decision letter as a whole (see *Dartford BC v Secretary of State for Communities and Local Government* [2014] EWHC 2636 (Admin), per Patterson J at paras 39-42; *Gill v Secretary of State for Communities and Local Government* [2015] EWHC 2660 (Admin), per Rhodri Price-Lewis QC, sitting as a deputy High Court Judge, at paras 22-24; and *R (Kverndal) v LB Hounslow* [2015] EWHC 3084 (Admin) at paras 63-64; and see also *Hampton Bishop Parish Council* at paras 41-42).”

7. In the decision of this court in *Secretary of State for Communities and Local Government v BDW Trading Ltd* [2016] EWCA Civ 493, which post-dates the judgement below, Lindblom LJ helpfully summarised the principles to be derived from the authorities in this way at paras. [20]-[23]:

- ‘20. Without seeking to be exhaustive, I think there are five things one can fairly say in the light of the authorities.

21. First, the section 38(6) duty is a duty to make a decision (or “determination”) by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan (see Lord Clyde’s speech in *City of Edinburgh Council*, at p.1458D to p.1459A, and p.1459D-G). Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull

in different directions (see Lord Clyde’s speech in *City of Edinburgh Council*, at p.1459D-F, the judgements of Lord Reed and Lord Hope in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, respectively at paragraphs 19 and 34, and the judgement of Sullivan J., as he then was, in *R. v Rochdale Metropolitan Borough Council, ex p. Milne* [2001] JPL 470, at paragraphs 48 to 50). Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides “whether the development plan should or should not be accorded its statutory priority”, and secondly, “if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration” (see Lord Clyde’s speech in *City of Edinburgh Council*, at p.1459H to p.1460D). Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole (see the judgement of Richards L.J. in *R. (on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, at paragraph 28, and the judgement of Patterson J. in *Tiviot Way Investments Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin), at paragraphs 27 to 36). And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance (see the judgement of Richards L.J. in *Hampton Bishop Parish Council*, at paragraph 30).

22. The authorities contain several passages relevant to the issue here. The first is in Lord Clyde’s speech in *City of Edinburgh Council* (at p.1459H to p.1460C):

“... [In] my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. ... In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.”

23. On the same theme Richards L.J. said in his judgement in *Hampton Bishop Parish Council* (at paragraph 28):

“... It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan.”

Richards L.J. added (in paragraph 33) that if the decision-maker does not do that he will not be in a position to give the development plan what Lord Clyde described in *City of Edinburgh Council* as its “statutory priority”. He went on (in the same paragraph) to recall Lord Reed’s observation in *Tesco v Dundee City Council* (at paragraph 22) that “it is necessary to understand the nature and extent of the departure from the plan ... in

order to consider on a proper basis whether such a departure is justified by other material considerations”.’

8. An officer’s report containing a planning authority’s reasons for granting planning permission is to be read fairly as a whole, focusing on the substance of the matter rather than the form. It is not incumbent on an officer compiling a report for the planning committee of a local planning authority to set out and discuss each policy in turn, like a sort of examination paper. If it appears as a matter of substance on a fair reading of the report that matters relevant to the proper application of policies in the development plan have been appropriately identified and assessed, that will be sufficient. Such reports are to be read against the background that they are written for an informed audience (the planning committee) who may be taken to have a reasonable understanding of, or the means of checking on, the local context and the legislative and policy framework in which the decision is to be taken: see e.g. *R v Mendip District Council, ex p. Fabre* [2000] 80 P&CR 500, 509; *Oxton Farms, Samuel Smith’s Old Brewery (Tadcaster) v Selby District Council* (CA, 18 April 1997) 1997 WL 1106 106, per Pill LJ; *R (Trashorfield Ltd) v Bristol City Council* [2014] EWHC 757 (Admin) at [13] per Hickinbottom J.
9. The development plan in this case has three relevant elements. First, the London Plan 2015 applies. Most important on this appeal is policy 7.17 in that plan, which provides in relevant part as follows:

“Policy 7.17 Metropolitan Open Land

Strategic

- A. The Mayor strongly supports the current extent of Metropolitan Open Land (MOL), its extension in appropriate circumstances and its protection from development having an adverse impact on the openness of MOL.

