

Linden Homes Ltd v Bromley Borough Council

Town and country planning – Development – Development plan – Claimant house builder seeking to develop site – Site falling within area of defendant local authority's proposed development policy – Claimant objecting to proposed policy – Inspector concluding proposal's sound – Proposals being adopted by authority – Whether proposal 'sound' – inspector erring in conclusions – Planning and Compulsory Purchase Act 2004, s 113

[2011] EWHC 3430 (Admin), CO/12524/2010, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

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QBD, ADMINISTRATIVE COURT

JUDGE BIDDER QC (sitting as a deputy High Court judge)

31 OCTOBER, 19 DECEMBER 2011

19 DECEMBER 2011

M Lowe QC with P Miller for the Claimant

T Comyn for the Defendant

Davies Arnold Cooper LLP; Director of Legal, Democratic and Customer Services, Bromley Borough Council

JUDGE BIDDER QC:

[1] This is an application by the Claimant under s 113 of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) to modify certain provisions of the Bromley Town Centre Area Action Plan (“the AAP”) in so far as they relate to the policies guiding the redevelopment of the Bromley North

Railway Station, known in the AAP as Policy Opportunity Site A (“OSA”).

[2] The Claimant is a house builder and has an interest in the site as a member of a consortium of landowners, including Network Rail, that are interested in pursuing the redevelopment of the site and in that capacity made a series of duly made objections to the submission AAP that were considered at an Examination in Public (“EIP”) held into the AAP by an independent Inspector between 30 March on 14 April 2010. The Inspector submitted his report (“IR”) to the Defendant (the local planning authority) on 11 August 2010 and the AAP was adopted by the Defendant on 25 October 2010.

[3] The AAP sets out proposals and a policy framework for the delivery of housing, employment, leisure and associated community facilities, infrastructure and transport initiatives within Bromley Town Centre over a 15 year period.

[4] Section 113(3) of the 2004 Act provides the means to challenge a relevant document such as an AAP. It states, so far as is relevant to this challenge “A person aggrieved by a relevant document may make an application to the High Court on the ground that (a) the document is not within the appropriate power.”

[5] The challenge has been made within the specified period.

THE STATUTORY FRAMEWORK

[6] The Defendant is responsible pursuant to pt II of the 2004 Act for the production of a suite of documents known as the “Local Planning Framework” which contains documents known as “local development documents” which must set out the Defendant's policies relating to the development and use of land in the Defendant's area (s 17(3)).

[7] By s 37 of the Act, certain of the “local development documents” are to be “development plan documents”. Pursuant to s 38(2), development plan documents are components of the development plan, in accordance with which applications for planning permission must be determined unless material considerations indicate otherwise (s 38(6)).

[8] By s 18(8), a local development document (including a development plan document) is required to be adopted by resolution of the local planning authority prior to its having affected as a local development document.

[9] By s 20(1), every development plan document must be submitted to the Secretary of State for independent examination prior to its adoption. By s 20(4) an independent examination is required to be undertaken by a person (“the Inspector”) appointed by the Secretary of State. By s 23(3-4), a local planning authority may adopt a development plan document with modifications only if the Inspector recommends such modifications. Thus, the results of the Inspector's examination are binding upon the local planning authority.

[10] By s 20(5), the purpose of the independent examination is to determine whether the development plan document satisfies the requirements of (amongst others) s 19 and whether the document is sound. The concept of “soundness” is at the heart of this challenge.

[11] Section 19(2)(a) requires that in preparing the document the local planning authority must have

regard to national policies and advice contained in guidance issued by the Secretary of State. To “have regard to” does not require slavish adherence (*Simpson v Edinburgh Corporation* 1960 SC 313, 1961 SLT 17).

[12] Relevant guidance issued by the Secretary of State at the time that the AAP was considered by the planning Inspector comprised Planning Policy Statement 3 (“PPS”) and PPS 12 (June 2008). The latter provided guidance as to the principles with which development plan documents should comply and as to the meaning of “soundness” which must be applied in an examination. PPS 12 advises that “The Core Strategy is the key plan within the Local Development Framework (1.4) and ‘the principal Development Plan Document.’” It is not the function of the AAP to “take the place of the core strategy”.

[13] The meaning of soundness is set out in para 5.2(3) “To be ‘sound’ other DPDs should be JUSTIFIED and EFFECTIVE and consistent with NATIONAL POLICY.”

[14] The concept of “justification” and “effectiveness” are those applicable to Core Strategies and are expanded upon in PPS 12 at paras 4.36 to 4.38 and 4.44 to 4.47 respectively. They should therefore be:

“4.36 . . .

- Founded on a robust and credible evidence base; and
- the most appropriate strategy when considered against the reasonable alternatives.”

[15] As to what constitutes the evidence base, 4.37 states:

“Core strategies have major effects. Social and economic impacts may include altering property values by a considerable amount or helping access to housing, jobs, access to the local services and open space for many people, especially people with limited resources. There may be impacts on environmental or cultural assets: the core strategy may affect how much the area contributes to mitigating and reducing climate change. It is therefore essential that core strategies are based on thorough evidence. The evidence base should contain two elements:

Participation: evidence of the views of the local community and others who have a stake in the future of the area.

Research/fact finding: evidence that the choices made by the plan are backed up by the background facts.

Evidence gathered should be proportionate to the job being undertaken by the plan, relevant to the place in question and as up-to-date as practical having regard to what may have changed since the evidence was collected.”

[16] The guidance on “Alternatives” is at 4.38:

“The ability to demonstrate that the plan is the most appropriate when considered against reasonable alternatives delivers confidence in the strategy. It requires the local planning authority to seek out and evaluate reasonable alternatives promoted by themselves and others to ensure that

they bring forward those alternatives which they consider the local planning authority should evaluate as part of the plan – make process. There is no point in inventing alternatives if they are not realistic. Being able to demonstrate the plan is the most appropriate having gone through an objective process of assessing alternatives will pay dividends in terms of an easier passage for the plan through the examination process. It will assist in the process of evaluating the claims of those who wish to oppose the strategy.”

[17] In relation to “effectiveness”, 4.44 states:

“Core strategies must be effective: this means they must be:

- deliverable;
- flexible; and
- able to be monitored.”

[18] In relation to “deliverability”, 4.45 states:

“Core strategies should show how the vision, objectives and strategy for the area will be delivered and by whom, and when. This includes making it clear how infrastructure which is needed to support the strategy will be provided and ensuring that what is in the plan is consistent with other relevant plans and strategies relating to adjoining areas. The evidence must be strong enough to stand up to independent scrutiny.”

[19] The soundness of the AAP was a matter to be judged by the Inspector.

[20] PPS 3 (tab 2 in the authorities bundle) in para 62 requires the authority to have an implementation strategy. Local Development Documents “should set out a housing implementation strategy that describes the approach to managing delivery of the housing and previously developed land targets and trajectories”. These strategies should include:

- “i) scenario and contingency planning to identify different delivery options, in the event that the actual housing delivery does not occur at the rate expected
- ii) a risk assessment to identify obstacles and constraints to housing delivery and development of management strategies to address any risks.”

[21] It is not in dispute that the court will only consider a challenge on the grounds that the AAP is not within the powers of the Act on the basis that as a matter of law it is flawed or the procedural requirements have not been adhered to. The appropriate test in law where the challenge is to the alleged soundness of the AAP was recently set out in *Barrett v Wakefield MBC* [2010] EWCA Civ 897 where Carnwath LJ at para 33 observed:

“Soundness was a matter to be judged by the Inspector and the Council, and raises no issues of law, unless their decision is shown to have been 'irrational' or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law.”

[22] Plainly, the reasons given by the Inspector for making his recommendations must comply with the public law requirements of sound decision-making and the well-known guidance of Lord Brown

in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33 at p 36, [2004] 4 All ER 775, [2004] 1 WLR 1953 bears repeating:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

[23] The Inspector is a technical tribunal and is entitled to make decisions, make value judgments or subjective judgments about planning matters which fell within his qualifications and experience (*Westminster Renslade Ltd v Secretary of State for the Environment* (1983) 48 P & CR 255, [1983] JPL 454, per Forbes J at 455).

[24] It is common ground that the Inspector should give the parties a fair opportunity to deal with any new line of reasoning that he decides to follow.