Planning decisions

- B. The strongest protection should be given to London’s Metropolitan Open Land and inappropriate development refused, except in very special circumstances, giving the same level of protection as in the Green Belt. Essential ancillary facilities for appropriate uses will only be acceptable where they maintain the openness of MOL.

...

Commentary

- 7.56. The policy guidance of paragraphs 79-92 of the NPPF on Green Belts applies equally to Metropolitan Open Land (MOL). MOL has an important role to play as part of London’s multifunctional green infrastructure and the Mayor is keen to see improvements in its overall quality and accessibility. Such improvements are likely to help human health, biodiversity and quality of life. Development that involves the loss of MOL in return for the creation of new open space elsewhere will not be considered appropriate. Appropriate development should be limited to small scale structures to support outdoor open space uses and minimise any adverse impact on the openness of MOL. Green chains are important to London’s open space network, recreation and biodiversity. They consist of footpaths and the open spaces that they link, which are accessible to the public. The open spaces and links within a Green Chain should be designated as MOL due to their Londonwide importance.”

10. Policy 7.17 also appeared in the previous 2011 iteration of the London Plan, with the explanatory text at paragraph 7.56 referring to the then applicable national policy for the Green Belt, contained in PPG2 (now replaced by paras. 79-92 of the NPPF). There is no difference in substance.
11. In addition, policy 7.4 of the London Plan requires that attention be given to the local character of the area where proposed development is to take place, including such matters as that development “should improve an area’s visual or physical connection with natural features”.
12. It is also relevant to note that a number of policies in the London Plan contemplate that it will be for local planning authorities in the London area to develop their own local policies to flesh out and give practical effect to statements of policy at a general level in the London Plan: see e.g. policies 5.7, 5.8, 5.12 and 7.4. But this is not a feature of policy 7.17.
13. Next, the Council’s own Core Strategy forms part of the development plan. Policy CP10 applies to open land and parks, including MOL and provides that the open environment will be protected and enhanced. Policy CP11 provides for protection of the River Thames Corridor in respect of its natural and built environment, including through the Thames Landscape Strategy.
14. Finally, the development plan includes the Council’s Development Management Plan 2011. Policy DM HD1 deals with conservation areas. It provides:

“Policy DM HD 1:

Conservation Areas – designation, protection and enhancement

The Council will continue to protect areas of special significance by designating Conservation Areas and extensions to existing Conservation Areas using the criteria as set out in PPS 5 and as advised by English Heritage.

The Council will prepare a Conservation Area Appraisal and Management Plan for each Conservation area, these will be used as a basis when determining proposals within or where it would affect the setting of, Conservation Areas together with other policy guidance.

Buildings or parts of buildings, street furniture, trees and other features which make a positive contribution to the character, appearance or significance of the area should be retained. New development (or redevelopment) or other proposals should conserve and enhance the character and appearance of the area.

Commentary

4.3.2 – There are now 72 Conservation Areas within the borough where the Council has stronger controls than elsewhere, for example over demolition and works to trees. The Council has a statutory duty to preserve and enhance these areas through its policy making and planning powers. ...

4.3.4 – It is particularly important that any scheme not only preserves but positively enhances the Conservation Area. Article 4(2) Directions will be used to withdraw permitted development rights where appropriate. These would be used to protect elements which make a key contribution to the character and appearance of a conservation area, local support for a Direction will be an important consideration.

4.3.5 – High quality new development and exceptional design which responds to local and historic context can make a very positive contribution. The mis-use of metal, glass, wood cladding and non-traditional materials, where inappropriate, will not be permitted on, or

in proximity to Listed Buildings, Buildings of Townscape Merit or in Conservation Areas. Proposals for any schemes within Conservation Areas must include an historical and architectural evaluation of the historic environment within the Design and Access Statement accompanying the planning application...”

15. Policy DM OS2 made provision in relation to MOL as follows:

“Policy DM OS 2:

Metropolitan Open Land

The borough’s Metropolitan Open Land will be protected and retained in predominately open use. Appropriate uses include public and private open spaces and playing fields, open recreation and sport, biodiversity including rivers and bodies of water and open community uses including allotments and cemeteries.

It will be recognised that there may be exceptional cases where appropriate development such as small scale structures is acceptable, but only if it:

1. Does not harm the character and openness of the metropolitan open land; and
2. Is linked to the functional use of the Metropolitan Open Land or supports outdoor open space uses; or
3. Is for essential utility infrastructure and facilities, for which it needs to be demonstrated that no alternative locations are available and that they do not have any adverse impacts on the character and openness of the metropolitan open land.

Improvement and enhancement of the openness and character of the Metropolitan Open Land and measures to reduce visual impacts will be encouraged where appropriate.

When considering developments on sites outside Metropolitan Open Land, any possible visual impacts on the character and openness of the Metropolitan Open Land will be taken into account.

Commentary

4.1.1 – The Metropolitan Open Land (MOL) designation is unique to London and protects strategically important open spaces within the built environment. MOL, as shown on the Proposals Map, plays an important role as part of the borough’s and London-wide green infrastructure network and improvements in its overall quality and accessibility are encouraged.

4.1.2 – MOL is open land or water, either publicly or privately owned and with or without public access. The contribution of MOL is as vital as Green Belt and therefore it will be protected as a permanent feature and the policy guidance of PPG 2 on Green Belt applies equally to MOL.

4.1.3 – The purpose of this policy is to safeguard this open land and protect and retain it in predominately open use. However, the policy also recognises that there may be exceptional cases where appropriate development could be acceptable, as outlined in the policy. Water, waste water treatment and sewage treatment plants, including any associated facilities, are considered to be essential utility infrastructure. Development that involves the loss of MOL in return for the creation of new open space elsewhere will not be considered appropriate. New uses will only be considered if they are by their

nature open or depend upon open uses for their enjoyment and if they conserve and enhance the open nature, character and biodiversity interest of MOL...”

16. In addition, policy DM OS 11 provides for regard to be had to the special character of the Thames Policy Area through, among other things, ensuring that development establishes a relationship with the river. Policy DC1 provides for regard to be had to design quality of any proposed development.
17. National policy on the Green Belt is contained in paras. 79-92 of the NPPF. The policy places substantial constraints on development in the Green Belt in two ways: it provides a very limited definition of what will count as appropriate development in the Green Belt in paras. 89 and 90 of the NPPF and, in relation to inappropriate development (i.e. all other development) it provides that planning permission should be refused unless “very special circumstances” exist in favour of development (para. 87). The first sentence of para. 89 states that, subject to exceptions which do not apply in this case, “A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt.”
18. The present challenge to the grant of planning permission is not directly based on national policy on the Green Belt, but Mr Lockhart-Mummery QC for the Appellant submits that the strict test for development in the Green Belt is incorporated by reference into policy 7.17 in the London Plan.

The planning application and the April report

19. The planning application emphasised that the proposed development was in line with development plan policies to promote schemes for renewable energy. It was not suggested that the development could be regarded as falling within the categories of appropriate development as defined in national Green Belt policy in the NPPF; nor was it suggested that this was a case where “very special circumstances” existed to justify the grant of planning permission in accordance with the test in para. 87 of the NPPF. The assumption was that the provisions in the NPPF were not relevant to the application.
20. Similarly, the representations received from objectors (including the Appellant) did not make reference to the provisions in the NPPF dealing with development in the Green Belt.
21. The April report listed relevant policies for the benefit of the planning committee at the beginning. All the policies referred to above were listed save for policy CP10 (but this was referred to in terms at paras. 2 and 42 of the April report) and policy CP11 (which was not referred to elsewhere in the report).
22. The April report provided a summary of the representations in support of the planning application and of the representations in opposition to it. It went on to set out an assessment of the merits of the application. For present purposes, the relevant discussion of the merits of the application was at paras. 42 to 48:
 - “42. The River Thames is designated Metropolitan Open Land (MOL) and as such Core Strategy policy CP 10, DMP policy DM OS 2 apply. In addition, the site is within the Teddington Lock Conservation Area, designated as Other Site of Nature Importance and falls within the Thames Policy Area as well as high risk flood zone (flood zone3).
 43. Teddington Weir is a prominent structure within the River Thames and the existing landscape, recognised within the Thames Landscape Strategy along with the lock and footbridge as the main focus of activity and interest in this reach. The section of the weir to be used for the hydro power scheme was constructed in 1991-92. The proposal is to construct a hydropower installation (three Archimedean screw turbines) within the