THE BROAD FACTUAL BACKGROUND

[25] As para 1.2.3 of the AAP makes clear, the preparation of the AAP was being brought forward by the Defendant in advance of the Core Strategy because of the need for a comprehensive framework for dealing with development proposals in the town centre. It would be informed by saved Unitary Development Plan (“UDP”) policies and would itself feed into the preparation of the Core Strategy. Paragraph 2.1.1 of the AAP indicates the motivation behind that course, namely the decline of the town centre's retail and leisure facilities in recent years, highlighted by technical studies and consultation with stakeholders. The Defendant recognised that change was required if the centre was to realise its full potential and provide “a more attractive place to shop, work, live and visit, whilst protecting the essential character of the historic parts of the town”.

[26] The AAP also sought, in accordance with the policies of the London Plan and the national guidance on sustainable development, to increase the proportion (a small proportion – around 3.35%) of the Borough's housing stock located within the town centre, which had been identified as an excellent location for new housing supply of all tenure types.

[27] A strategic policy in the AAP was termed BTC1:

“In order to promote a vibrant mix of uses and activities in Bromley Town Centre the council will

work with the private sector to deliver mixed use development schemes on the Opportunity Sites identified in the Key Diagram which together will comprise:

- around 42,000 m2 (gross) additional retail floor space
- around 7500 m2 (gross) additional food and beverage floor space
- around 7000 m2 (gross) additional business floor space
- around 1820 residential units
- around 4000 m2 (gross) additional leisure floor space
- around 3500 m2 (gross) additional community facilities
- up to three hotels”

[28] It is significant in relation to the issues in this application to note that policy BTC 1 also states “It will be necessary to demonstrate that the required transport and other infrastructure and community facilities can be provided to support the proposed development.”

[29] At paras 1.2.7 to 16, the AAP sets out the regional policy context for the plan, including setting key strategic priorities, such as promoting use and improvements to public transport. It states in para 1.2.10:

“The London Plan states that Boroughs should adopt the residential density ranges set out in the consolidated London Plan Density Matrix. As a Metropolitan Centre, Bromley is classified as a central location where higher densities will be promoted.”

[30] At 2.1.11 the AAP indicated that Bromley town centre had good rail and bus linkages and two railway stations but that the quality of public transport facilities was generally poor and that there was a need for improvements to the facilities at both stations. It was intended (see 3.1.5) that new destinations would be created in the town centre including, with particular relevance to this case, a Northern Gateway, which would be a transport hub and an enhanced gateway to the town.

[31] The AAP also set out (under 4.1) a number of objectives. Objectives 2 and 8 are relevant to this case, as is 4 “Providing residential capacity within the town centre, through mixed use development that ensures housing meets local needs including the supply of affordable housing.”

[32] The Key Diagram referred to above is at p 68 of the trial bundles. It identifies a number of Opportunity Sites which will be the focus for development in the town centre. The distribution of development is set out in table 4.2 at p 67. The OSA in issue in these proceedings is Bromley North Station. The number of residential units allocated to that opportunity site is “around 250”, the phrase which is, above all, central to the challenge in this case.

[33] Policy BTC 2 relates to residential development. At 4.3.2 the AAP states:

“The Consolidated London Plan sets a target for the development of a minimum of 4850 dwellings in the Borough by 2016/17, which is just under 9% of the total expected for the South East Sub region as a whole. Currently, the town centre contains a relatively small proportion of the Borough's

housing stock with around 3.35% of the housing stock located within the town centre area. Bringing forward a significant proportion of the Borough's targets within the town centre could result in the Council surpassing its target.”

[34] The actual summary of the policy BTC 2 states “Development proposals should accord with the Density Matrix in the London Plan . . . taking into account site characteristics and the surrounding character of the town centre and adjoining residential areas.”

[35] Later in the AAP the OSAs are described. Site A, Bromley North Station, is central to this application. The policy is set out as follows:

“The council will work with Network Rail land, land and property owners and developers to secure the comprehensive development of this area to secure a mixed use development comprising:

- improved station and transport facilities;
- around 250 residential units, including provision of family housing;
- additional 2000 m2 of B1 offices;
- ancillary retail uses and Food & Drink;
- 1000 m2 for community uses (including a health facility);
- decked car parking to replace existing number of public parking spaces; on-site provision for residential parking and restriction on residents' ability to buy parking permits on nearby streets;
- an improved market facility if this has not by that time been relocated to a suitable new site in the town centre.”

[36] The Claimant again challenges the phrase “around 250”.

[37] The Claimant, in partnership with Network Rail, was proposing a complete scheme to develop OSA in accordance with the AAP policy. It will be appreciated that the provision of decked car parking was a particularly expensive part of that scheme and that the financial driver for the entire scheme was the residential units. The Claimant says that this is a centrally important point when it comes to assessing the “effectiveness” of the AAP.

[38] It is also important to look at the AAP policy for building height (p 92). The AAP indicates that the majority of buildings within the town range between two to five storeys. The policy (BTC 19) in the AAP includes the statement “There may be potential for the development of tall buildings in locations identified on the Key Diagram subject to design and environmental considerations.”

[39] The Key diagram is on p 93 and on the OSA is a star which indicates that this is a possible location for tall buildings. The design principles of the AAP (p 152) make it clear that the reason for the potential for taller buildings is to respond to an existing ten story residential building east of the OSA.

[40] The importance of the OSA and the significance of an overall development of the site is made clear by policy BTC22 at p 99 which indicates that the council will expect “step-change

improvements at both Bromley South and Bromley North stations to reflect their increasingly important roles as public transport gateways, including better interchange and disabled access.”

[41] Opportunity site G contains the largest proposal for residential units, some 1180. That, however, is followed next by the OSA.

[42] The phasing of developments is indicated in table 6.1 (p 131 A). The importance of this OSA is again indicated by the fact that its indicative timescale for development is in the first two stages, namely, over ten years. The delivery strategy indicates that “Bromley Council is working with other landowners and developers including Network Rail and Linden Homes to prepare a comprehensive scheme”. The risk is stated to be “land assembly”. The flexibility in the policy was indicated to be “Smaller or less comprehensive schemes could come forward if land assembly not achieved. However, this would realise fewer benefits for the town centre as a whole.”

THE CLAIMANT'S REPRESENTATIONS TO THE INSPECTOR

[43] The entire representations of the Claimant can be found, together with their attachments at tab three of the trial bundle. Objection was taken to the reference in policy BTC 1 to “Around 1820 residential units” and the contention was that the word “around” should be amended to “at least”. The formal representation contended that the AAP did not make clear how the plan would deliver the specified number of units nor, in the absence of a clear evidence base, did the policy provide sufficient flexibility to increase the level of residential development to improve the plan's effectiveness.

[44] Policy OSA was sought to be amended in the following way: “Around At least 250 residential units, including where possible provision of family housing.” In addition it was submitted that a further sentence should be inserted into the policy text, namely “The final amount of residential provided on site will need to be justified on viability grounds and will need to be in compliance with policy BTC 2 and other policies within the plan.”

[45] Important submissions in the representations were:

“The delivery of the Bromley North sites within the timescales envisaged in the AAP is important if these considerable community benefits are to be provided for the Borough and the wider objectives of the AAP are to be met. The site is also a critical part of the creation of a 'Northern Gateway' to the town centre as well as providing a significant proportion of new housing and B1 floor space in the town centre.”

Pointing out that the most significant capital cost would be the delivery of the replacement car park the representations continue:

“Whilst the detailed design of this car park and construction phasing is yet to be agreed its impact on scheme viability will be significant, particularly if early provision is required to enable continuance of provision of the existing car parking spaces and the release of land for the first phases of the residential development. The cost of this car park will amount to 33% of the total build cost.”

[46] Further, and critically to the Claimant's contention that the AAP was not viable, the representations continued:

“The main income generator on the site will be the proposed new housing which will predominantly be to the rear of the site. In order to deliver the benefits to the local community high-density flatted development, rather than houses, will need to be provided. On this basis homes will not be sold until whole blocks are constructed and finished which has significant cash flow implications. The proposed housing will be designed to comply with the relevant design, sustainability and the affordable housing policy requirements which also impacts upon the scheme value. On this basis a mixed-use scheme providing 250 dwellings will result in a viability where total build costs will amount to approximately 95% of the gross development value excluding any section 106 contributions, sales costs, reasonable developers profit, and land acquisition costs or development financing costs.

Linden Homes and Network Rail are committed to deliver a high-quality redevelopment that fulfils the aims of the AAP, however, a scheme providing 250 units is clearly not viable.”

[47] The representation also points out this:

“A scheme providing 250 residential dwellings will, however, only achieve a density of 110 units per hectare, based on a site area of 2.26 ha. The site is situated within a 'central' setting as defined by the London Plan and has an 'excellent' public transport access ability level As such the acceptable density, based on the London Plan matrix, for a flatted scheme in this location is between 215-405 units per hectare.”