existing Teddington weir to generate electricity. This requires the demolition of this section of the weir (consisting of two fixed crest weirs, two radial gates and two fish passes) .

44. From a MOL perspective, this proposal is considered to be a replacement structure, whereby one engineering solution is replaced by another one. The overall scale of the structure is comparable with the adjoining large roller sluice gates. The screws will be mainly below the top of the river wall, whilst the shafts will extend up to a higher level (above the projected maximum flood level), where the generator platform and walkway will be situated.
 45. In line with MOL policies, there is a presumption against inappropriate development, and building development is generally unacceptable. MOL policies however recognise that there may be exceptional cases where appropriate development, such as “small scale structures”, is acceptable. Whilst not in itself a small structure, this proposal is for a replacement structure of an existing engineering component within the wider context of the weir, it does not involve a change of use as such and is functionally linked to the river, it is considered that this proposal is in line with MOL policies.
 46. The proposals clearly have a visual impact on a sensitive section of the riverside, with views from and to listed structures, particularly the footbridge.
 47. The overall scale is within that of the lock structures generally and the arches incorporated into the design and general indication of materials relate it visually to the existing main structure. As such it is not considered that the visual impact is generally negative. In the key view from the footbridge the turbines would add an element of visual interest and its overall design again is seen to be in character with the operational infrastructure which itself forms a key characteristic of the riverside conservation area. As a consequence it is not considered to compromise heritage assets, registered or otherwise, within their immediate or wider context, as has been suggested or the objectives set out in the Thames Landscape Strategy.
 48. The need for an acceptable exposition of balancing benefits in order to balance such highly adverse impact would only arise if the premise that there was such a highly adverse impact was accepted. The proposal is seen as acceptable in its own rights and not dependent on a required level of ‘green’ measures or alternative benefits.”
23. The recommendation in the April report was in these terms:
- “The proposal has been considered in the light of the Development Plan, comments from statutory consultees and third parties. It has been concluded that, subject to conditions to protect environmental (including biodiversity) and local concerns, including wider heritage assets and noise and disturbance, there is not sufficient or significant harm to interests of acknowledged importance caused by the development that justifies withholding planning permission.
- The proposal has not been found to cause an increase in flood risk irrespective of whether or not proposed strategic flood risk schemes go ahead.
- RECOMMENDATION: PERMISSION”
24. The assessment and recommendation in the April report remained unchanged in substance when the matter was finally considered and planning permission was granted in September 2015.