[48] In addition to these formal representations, the written evidence submitted to the Inspector by the Claimant included a detailed written statement by Boyer Planning and an assessment of economic viability by BNP Paribas. The entire documents can be found at tabs 4 and 5.

[49] The Boyer Planning report argues that the AAP did not test alternative housing delivery scenarios to ensure that the housing objectives were achieved should development not to be delivered on certain sites within the anticipated timescales. It recognised that the AAP had been prepared ahead of the Core Strategy but contended that the lack of clear monitoring targets to measure the implementation of the AAP means that it was unclear how the plan's effectiveness would be measured.

[50] At 3.4 of the Boyer report, in the section dealing with flexibility, the authors indicate:

“The London Plan (2008) provides an annual housing target of 485 units per annum for the borough up to 2016/17. The recently published draft replacement London Plan (October 2009) proposes to increase this annual housing target to 565 units per annum between 2011 and 2021. The housing trajectory shows that the council has had a cumulative shortfall in its housing supply since 1987.”

[51] It should be noted that the 565 unit figure had, at the time of the EIP, not been finalised and was disputed, having been, subsequent to the EIP, reduced. However, as the table, “app 5” to the report (p 241) shows, the information available to the Inspector, albeit provisional, showed a cumulative shortfall for 2015/16 of 350 dwellings. The figure of 485 homes for 2007/2008 in the “Targets” line is derived from the adopted London plan of 2008 and represents the annual figure that Bromley had to provide for. In 2011/2012 the figure changes to the provisional 565. That was a draft “provisional” figure in the emerging London Plan. As previously indicated, subsequent to the EIP that figure was reduced but not, in fact, to the extent that there was not a shortfall up to

2015/16, though that shortfall was very small.

[52] The Boyer report contends at 3.6:

“The design principles should reflect this guidance (ie a high-density development of between 215-405 units per hectare should be acceptable given the site's high PTAL rating of 6 and the fact that the redevelopment will be a flattened development). The provision of 'around 250 residential units' is not considered to represent sufficient flexibility for future development to optimise the potential of the site by delivering a high quality, design led to scheme and therefore not consistent with these objectives.”

The objectives referred to are set out in PPS 3.

[53] Paragraph 4.5 of the report points out that the provision of taller buildings at the front of the site provides the opportunity to create a “cluster” of tall buildings optimising the site's central location and excellent public transport access ability which would be in accordance with assessment criteria contained within the English Heritage's “Guidance on Tall Buildings”.

[54] Importantly and centrally for the Claimant's argument that the AAP residential policy for the OSA is not viable and, therefore, not “sound” para 4.6 states:

“There is a lack of evidence to support the current allocation of residential development on the site. The council have not undertaken any work that would suggest that the scheme providing 250 units and delivering all the benefits sought by the AAP, would be viable. The only market evidence submitted in support of the AAP is the Evidence Base Report published in June 2009. The values contained within this document date from December 2006 and mid-2007, the height of the property market, and as such this information is not considered to represent a robust evidence base given the subsequent change in market conditions and therefore represents insufficient justification to support the strategy outlined within the AAP.”

[55] The lack of viability of the AAP policy on the OSA, as argued by the Claimants, is underlined by the BNP Paribas report submitted on their behalf.

[56] The report first notes that residential land values fell by some 50% in 2008 from their peak levels in mid-2007. The report comments on the already mentioned “Evidence Base Report” produced by the council which report quotes figures from mid-2007 and, in the light of the very substantial readjustment since that time BNP Paribas considered that the report should carry little weight. The report then considers all aspects of valuation including the build costs which are set out in a detailed appendix. The report compares them with average construction rates and concludes that “When considered against these figures Linden's assumed costs are more than reasonable”. They also assume that £6000 in s 106 contributions would be payable on each of the private residential units.

[57] The result of their appraisal demonstrated that a 250 units scheme would result in a negative Residual Land Value (“RLV”) in the order of minus £4.55 million. They comment:

“This is a considerable deficit. Any development scheme would be required to provide sufficient land value to encourage the landowners to bring the site forward for development. Clearly a negative

land value will not be sufficient and the site will remain undeveloped.”

[58] Under their section “Sensitivity Analysis” they note that the residential market was beginning to show signs of recovery but also that with sales values rising build costs were also beginning to rise. In their schedule at p 269 they factor in a 10% and 20% uplift of residual land value against a 5% or 10% assumed increase in build costs with a “No Change” position also assumed. The only assumed position which produces a positive figure is if there were to be a 20% uplift in residual land value with no change in build costs, in which case the positive value is £.75 million. As the report indicates “These results demonstrate that unless there is a considerable uplift in residual sales values, with build costs remaining static, the scheme will not provide a positive land value.”

[59] They continue:

“However, it must be noted that this scenario is extremely unlikely to materialise in reality and the result is only included for completeness. Construction costs and sales values are highly correlated because construction activity increases in response to higher sales values leading to higher demand and therefore higher costs. As such we would not expect a substantial increase in sales values without a corresponding rise in construction costs.

Taking this into account it is clear that even as the residential market recovers a 250 unit residential scheme will not be capable of returning a positive land value.”

[60] The report also considers the possibility that social housing grant would not be provided for the affordable units and conclude that if that materialises the scheme would be totally unviable.

[61] Mr Lowe QC, for the Claimants, summarised the message of the Boyer report and the BNP Paribas analysis of the viability of the OSA proposals as being “If you produce a plan with these policies it will not be an 'action plan'.” Instead, he contended this was not a route for delivery but for failure.

[62] The costs of the proposed development were set out in App 5 to the BNP Paribas report giving the net development value, outlay and profit, which information was given to the Authority well in advance of the EIP.

[63] After submission of that material but before the hearing there was discussion of the scheme with the Greater London Authority. A copy of the GLA's assessment is at tab 7 of the bundles. The assessment noted that the proposal included the delivery of approximately 500 residential dwellings in blocks ranging from 5 to 13 storeys. At para 10 of the assessment the GLA indicated that “a residential-led mixed-use development along the lines proposed by the Applicant would be acceptable from a strategic planning perspective”.

[64] As to density, the assessment noted (p 310) that:

“Policy BTC2 of the Bromley Town Centre AAP requires housing proposals 'to accord with the density matrix in the London Plan' taking into account site characteristics and the surrounding character of the town centre and adjoining residential areas.”

The assessment continues:

“13 It is recalled that in 2006, the Secretary of State concluded that Bromley should 'adopt the density/location matrix set out in the London Plan and apply this across the whole borough to all sites'. In January 2009, Bromley Council was further advised that the draft AAP did not accord fully with that decision and, therefore, that the wording 'assessed against' ought to be changed to read 'should accord with'. That change has been made in the submission document.

14 The 2.62-hectare site is situated less than 800 metres' walking distance of a Metropolitan town centre, in a central setting typified by dense development, a mix of different uses and a public transport accessibility level of 6a; the combination of which the London Plan would make one of the most suitable sites for high-density development.

15 The usual method of calculating an appropriate residential density for the site is the 'Greenwich method' by which the gross residential floor space is subtracted from the site area to give the net residential area. However, that level of detail has not been provided, given the very preliminary stage of the current development proposals.

16 Nonetheless, depending on the mix of unit sizes proposed, it is evident from the setting and level of accessibility of the site, that policy 3A.3 and the density matrix of the London Plan would support a density range of at least 140-290 units per hectare (or 650-1100 habitable rooms per hectare). For the 2.62-hectare site, the lowest range would deliver a gross residential density of 367-760 units, which is significantly higher than the 250 units proposed in the submitted AAP. Against that background, it is considered that the proposed total of 500 units is an acceptable number in strategic planning terms.”

[65] The assessment generally welcomes the main aims of the AAP although at para 40 there is some critical commentary on the heights of some of the proposed buildings and at para 42 there is a suggestion that new massing is attempted. The Claimant contends, correctly, in my judgment, that the assessment constituted important encouragement of higher densities of housing by the Strategic Planning Authority. The conclusion at para 77 supports the principle of the redevelopment but indicates:

“However, there still remain issues relating to site ownership, design, layout, amenity and open space provision and parking arrangement, further work is therefore required to ensure that the proposals comply with the London Plan.”

THE RESPONSE OF THE BOROUGH COUNCIL

[66] The Borough Council made a response to the submissions of the Claimant which can be found at tab 8. It was said that in drafting the policy framework for the OSA the council had carried out a range of technical studies that informed and refine the allocation of around 250 residential units. It is, however, noteworthy that the draft consultation of November 2008 stated 400 units for the OSA and after a consultation response received from local residents stating that there was over development the output was reduced to 250 units.

[67] The response accepted that the southern section of the AAP was suitable for higher density development and the site also included an opportunity for a taller building on the eastern section of the site, adjacent to the 10 story building to the east of the opportunity site. Paragraph 5.3 of the response indicated that the density proposed in the revised draft AAP (the increase from 250 to 400

units) was based on the density matrix set out in the London Plan with the draft AAP acknowledging that it would be necessary to demonstrate how the development could be integrated with the surrounding area and existing residential amenity safeguarded.

[68] The massing study that had been carried out by the council indicated that increasing from 250 to 400 units would increase the height of the residential development across the site from a maximum of six storeys to a maximum of eight to ten stories in the centre of the site and from four stories to 6 stories on the Station Road frontage. The council indicated that from their understanding of the site and its surroundings, that increase in height could have a significant impact on adjoining properties, which were generally three stories in height and would be difficult to integrate with the surrounding area.

[69] Further, they considered that the current wording of the AAP policy OSA included an appropriate degree of flexibility, as units were quoted indicatively through the use of “around”. Mr Lowe argued that this was a very preliminary massing study which had not been informed by the discussion in the GLA report but was rather in all probability work done before that and not revised.

[70] The council response at 6.3 recognised that “Economic viability is clearly currently challenging in a weakened residential market and viability work undertaken based on September 2008 values demonstrated that the site may not be viable . . .”. Paragraph 6.4 stated:

“Importantly the phasing of the current AAP has been given a flexible delivery timescale and is assumed to be delivered in phases one or two of the AAP period (a five to ten year window). This indicates that there is clearly time for land values to recover to a point which would allow a viable scheme to be delivered, in line with parameters set by the current AAP.”

Even with the benefit of hindsight, Mr Lowe QC could be forgiven for commenting that that was a particularly optimistic view. It is certainly not clear from the council's response whether there was an evidential base for that proposition.

[71] At tab 16 in the bundles, and forming part of the documents put before the Inspector, is a housing density calculation which actually does make a “Greenwich method” calculation (which, at the time of the GLA assessment, was not possible) of the 250 units scheme (in fact, of a 252 units scheme). The net density was 185 units per hectare. This calculation was provided by Mr Williams of Boyer Planning.

THE CLAIMANT'S OBJECTIONS TO THE AAP

[72] The essence of the objections of the Claimant to the AAP was fourfold. First, it was submitted that the policy was not deliverable, on the basis that the level of housing was insufficient to render any scheme viable. Mr Lowe argues that it was essential that the Inspector grappled with that problem and it was suggested that the Inspector might wish to ask the authority to explore a higher density.

[73] Second the Claimant queried whether the policy was sufficiently flexible to meet the objectives given the viability problem and the policy support for higher densities than the 185 units per hectare.

[74] Third, the Claimant invited the Inspector to consider whether the evidence justified the conclusion that the implied limitation of numbers was “sound”.

[75] Finally it was submitted that the AAP was not “effective” in the absence of monitoring or appraisal.

[76] Apart from the evidence detailed above, it is important to note the additional evidence that was before the Inspector and that which was not advanced before him. Mr Jeremy Davies, the Regeneration Manager for the Claimant in a statement in the second trial bundle confirms that at the EIP there was no discussion of the delivery strategy for the plan or how it could be monitored. Nor does he recall any discussion as to how the borough was likely to meet its housing targets overall nor whether a reduction in affordable housing contributions and financial obligations under a s 106 agreement could be adjusted so as to make the scheme viable. Additionally there was no discussion of the implications in terms of either viability or cost of providing the office and retail floor space elsewhere or how that would related to the concept of a sustainable regeneration of the site.

[77] Additionally, Mr Davies, who attended both sessions of the EIP states that there was no evidence before the examination of whether a scheme with about 400 residential units would require a substantial change in the balance of uses to be acceptable nor was there any discussion of this issue. Thus the Claimants contend that the first time that they saw a discussion of this issue was when they read the report of the Inspector.

[78] In response to Mr Davies's statement the Respondents have submitted a statement by Mr Bob McQuillan at pp 590 onwards of the second bundle. That statement has to be read together with his corrective statement at p 660. The amended housing trajectory that he refers to in the first statement was not, he accepts, placed before the Inspector.

[79] Mr McQuillan contend that there was evidence before the Inspector that there was a manageable shortfall against target for the borough and he also argues that there was no evidence in the Inspector's statement to suggest that the Inspector failed to consider the viability evidence. He also contends that it is significant that in the GLA response to the draft AAP the GLA's head of planning affirmed that the approach of the current plan “accorded with the broad strategic policies and objectives set out in the London plan”.

THE INSPECTOR'S REPORT AND THE CLAIMANT'S ARGUMENTS

[80] In the Executive Summary (p 188) the Inspector says “The overall conclusion is therefore that the Council's proposals are essentially sound and provide a good basis for the future planning of the Bromley Town Centre.”

[81] The Inspector was satisfied that the AAP met the requirements of the Act and Regulations and properly took the starting point for his examination the assumption that the local authority had submitted what it considered to be a sound plan. He noted that the Consolidated London Plan identified Bromley Town Centre as an area where housing should be intensified as part of mixed-use schemes. He also acknowledged that there was a dispute over the attempt in the emerging London Plan to increase the yearly figure of dwellings in Bromley from 485 to 565 and that that might be

reduced.

[82] He said at para 5.10:

“The focus of development in the town centre will be the Opportunity Sites, to be phased over a 15 year period. The development of other sites which meet the objectives of the Area Action Plan may also come forward and if so the cumulative effects of these and the opportunity sites will be taken into account. It appears to me that the targets in policy BTC 1 provide a reasonable balance between uses in the redeveloped town centre. However, I do not find the housing figures critical. If they are achieved, the overall housing targets were Bromley as a whole should readily be met.”

[83] Mr Lowe points out that nowhere does the Inspector make reference to PPS 3 para 62 requiring Local Development Documents to set out a housing implementation strategy which should take into consideration contingency planning to identify different development options in the event that the actual housing delivery did not occur at the anticipated rate. Moreover he submits that no or no adequate reasons are given for reaching this conclusion that the overall housing target for the borough should readily be met. Albeit that the 2009 housing trajectory evidence does not reveal a substantial deficit it does illustrate that the overall Borough target would continue to be in deficit and that deficit could not be rectified without the AAP sites.

[84] Additionally the report makes no reference to the requirements of PPS 12 in respect of contingency planning and options to provide for housing if identified sites did not perform. The Inspector does not grapple with the absence of monitoring indicators to test the effectiveness of the AAP which contingency planning and monitoring is integral to the plan's integrity as an implementation document. The housing trajectory document does not, contends the Claimant, give rise to the optimism expressed at para 5.10 given that the Defendant have not been able to meet the requirements of the current London plan to date. Without the AAP sites the trajectory clearly demonstrated that there would be an inadequate land supply. Thus it is impossible to say from reading the report how the Inspector concluded that the housing figures were not critical.

[85] At para 6.2 the Inspector recognises that the Greater London authority and the government office supported the need for early submission of the AAP in advance of the core strategy.

[86] In relation to high buildings, the Inspector says at 6.9:

“It was suggested at examination that to guide development a range of heights should be considered for each site. I do not share the view that this would be helpful. I accept that some representors are concerned about what are considered to be weaknesses in the planning application system, under which planning committees occasionally permit some forms of development which are not popular with residents or local societies. Regardless of this if the development is to achieve a balanced mix, ultimately the determination of the height, form and massing can only be satisfactorily decided upon when there is a detailed proposal to consider and its full impact can be assessed.”

[87] The Inspector specifically deals with the OSA at para 6.15 onwards. At 6.16 his finding is “Because of the size of the site, a full land assembly could not be achieved, less comprehensive schemes would be possible.”

[88] Mr Lowe points out that although less comprehensive schemes would be possible it is entirely

uncertain that they would produce the public transport requirements of the borough and that the Inspector fails to grapple with this point. Indeed the Inspector recognises the desirability of the entire scheme proposed for the OSA at 6.16 “Although I do not consider the comprehensive development of the site is critical in terms of deliverability over the planned period maximum visual improvement would best come from a fully integrated scheme.”

[89] The Inspector accepts that the OSA has mainly central area characteristics and uses with a close relationship to the adjacent key public transport hub and interchange for the town. Thus he does not agree with representations that development of the site should be restricted because it has suburban characteristics.