Discussion

25. There are three grounds of appeal, all of which revolve around a complaint that the Council failed to comply with its duty under section 38(6) of the 2004 Act to take policies in the development plan properly into account. Mr Lockhart-Mummery submits that the Council:
 - i) failed properly to take policy 7.17 into account;
 - ii) failed properly to take policy DM HD 1 into account; and
 - iii) failed properly to take a range of other policies into account, specifically policies 7.4, CP10, CP11, DM OS11 and DM DC1.
26. Mr Kolinsky QC, for the Council, says that ground (i) emerged only tangentially and assumed prominence only late in the day in the course of the hearing before the judge. That appears to be the case, but it is not disputed that as events transpired this ground was a live ground of claim before the judge and it is not suggested that it is not now open to the Appellant to maintain it as a ground of appeal.
27. Mr Lockhart-Mummery made a very broad submission, that the April report did not refer in a meaningful way to the policies set out above because it did not set them out or refer to them in the body of the discussion of the application in the report. I do not accept this argument. The relevant principles governing the approach to interpretation of an officer's report on a planning application have been referred to above. If, as a matter of substance on a fair reading of the report, a particular policy has been brought into account, that will be sufficient and lawful, even if it is not referred to in terms. But clearly, if relevant policies have been listed in the report for the benefit of members of the planning committee, that will make it easier for the local planning authority to show that such policies have been properly taken into account.
28. In relation to ground (i), Mr Kolinsky accepts that the proposed development would not have been of a character which fell within the limited categories of appropriate development in the Green Belt as defined in paras 89 and 90 of the NPPF. Therefore, if one were looking at this as an application for development in the Green Belt, the "very special circumstances" test in para. 87 of the NPPF would have been applicable. He acknowledges that the Council did not consider that test in the present case.
29. However, Mr Kolinsky's submission is that policy 7.17 of the London Plan allows for the Council, in promulgating its own Development Management Plan, to fill in the detail of what is to count as "appropriate development" in the MOL for the purposes of the application of the Green Belt analogy set out in subsection B of that policy. He submits that the Council did this by way of policy DM OS2 in relation to protection of MOL, and that in para. 45 of the April report in particular it was assessed that on the application of that policy the proposed development could be regarded as "appropriate development". Therefore, it was not necessary for the Council to consider the "very special circumstances" test for inappropriate development on MOL or in the Green Belt, nor to conclude that that test was satisfied in the circumstances of this case. The judge accepted this analysis.
30. In my view, it is clear from the paragraphs of the April report set out above, and para. 45 in particular, that the Council's assessment tracked the policy considerations in policy DM OS2. I consider that it reached the legitimate and rational conclusion as a matter of planning judgement that the proposed development qualified as "appropriate development" in accordance with that policy, in that it was identified as an exceptional case where conditions 1 and 2 set out in DM OS2 were satisfied. Mr Lockhart-Mummery sought to suggest that the proposed development was not in accordance with policy DM OS2 because it was not a small-scale structure. However, non-compliance with policy DM OS2 was not raised as a ground of

appeal and in any event, as Mr Kolinsky correctly pointed out, the policy does not require that the proposed development must necessarily be a small-scale structure (see the words: “*such as small-scale structures*” – my emphasis).