[90] A critical passage singled out for criticism by the Claimants is 6.19:

“The Council has carried out a modelling exercise for the site which indicated a way forward. The scheme was dominated by a multi-storey car park and the relationship of building blocks would not appear to provide an adequate public space, or for the best location that tall buildings. However the urban design analysis suggests that around 250 units would be appropriate for this site and this was supported by a financial appraisal based on September 2007 values. I accept for the present this may no longer be economically viable but the Area Action Plan delivery period is flexible.”

[91] Mr Lowe points out that this is the sole discussion of 250 units being effective and producing a viable scheme. It is the only assessment of viability of the scheme. The Inspector accepts that the financial appraisal put before him by the council was simply incapable of being viable based as it was on outdated values. It is, therefore, clear that he accepted the BNP Paribas criticism of the financial appraisal. However it is argued that the Inspector fails to deal with the powerful economic arguments in the rest of the BNP Paribas report. Mr Lowe describes the reasoning in this paragraph as scant and superficial and contends that it does not deal with the evidence. The report does not propose how monitoring of the scheme will take place and the mere reference to the “flexibility” of the AAP delivery period simply ignores the only up-to-date evidence of financial viability before the EIP.

[92] At 6.21 the Inspector says:

“There are a number of ways the site could be developed and these have to allow for the integration of the needs of various users and also respect the setting of the site. I believe there is no need at this stage to be further prescriptive than the wording of the policy itself and the key design principles set out on page 175 . . . if 400 housing units were to be accommodated on site I consider the height of buildings on OSA would need to be significantly increased.”

[93] The Inspector deals with PPS3 at 6.22:

“Planning Policy Statement 3 advises in Appendix B that net dwelling density is calculated by including only those side areas which will be developed for housing and are directly associated uses. From Appendix 1 of the evidence Boyer Planning and BNP Paribas Real Estate the various drawings do not convince me that the massing of development could be increased to 400 dwelling units without significant change in the balance of uses on the site.”

[94] Mr Lowe points out that the Inspector does not suggest that the 400 units would harm the

character of the area only that it would change the balance of uses. The statement of Mr Davies at 580 makes the point that there was no evidence before the examination of whether a scheme with about 400 residential units would require a substantial change in the balance of uses to be acceptable nor was there any discussion of the issue. In other words the Claimant is contending that it had no opportunity to respond to this issue which was first mentioned in the Inspector's report. I do not understand that to be challenged by the Defendant. Mr Lowe also points out that the Inspector does not say why the change in the balance of uses would be harmful or a matter of concern. It is all the more surprising that the Inspector raises that objection to the massing evidence of the Claimant when it was not part of the council's case that the additional housing would have an adverse effect on the balance of uses.

[95] At 6.23 the Inspector continues:

"I, therefore, do not consider it realistic to change the wording of the present policy. The policy is flexible in that it states 'Around 250'. To change the policy to 'At least 250 dwellings' would impose an unreasonable planning burden on the Council to accept a scheme without knowing whether in planning and design terms a particular number of units could be accommodated."

[96] The Claimant argues that even if the wording was "at least 250" that will not mean a presumption that the figure must be larger. Indeed they argue that "around 250" actually introduces less flexibility. If the wording was "at least 250" then increases above that figure must be justified on familiar ground such as design and effects on amenities and on listed buildings.

[97] In relation to the Claimant's challenge under s 113 to the AAP on the grounds that it is not "sound" and the finding, to that effect, of the Inspector the first heading of complaint in the Particulars of Claim is in relation to "Delivery Strategy, Implementation and Monitoring Indicators" and it is contended that the issues of how the appropriate level of housing required to support the redevelopment of the town centre and to achieve the Plan's objectives for the centre is likely to occur, how that may be measured and tested and the availability of an alternative strategy should they not perform or under perform against the Plan's targets is not addressed.

[98] The targets in policy BTC1, and in particular, the target of "around 250 residential units" are only dealt with at para 5.10 of the report where the Inspector concludes that he "does not find the housing figures critical". The trajectory indicated that without these sites in the OSA there would be inadequate land supply and there would be a shortfall of housing. Thus, on the face of the evidence as presented in the AAP and at the EIP the OSA site was indeed critical to the meeting of the BTC1 targets. The Inspector, it is argued, gave no reasons for the finding that the housing figures were not critical or that the overall housing target for the Borough should readily be met and gave no opportunity to the Claimant to address the point which was procedurally unfair. The only consideration of alternative schemes to the main proposal of the Claimant and Network Rail in relation to the OSA is at para 6.16 where the Inspector concludes that "less comprehensive schemes would be possible". There was no consideration in the evidence before the EIP or in the report of any alternative schemes and, as it appears from its context that that is a critical reason for his finding the AAP housing allocation for the OSA sound, it was, at the very least, necessary for the Inspector to have explained how the 250 units would produce the public transport benefits which were also required for the Action Plan.

[99] The next main attack on the Plan and the report is in relation to housing density.

[100] At 6.24 of the IR the Inspector says:

“As the developers have suggested, the key to achieving a successful development on this site is the ability to foster a good relationship between surrounding areas in terms of scale, connectivity and integration. However, according to the notes of the meeting held on 1 March 2010 with the Greater London Authority no net residential area had been defined to enable a reliable density figure to be produced in accordance with advice in PPS3.”

[101] As I have indicated above, there was indeed before the Inspector a “Greenwich Method” calculation which, on its face, did provide a “reliable density figure”. In the notes from the enquiry at p 582, Mr Williams of Boyer planning explained the note (at 566) and there is then a reference to a representor contending that the area chosen for the calculation included the railway line and, thus, started from too large an area. However, as Mr Lowe made clear in argument before me, and I accept the argument, it is obvious from the calculation that Mr Williams did not fall into the trap of failing to exclude the railway line in his calculation and that the Boyer Planning note is, indeed, Greenwich compliant. Had the Inspector taken a different view it is surprising that he did not note that finding.

[102] The GLA conclusion is that 500 units would be acceptable in strategic planning terms on the OSA. It appears from the report that the Inspector accepted the wording of the AAP policy in relation to dwellings without taking account of the GLA conclusion that 500 units would be acceptable in strategic planning terms. His only mention, in this context, of the London Plan is the citing of the absence in the March 2010 meeting of a reliable density figure. He does not mention the Claimant's submitted density calculation which applies a net residential area.

[103] Mr Lowe contends that density was an important issue given the role of residential development as the source of funding for the overall scheme as well as in urban design terms to mark a gateway into the town centre.

[104] No reason is given by the Inspector for rejecting the Claimant's density calculations which appear to make good the absence of a reliable density figure in the meeting of 1 March 2010. Thus, the Inspector sidesteps the actual recommendation of the London Plan which would have tended to support the Claimant's contention that the policy of the Council in relation to residential dwellings in the OSA was unviable and therefore not sound. It is contended on behalf of the Claimant that therefore the report has failed to grapple with a principal issue and an important element of the Claimants case.

[105] The third area of challenge relates to viability.

[106] The starting point for Mr Lowe's submissions, and one that does not appear to me to be challenged, is that the contribution that the OSA and OSG make to the housing supply within the town centre is approximately 80% of the total. Thus, he contends, consistently with PPS 3 and 12, it is critical that the AAP should allow for the effective and viable delivery of those sites, or, failing that, have a sound range of alternative sites to deliver equivalent benefit.

[107] The BNP Paribas evidence, which I have summarised above, stood unchallenged at the EIP. I

have already quoted from paras 6.19 to 6.20 in the IR. The BNP Paribas evidence is clear and unequivocal. It is not suggested that their calculations are overstated or their various alternative scenarios are unrealistic. The Inspector suggests that, as the delivery period of the AAP is flexible, the scheme may be viable in the future.

[108] Mr Lowe simply submits, without, I am inclined to think, putting his case too high, that those conclusions in 6.19 and 6.20 are wholly inconsistent with the evidence at the EIP. It fails to take into consideration the unchallenged evidence of BNP Paribas and the realistic conclusions which ought to be drawn from that and, in conclusion, Mr Lowe submits the Inspector's conclusion was perverse.

[109] At 6.25 the Inspector says:

“It also seems to me that some of the costs shown, such as those involved in the provision of affordable housing and financial obligations in a section 106 agreement may need to be re-negotiated to enable some development to take place. If over the years the market housing situation does not improve and a viable scheme cannot be agreed the Council will have to monitor likely development of the site to assess whether it should be in a later phase, or look to other Opportunity Sites to provide the required office and retail floor space. Although OSA is an important gateway site its development is not closely related to the development of other sites within the town centre.”