31. However, in my judgement, Mr Kolinsky’s analysis of the interaction of policy 7.17 and policy DM OS2 cannot be sustained. Policy 7.17, at subsection B, is in clear and unqualified terms. The protection to be afforded to the MOL is to be equivalent to, and no less than, the protection afforded to the Green Belt in national policy. This appears from (i) the opening words (“The strongest protection should be given to London’s [MOL]”); (ii) the fact that “inappropriate development” is a recognised and clearly defined concept for the purposes of the protection of the Green Belt, so that it is natural to read the words used here as a reference to that concept; (iii) the express statement that the protection given under the policy should be “the *same* level of protection as in the Green Belt” (my emphasis); and (iv) the consideration that the policy in subsection B falls to be interpreted in the light of the commentary in para. 7.56, which states in terms that “The policy guidance of paragraphs 79-92 of the NPPF on Green Belts applies equally to [MOL]”, making clear the intention of cross-reference under the policy to paras. 89 and 90 of the NPPF defining what is to count as “appropriate development”.
32. Mr Kolinsky argued that subsection B of policy 7.17 meant only that the “very special circumstances” test aspect of the protection of the Green Belt was intended to apply, and not the definition of “appropriate development”. This suggestion cannot stand with the express language used in subsection B and the explanatory text in para. 7.56. Moreover, the argument, if correct, would make the phrase “giving the same level of protection as in the Green Belt” otiose. As I have explained above, national policy on the Green Belt accords it protection by a combination of (a) a restrictive definition of “appropriate development” and (b) a test of “very special circumstances” which has to be satisfied in respect of inappropriate development. Since subsection B of policy 7.17 itself sets out the “very special circumstances” test for inappropriate development, the natural inference is that the phrase “giving the same level of protection as in the Green Belt” refers not only to limb (b) of the protection for the Green Belt, but also to limb (a). Moreover, the effect of Mr Kolinsky’s argument is that it is left to local planning authorities to define for themselves what counts as appropriate development in this context; but that would involve giving subsection B an interpretive gloss which cannot be justified, particularly when that policy is contrasted with other policies in the London Plan which make it clear when and where such local policy setting and qualification of the strategic policies in the London Plan is permitted: see para. [12] above.
33. Mr Kolinsky also sought to derive support for his argument from the sentence in the commentary at para. 7.56 which states that “Appropriate development should be limited to small scale structures [etc]”. However, I do not think this assists him. It is a sentence predicated on there being an application for “appropriate development”, which on a proper construction of policy 7.17 means development which is appropriate development in terms of national Green Belt policy. The sentence does not show that such an interpretation of policy 7.17 is incorrect.
34. Mr Kolinsky emphasised that policy DM OS2 was adopted after a process of scrutiny of the Council’s Development Management Plan in which no-one (including the Greater London Authority, which had promulgated the London Plan) contended that it was inconsistent with the London Plan. Be that as it may, it does not affect the proper interpretation of policy 7.17, which is a matter for this court. It may be that potential inconsistencies between policy DM OS2 and policy 7.17 were simply overlooked previously. However, it is common ground that neither policy takes precedence over the other. Both qualify as policies in the development plan and the approach to each of them has to be in accordance with the legal principles referred to above.
35. Mr Kolinsky also emphasised that the applicant for planning permission did not consider that it had to put forward a case of “very special circumstances” to justify the grant of permission and that no objector objected to the development on the basis that it constituted inappropriate

development in terms of Green Belt policy. However, whilst this may well explain why the Council did not focus on that aspect of the policy framework it cannot justify its failure to assess that the proposed development was inappropriate development under policy 7.17 and its consequent failure to assess whether the “very special circumstances” test was satisfied in this case. In acting as local planning authority, the Council was guardian of the public interest, as reflected in the various policies relevant to assessment of the proposed development, and it was incumbent on it to identify the correct approach to be applied under the relevant policy framework even if proponents of and objectors to the scheme had failed to do so.

36. Accordingly, I consider that in accepting Mr Kolinsky’s submissions the judge erred in his approach to the proper interpretation of policy 7.17. Contrary to Mr Kolinsky’s submissions, the Council failed to appreciate that the planning application was for development which was inappropriate in the context of MOL and therefore failed to ask itself the critical question, whether very special circumstances existed which justified the grant of planning permission.
37. I will now deal with grounds (ii) and (iii) before turning to the question of exercise of discretion in relation to remedy. Ground (ii) relates to the Council’s approach to consideration of the application in the context of the conservation area in which the development site is located. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that in the exercise of its functions with respect to land in a conservation area a local planning authority is required “to pay special attention ... to the desirability of preserving or enhancing the character or appearance of that area.” It is not in issue on this appeal that the Council complied with this duty, but Mr Lockhart-Mummery submits that policy DM HD1 imposes a stricter test, namely that new development “should conserve *and* enhance the character and appearance of the area” (my emphasis), and that the Council failed to make an assessment that there was both preservation and enhancement of the character and appearance of the area.
38. I do not consider that this ground of appeal is made out. The strict, chancery-style interpretation of policy DM HD1 proposed by Mr Lockhart-Mummery is not appropriate in this context. It is clear that the policy statement was intended to reflect the Council’s statutory duty with respect to conservation areas rather than to create a new and more demanding policy test (see, in particular, para. 4.3.2 of the commentary on the policy); and there is also force in Mr Kolinsky’s submission that the reference to enhancing the character and appearance of the area involves a particular focus on design quality for developments in conservation areas (as indicated by paras. 4.3.4 and 4.3.5 of the commentary on the policy), rather than a discrete policy requirement that a development should enhance a conservation area as well as conserving it. It would be surprising if, in the context of a policy relating to conservation areas, the Council had intended to create a policy going beyond conservation, which is the point of designating such an area in the first place. I therefore consider that the judge was correct to accept Mr Kolinsky’s submissions on the proper interpretation of policy DM HD1. In any event, I think that there was sufficient identification of enhancement of the character of the area at para. 47 of the April report (no generally harmful visual impact, an added element of visual interest and good overall design in character with existing operational infrastructure at the site, which already involves two arched structures above the weir) such as to make it clear that, as a matter of substance, the Council concluded that the policy would be complied with even on the stricter interpretation urged by Mr Lockhart-Mummery.
39. Similarly, I do not consider that Mr Lockhart-Mummery’s portmanteau make-weight ground (iii) is made out. The discussion at paras. 42-48 of the April report, read in the context of identification earlier in the report of a range of representations regarding the visual and heritage impacts of the development, shows that, as a matter of substance, the Council considered in the exercise of its planning judgement that the proposed development complied with the policies listed by Mr Lockhart-Mummery. That is so even in relation to policy CP11 (River Thames Corridor), which was not expressly referred to in the April report, because the substance of the discussion dealt with the impact of the development on the natural and built environment of the