[110] As Mr Davies' statement (unchallenged on this point) makes clear, re-negotiation of affordable housing or s 106 financial obligations were never discussed at the EIP not was there evidence about them. The BNP Paribas report does deal with them, but only to discount them as a means of achieving viability of a 250 unit scheme. There is no discussion of the evidence of the BNP Paribas report at this point in the IR or at all. Indeed, so far as I can see, there is but one mention of the Boyer Planning and BNP Paribas reports in the IR, at 6.22 in relation to massing drawings.

[111] Mr Lowe submits that the conclusion in 6.25 is pure speculation, that there is no expressed reasoning to show how the Inspector could have taken the view that adjustments to affordable housing elements (which guidance calls for) or s 106 arrangements could be on such a scale as to render the 250 unit scheme viable – whether immediately or over the Plan timescale. Moreover, as these adjustments were not raised by either the Defendant or the Inspector at the EIP the Claimant had no opportunity to deal with these issues.

[112] It is worth repeating that the BNP Paribas conclusion was that the scheme resulted as at the date of that report in a Residual Land Value of minus £4.55 million.

[113] While the Inspector suggests (and this is relevant as well to the issues of monitoring and deliver) that development in a later phase or greater contributions from other Opportunity Sites could provide requisite office and retail floor space (the corollary of there being an inadequate number of dwellings allowed for the financial drivers of the scheme, being that the scheme would not go forward and the office and retail floor space would not materialise), the viability evidence is, of course, very relevant to those alternatives suggested by the Council and the Inspector and there was, moreover, no evidence to the effect that alternatives existed. No other alternative sites were tested or put forward to the EIP and the IR failed to take account of the constraints of OSG, which are set out later in his report (see, for example, 6.37, 6.38 – “a number of imponderables to consider

on which there is a lack of robust evidence”, 6.39 and 6.43).

[114] Again Mr Lowe submits, and there is again no challenge to this, there was no evidence which could on this issue at 6.25 have allowed the Inspector to reach his conclusion.

[115] Thus, it is submitted that the Inspector's conclusions on viability, which appear to be material to his overall finding that the AAP was “sound” were, first, pure speculation, second, were contradicted by the unchallenged evidence from BNP Paribas, third, were not supported by any or any adequate reasoning and fourth, were not raised at the hearing and so were procedurally unfair.

[116] The final area of challenge relates to the “balance of uses” issue. I have already quoted para 6.22 above. The risk of a significant change in the balance of uses was the justification given by the Inspector for rejecting the massing studies in the Claimant's evidence, supporting their contention that the “around 250” units scheme could be increased in line with the GLA guidance without significant difficulty.

[117] The simple contention of the Claimant is that this was simply not an issue that was raised in the EIP. It can be seen from the OSA policy (p 110) that the site was described as “a mixed use residential led development” with no apparent restriction in the policy in relation to the mix of uses. Moreover, Mr Lowe argues that 6.22 is inconsistent with the Inspector's previous rejection of a restrictive height policy at 6.20. As this was an issue apparent from the AAP the Claimant had no reason specifically to deal with it and as it was not raised at the EIP the Claimant had no opportunity to rebut the point. It is submitted that no sufficient reasons are given by the Inspector for the conclusion in 6.22 and that it was procedurally unfair to reject the Claimant's massing studies for this reason without giving them an opportunity to deal with the point.

THE DEFENDANT' ARGUMENTS

[118] On the issue of deliverability and monitoring in particular, but also generally, the Defendant stress that the AAP was prepared in advance of a Core Strategy. While that, no doubt, posed difficulties for the Defendant, and while the AAP should not take the place of the core strategy, I stress that the AAP remained a Local Development Document that had to comply with the relevant Planning Policy Statements.

[119] It is also right to say that the Claimant recognised, in the context of PPS 3 advising a strategic evidence based approach to housing provision that neither a Strategic Housing Market Assessment (SHMA) nor a Strategic Housing Land Availability Assessment (SHLAA) was available to guide the housing content of the AAP.

[120] Mr Comyn points out that, as set out at para 2.1.14 of the AAP the Bromley Town Centre contains a relatively small proportion, only 3.35%, of the Borough's housing stock.

[121] He further submits that the AAP, dealing generally with the Bromley Town Centre, stresses (p 54 of the first bundle) the importance of providing additional housing to create “a balanced mix of uses in the town centre” There are, additionally, other references in the AAP (at 60A and B of the bundle) to mixed use and, of course, the OSA was intended to be a mixed use development. However, I am not convinced that those general statements are an answer to the argument of the Claimant that a shift or imbalance of mix of uses in the OSA was not specifically put in issue at the

EIP.

[122] The Defendant acknowledge the need to accord with the Density Matrix of the London Plan but that acknowledgement under policy BTC2 (p 69) is qualified: “taking into account site characteristics and the surrounding character of the town centre and adjoining residential areas.” Undoubtedly, as Mr Comyn contends, that is an important qualification.

[123] Mr Comyn also accepts that policy BTC 19 indicates that “there may be potential for the development of taller buildings (he stresses that it says 'taller' and not 'tall') in locations identified on the Key Diagram subject to design and environmental considerations” but argues that, although the Key Diagram contains asterisks indicating the OSA is suitable for taller buildings, the qualification in the policy is important.

[124] He acknowledges that the GLA report identifies the OSA as “one of the most suitable site for high density development” but that suitability must be related to a mix of uses and public transport accessibility.

[125] The massing study which the Borough put before the Inspector demonstrated that with a 250 unit scheme, storeys would be between 4 and 6 but with 400 stories rose to 10. Mr Comyn argues that the Inspector placed emphasis on these massing studies and that the Borough submitted that the 400 scheme was unacceptable in terms of impact, density and tall buildings and considered that around 250 was the maximum for the town centre for amenity reasons.

[126] On the issue of viability and the Inspector's apparent rejection of a 400 unit scheme because of its impact on the contemplated “mixed use” development, Mr Comyn refers to para 4.1.5 of the AAP which states:

“The scale of development proposed and the mix of uses takes account of Bromley's role, its physical capacity and the capacity of transport and other infrastructure. In maintaining and or developing the recognisable cultural, historical and picturesque qualities that make Bromley the town that it is the council believe that there is further potential for the town to create its own distinctiveness and the AAP can help build on such characteristics.”

[127] The council had carried out appraisals on various sites to determine how much development could be contemplated. The exercise was to find out how much development could be fitted in and yet maintain the cultural and aesthetic centre of Bromley.

[128] However it is common ground between Mr Lowe and Mr Comyn that guidance at the AAP stage did not remove the need for more detailed consideration of the balance between development and cultural and aesthetic considerations at a later stage. This is recognised in the AAP at 5.1.2: “the precise amount and mix of different uses will be subject to more detailed assessment and site planning at the planning application stage”.

[129] Mr Comyn submits that in the absence of the core strategy the AAP should say how it should contribute to the Borough wide housing target. He argues that PPS 3's guidance on an Implementation Strategy (see authorities bundle tab 2, para 62) is a reference to a core strategy document, not an Action Plan. I have to say that that seems to me to fly in the face of the specific

reference in this section of PPS 3 to its applying to all LDDs.

[130] There is no doubt that the AAP contains a section on Implementation (pp 126a to 161a of the first bundle) and Mr Comyn stresses BTC 31:

“Residential and commercial developments in the town centre will be required to make an appropriate contribution to affordable housing, environmental improvements, transport, education, health and social/community facilities to be agreed with the council taking into account other policies in the AAP.”

[131] Equally, there is a section on the AAP dealing with Monitoring Mechanisms (p 158a and succeeding pages).

[132] Mr Comyn does underline that the trajectory at p 241 does not involve contributions by the AAP sites. That is true but if the Borough were to meet its targets (and it had persistently failed to do so), the AAP sites had to make a contribution. He submits that the Inspectors report at 5.3 found that the figure of 1820 in policy BTC 1 was the “approximate amount of development which can be accommodated in the town centre” and that the figure was “indicative” (IR 7.13) and could give no indication of the appropriate level of development for an individual opportunity site. In other words the Inspector was not shutting the door on the developments in the OSA which were appropriate on the site.

[133] At 7.15 the Inspector states:

“It is argued that the housing implementation strategy should contain contingency plans in the event of certain sites not producing the number of dwelling units proposed. I have said elsewhere that I do not find the housing numbers critical to the borough as a whole. Also these housing numbers are only related to the Opportunity Sites which have been identified. I saw other sites and areas within the town centre which have not been specifically identified, probably because of their size or shape, where additional housing and other development may well occur during the plan period. There are also likely to be other sites coming up for development in the remainder of the Borough during the plan period.”

[134] Mr Comyn contends that 7.15 is plainly a reference to the Claimant's submissions and that taken together with 5.8 to 5.10, the references to the London Plan and the Inspector's reference to the trajectory the conclusion ought to be that the Inspector is dealing with the evidence before him.

[135] In his skeleton argument at para 19 Mr Comyn contends that para 8.3 of the report address the issue of flexibility of delivery and came to the reasonable judgement that, for OSA site and surrounding specific reasons, a requirement of “around 250 residential units” was appropriately “flexible” on this town centre site. He contends that the Claimant was given the opportunity to address all these issues in evidence at the EIP and that the Inspector grappled with the Boyer Planning statement at para 3.4 of that report and gave adequate and intelligible reasons why the AAP proposal of around 1820 residential units were not critical to meeting the Bromley Borough housing requirement.

[136] In relation to Mr Lowe's contention that the acceptance (at 6.16) by the Inspector of the flexibility policy of the council that “less comprehensive schemes would be possible” was “perverse”

Mr Comyn really does no more than restate the AAP at para 21 of his skeleton. He submits that the statement about less comprehensive schemes possibly coming forward was a matter of fact and 6.16 is a professional judgment of an expert Inspector.

[137] He points out that in the Boyer Planning report and in the Rolfe Judd concept plans as well as in the BNP Paribas report at p 274 it is accepted and acknowledged that Northside House will not be developed and will remain, as does the Inspector but I do not follow why that undercuts the Claimant's criticism of the lack of evidence or reasoning supporting the contention that less comprehensive schemes could come forward.

[138] On the density issue, Mr Comyn argues that the Inspector was entitled to form what appears to be a conclusion at 6.24 on the evidence. He accepts that the method of calculating "net dwelling density" in PPS 3 is prescriptive (see authorities bundle).

[139] He also stresses the qualification to BTC 2 (p 69).

[140] Mr Comyn argued that the Defendant explained in written evidence and in oral evidence (there is a very brief reference of pp 583 and 584) the rationale of the 250 residential unit policy. It is submitted that the Inspector, at 6.21, had regard to the "relationship of uses and density of housing" in the context of the site and surroundings – the 19th-century houses, the grade 2 listed station, the predominance of three to four storey houses – and reached a reasonable judgement on the evidence presented to the EIP (including the Defendant's "preliminary site capacity study" and the appendix A site plans) that a 400 units scheme would be likely to increase heights significantly.

[141] Mr Comyn contends that the conclusions of the Inspector at 6.21 are just the judgements that an Inspector is entitled to take on such matters and that the context of 6.21 is provided by 6.19. However Mr Comyn does not go on to grapple with the point that the urban design analysis relied upon by the Inspector to justify his conclusion that "around 250 units" would be appropriate was supported by a financial appraisal based on September 2007 values. I do not consider that Mr Comyn correctly submits that there was no challenge of the urban design appraisal. The challenge lies in the Claimant's financial appraisal report from BNP Paribas.

[142] In relation to the issue of viability Mr Comyn contends that at 6.22 the Inspector did have regard to the BNP Paribas report and he makes a point that the policy did not produce a 250 unit limits but said "around 250". Purely on a reading of the policy that seems to me to be a clearly restrictive phrasing. Mr Comyn stresses that the Inspector accepted that viability was doubtful but was prepared to accept the flexibility of the scheme having ten years to run and the adjustments that could be made in the provision of affordable housing and financial obligations in a s 106 agreement.

[143] Mr Comyn argues that the Inspector's conclusion is a reasonable one when a planning policy is being considered rather than planning permission.

[144] There was an issue at the hearing before me as to whether the 2007 viability study referred to by Bromley was actually produced at the EIP. It was undoubtedly referred to in the Bromley submissions. Mr Lowe says it was not put in evidence but Mr Comyn, while accepting it was not produced, argues that it was not asked for either. I do not think that the point has much significance as it is not clear from the Inspector's report that he actually accepted the 2007 survey. Indeed it

seems to me that the Inspector himself recognised the restriction on that survey underlined by BNP Paribas (see p 265, para 4.2)

[145] As to the level of affordable housing policy BTC 3 indicates: “the level of affordable housing required in any development scheme will be in accordance with adopted local and strategic policy and take into account other objectives of the AAP”. Mr Comyn argues that if the other policies of the AAP were hindered by the requirement for affordable housing that might have to be adjusted. The policy of the Secretary of State is that it is not possible to impose unreasonable affordable housing requirements on developers. He contends that BNP Paribas has assumed an amount of affordable housing and planning gain and that the Inspector is simply saying that their assumption may need to be adjusted.

[146] As to the complaint in relation to the “balance of uses”, the IR deals with this issue at 5.0 and succeeding paragraphs and at 5.14 the Inspector concludes that the “overall mix of uses is sound”. It is, of course, correct, as Mr Comyn contends, that it is an important policy of the AAP to promote a mix of uses in the Opportunity Site.

[147] As to the criticised para 6.22, Mr Comyn submits that this is simply a statement of reality and that the increase to 400 would be an increase of 166% on the site. Moreover, Mr Comyn argues that this was a professional view to which the Inspector was entitled to come. Mr Comyn submits that this was not a major issue but rather an additional consideration and that 400 units was beyond what was acceptable in a town centre.

CONCLUSIONS

[148] I deal first with the issue of deliverability and manageability. On the basis that “soundness” of a DPD depends on its being founded on a robust and credible evidence base and on its being deliverable, flexible and able to be monitored, I agree with Mr Lowe's arguments that the conclusions that the Inspector draws in relation to the housing figures – namely that they were not critical and that less comprehensive schemes would be possible – in the absence of substantial evidence that, apart from the Claimant's scheme, the housing deficit would be met in addition to the requirement for the public transport benefits in the Plan also to be met, do not appear to comply with the relevant guidance, namely PPS 3 and 12, which were material considerations in law.

[149] I entirely accept that the AAP was not meant to supplant the Core Strategy which it, unusually, preceded, but that does not obviate the need for the Council to ensure the soundness, in terms of deliverability and ability to be monitored, of what remained an important DPD. The Inspector, at para 6.0 of the Report, recognised the significance of the Core Strategy and accepted that there were good reasons for the early submission of the AAP but he does not develop in the report any view that the prematurity of the AAP justified its being any less compliant with PPS 12.

[150] Alternatively, the reasons given by the Inspector in relation to these important issues did not enable the Claimant to understand why the Inspector reached the conclusions that he did. Although reasons may be brief, there must be comprehensible reasons and, in particular, his conclusion that there were alternatives to the Claimant's scheme which would make up a shortfall while still achieving the other aims of the plans is, in my judgment, inexplicable as it stands, even having regard to the fact that this was an expert talking to the initiated.

[151] I bear in mind Mr Comyn's arguments that the Inspector appears generally to make reference to the Claimant's arguments and to deal with evidence put before him but in my judgement it is a valid criticism of the report that in dealing with alternatives to the Claimant scheme it was necessary to deal in more than generalities and to indicate how the AAP was to be deliverable and effective.

[152] Reading the report as a whole and, I hope, fairly I am unable to accept Mr Comyn's contention that there are "adequate and intelligible reasons" in the report for the conclusion that the AAP proposal of around 1820 residential units will not be critical to meeting the housing requirement.

[153] Mr Comyn merely restated the AAP policy in relation to flexibility – namely that "Smaller or less comprehensive schemes could come forward" – when dealing with the contention of Mr Lowe that there was no evidence before the Inspector that less comprehensive schemes would be either possible or even viable given the scale of the requirements with respect to the public transport elements for example and simply fails to indicate what such evidence might be, just as the Inspector had done at 6.16. To argue that 6.16 represents the Inspector's professional judgment appears to me a non sequitur and effectively is a concession that the evidence for the judgment is missing. The necessity for evidence seems to me to be essential if the plan was genuinely to be deliverable and it was incumbent on the Inspector to identify that evidence, even in short form, so that his reasons could be discerned. I do not consider he does so and I agree with Mr Lowe's arguments on this aspect of the report.

[154] Thus on this head of managing delivery, I agree with the challenge to the Inspector's conclusion that the AAP was sound.

[155] In relation to the density issue, I am unable to discern a reason for the Inspector ignoring the Claimant's density calculation. In my judgement it has significance. His seizing upon the absence of a reliable density figure in the notes of the meeting of 1 March 2010 with the Greater London Authority enables him to avoid dealing head-on with the conclusion of the GLA that 500 units would be acceptable in strategic planning terms for the OSA. In my judgement, on this issue the Inspector has failed to take account of material evidence which goes directly to the issue of the viability of the AAP and, therefore, its soundness.