River Thames corridor at this point and there was express reference at para. 47 to the Thames Landscape Strategy, to which policy CP11 refers as defining the special character of different reaches of the River Thames. There was full consideration of the development from the point of view of its effect on the character of the local area (policy 7.4), of protecting and enhancing the open environment (policy CP10), of protecting and enhancing the special character of the Thames Policy Area including by ensuring that development establishes a relationship with the river and takes full advantage of its location (policy DM OS 11), and of ensuring good design quality (policy DM DC1). The Council acted lawfully and rationally in making its assessment in relation to these policies.

40. Therefore I conclude that ground (i) is made out as a valid ground of appeal, but not grounds (ii) and (iii). The question then arises whether this is a case in which relief should be refused in the exercise of discretion by the court under section 31(2A) of the Senior Courts Act 1981. This provides in relevant part as follows:

“The High Court –

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

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.”

41. In this case, on the analysis adopted by Supperstone J in the High Court, he did not have to consider the exercise of discretion under this provision. CPR Part 52.10(1) provides that the appeal court has all the powers of the lower court, so it is for this court now to consider for itself whether this is a case in which relief must be refused under section 31(2A).
42. In my judgement, this is not a case in which relief should be refused under that provision or as a matter of any wider discretion as to remedy. Once the correct interpretation of policy 7.17 is identified as set out above, it can be seen that as a matter of substance the Council has gone badly wrong in its consideration of the planning merits of the application for development in this case. It failed to identify the development as inappropriate development in an area of MOL requiring the strongest protection against such development. It failed to consider whether, notwithstanding the inappropriateness of the development, “very special circumstances” exist to justify the grant of planning permission, and it is far from obvious that they do. On the materials available before the court, Mr Kolinsky did not maintain any detailed submission that “very special circumstances” can be shown to exist.
43. The significance of these omissions is underlined by policy 7.17 itself, which specifies that, absent “very special circumstances”, planning permission for inappropriate development should be refused. Part of the point of the strictness of this policy, as for national Green Belt policy, is to safeguard important open areas from “death by a thousand cuts”, by a series of planning permissions being granted for developments each apparently reasonable in itself but having a serious cumulative detrimental effect on the important public interest in the continuing openness of MOL and the Green Belt: see *R (Heath and Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P&CR 19, at [37] per Sullivan J; *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466, [24]-[26].
44. In light of the strictness of the policy in policy 7.17 and the importance of the public interest it protects, I do not think that it can be said that it is highly likely that the outcome for the Appellant would not have been substantially different if the conduct complained of (i.e. failure to understand and apply policy 7.17 correctly) had not occurred.
45. For the reasons given above, I would allow this appeal and quash the planning permission in issue in these proceedings.

Lord Justice Beatson:

46. I agree.