[156] On the viability issue, I start, of course, from the premise that the Inspector is an expert but it must be said that one looks in vain in the report for any explanation for why he takes the view that over the period set for the OSA in the plan the scheme may become viable, which is the clear inference from 6.19. If he did conclude that, on the evidence before him, the scheme could be viable, then that conclusion flew in the face of that evidence and was a very substantial and material error in my judgment.

[157] Of all the issues raised before me, the viability issue appears to me to be the one that is most clearly established. In the absence of any reasoning that I can follow in the IR, it is, in my judgment, perfectly appropriate to categorise the Inspector's conclusions on viability and alternatives as purely speculative. I do not believe even an expert and well informed party to the hearing would be able to understand how he reached these conclusions. He does not grapple with the BNP Paribas evidence, which was unchallenged and, on the face of it, perfectly reasonable and his findings are directly contradicted by that evidence. Although Mr Comyn suggests that the findings of the Inspector were reasonable I am unable to agree as I simply cannot follow how the Inspector has reconciled his

conclusions with the financial viability evidence. To suggest that the 250 unit scheme could be saved by “adjustments” to the elements of affordable housing and s 106 payments is an inadequate answer when one looks at the totality of the BNP Paribas report and the current deficit in land value calculated in it. Of course the Inspector is a planning expert, but if he is to use his expertise, the parties must be able to understand how he has done so.

[158] The viability of the scheme is central to the effectiveness of this part of the AAP. The conclusion that this aspect of the AAP is sound is importantly dependent on these findings by the Inspector.

[159] My conclusion on this aspect of the claim alone would be that the AAP as a result required modification so as to make it compatible with the statutory requirements.

[160] As to the balance of uses point, nothing submitted by Mr Comyn appears to me to challenge directly Mr Lowe's point that this was not a matter put in issue by the Defendant at the EIP. If it had been, then I would have accepted that this was a matter for the professional judgment of the Inspector. However, the parties would have had an opportunity to address him on the issue. If he was going to take the view that 400 units was beyond acceptability on a balance of user basis in this town centre, he would, it seems to me, have been bound to grapple with the GLA report and with the Claimant's density calculation. He did not and while this may not be an absolutely central issue it is in my judgment a very material one given its context in the IR – the paragraph in which it occurs is the only passage in the IR which deals with the BNP Paribas report and directly leads on to his conclusion that the AAP is sound as it stood, with the wording of “around 250” units.

[161] Again, I agree that the approach of the Inspector is flawed on the grounds of procedural fairness on this point

[162] I therefore uphold the Claimant's application on the ground that, as far as the OSA is concerned, the AAP is not within the appropriate power.

[163] In the Claim, the Claimant sought orders for amendment of the AAP but I am minded to order that the AAP is quashed in part, namely:

i) The first line/row of Table 4.2, “Bromley North Station . . .”.

ii) Policy OSA (I am undecided as to whether all the Policy need be quashed);

iii) Appendix 4 “A. Bromley North Station”, (again I query whether the whole Appendix need be quashed);

iv) Table 6.1 “A. Bromley North Station”;

v) Table 6.2 first line/row “Site A-Bromley North Station”; and

vi) Table 6.3 Site A – Bromley North Station.

[164] I am then minded to remit the AAP to the Defendant with a direction requiring these parts of the document to be treated as not approved and to require the steps taken in the process that resulted in the approval of these parts of the AAP to be treated as not having been taken and to require the Defendant to prepare, publish, consult upon and promote an AAP for the OSA site in accordance with the Town and Country Planning (Local Development) (England) Regulations 2004.

[165] I initially understood that Mr Lowe was content with quashing and re-preparing etc as opposed to amendment. It seems to me to be inappropriate for me to venture on amendment, nor is this such a clear case as to call for amendment. The parties were, I believe, in agreement at the end of the hearing that if they were not able to reach agreement on a specific order in the light of my judgment, I should allow further argument on the extent of the order. I therefore invite the parties to attempt to agree an order upon receipt of my judgment in draft and if it proves impossible to achieve agreement I shall ask the ACO to fix a date convenient to the parties for further argument. I shall also direct skeleton arguments to be exchanged and filed in advance of that hearing.

[166] If, however, the parties can agree an order dealing with the remedy and with ancillary matters then I excuse any attendance at the handing down of judgment.

Judgment accordingly.

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CONCLUSIONS

[148] I deal first with the issue of deliverability and manageability. On the basis that "soundness" of a DPD depends on its being founded on a robust and credible evidence base and on its being deliverable, flexible and able to be monitored, I agree with Mr Lowe's arguments that the conclusions that the Inspector draws in relation to the housing figures – namely that they were not critical and that less comprehensive schemes would be possible – in the absence of substantial evidence that, apart from the Claimant's scheme, the housing deficit would be met *in addition* to the requirement for the public transport benefits in the Plan also to be met, do not appear to comply with the relevant guidance, namely PPS 3 and 12, which were material considerations in law.

[149] I entirely accept that the AAP was not meant to supplant the Core Strategy which it, unusually, preceded, but that does not obviate the need for the Council to ensure the soundness, in terms of deliverability and ability to be monitored, of what remained an important DPD. The Inspector, at para 6.0 of the Report, recognised the significance of the Core Strategy and accepted that there were good reasons for the early submission of the AAP but he does not develop in the report any view that the prematurity of the AAP justified its being any less compliant with PPS 12.

[150] Alternatively, the reasons given by the Inspector in relation to these important issues did not enable the Claimant to understand why the Inspector reached the conclusions that he did. Although reasons may be brief, there must be comprehensible reasons and, in particular, his conclusion that there were alternatives to the Claimant's scheme which would make up a shortfall while still achieving the other aims of the plans is, in my judgment, inexplicable as it stands, even having regard to the fact that this was an expert talking to the initiated.

[151] I bear in mind Mr Comyn's arguments that the Inspector appears generally to make reference to the Claimant's arguments and to deal with evidence put before him but in my judgement it is a valid criticism of the report that in dealing with alternatives to the Claimant scheme it was necessary to deal in more than generalities and to indicate how the AAP was to be deliverable and effective.

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[154] Thus on this head of managing delivery, I agree with the challenge to the Inspector's conclusion that the AAP was sound.

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[160] As to the balance **of** uses point, nothing submitted by Mr Comyn appears to me to challenge directly Mr Lowe's point that this was not a matter put in issue by the Defendant at the EIP. If it had been, then I would have accepted that this was a matter for the professional judgment **of** the Inspector. However, the parties would have had an opportunity to address him on the issue. If he was going to take the view that 400 units was beyond acceptability on a balance **of** user basis in this town centre, he would, it seems to me, have been bound to grapple with the GLA report and with the Claimant's density calculation. He did not and while this may not be an absolutely central issue it is in my judgment a very material one given its context in the IR – the paragraph in which it occurs is the only passage in the IR which deals with the BNP Paribas report and directly leads on to his conclusion that the AAP is sound as it stood, with the wording **of** "around 250" units.

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- - ii) Policy OSA (I am undecided as to whether all the Policy need be quashed);
- - iii) Appendix 4 "A. **Bromley** North Station", (again I query whether the whole Appendix need be quashed);
- - iv) Table 6.1 "A. **Bromley** North Station";
- - v) Table 6.2 first line/row "Site A-**Bromley** North Station"; and
- - vi) Table 6.3 Site A – **Bromley** North Station.

[164] I am then minded to remit the AAP to the Defendant with a direction requiring these parts **of** the document to be treated as not approved and to require the steps taken in the process that resulted in the approval **of** these parts **of** the AAP to be treated as not having been taken and to require the Defendant to prepare, publish, consult upon and promote an AAP for the OSA site in accordance with the Town and Country Planning (Local Development) (England) Regulations 2004.

[165] I initially understood that Mr Lowe was content with quashing and re-preparing etc as opposed to amendment. It seems to me to be inappropriate for me to venture on amendment, nor is this such a clear case as to call for amendment. The parties were, I believe, in agreement at the end **of** the hearing that if they were not able to reach agreement on a specific order in the light **of** my judgment, I should allow further argument on the extent **of** the order. I therefore invite the parties to attempt to agree an order upon receipt **of** my judgment in draft and if it proves impossible to achieve agreement I shall ask the ACO to fix a date convenient to the parties for further argument. I shall also direct skeleton arguments to be exchanged and filed in advance **of** that hearing.

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Judgment accordingly.