Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure) Rules 2010

Immingham Eastern Ro-Ro Terminal DCO Application

Issue Specific Hearing 4 (ISH4) on the DCO

Post Hearing Submissions (including written submissions of oral case)

of

CLdN Ports Killingholme Limited

CONTENTS

1. INTRODUCTION

1.1 This document summarises the main oral submissions made by CLdN Ports Killingholme Limited (**CLdN**) at Issue Specific Hearing 4 (**ISH4**) dealing with the Draft Development Consent Order (**dDCO**) held on 28 September 2023, in relation to the application for development consent for the Immingham Eastern Ro-Ro Terminal (**IERRT**) by Associated British Ports (**the Applicant**) (**the Proposed Development**).

1.2 ISH4 was attended by the Examining Authority (**the ExA**), the Applicant, CLdN, and a number of other Interested Parties.

1.3 This document does not purport to summarise the oral submissions of parties other than CLdN, and summaries of submissions made by other parties are only included where necessary in order to give context to CLdN's submissions in response.

1.4 The structure of this document generally follows the order of items as they were dealt with at ISH4 set out against the detailed agenda items published by the ExA on 20 September 2023 (**the Agenda**). Numbered items referred to are references to the numbered items in the Agenda. Where post hearing notes have been added, those notes are prefixed with "Post-Hearing Note" and set out in italics for clarity.

2. **WRITTEN SUMMARY OF CLDN'S ORAL SUBMISSIONS**

Agenda Item	**Applicant's Response**
Item 1	
Welcome, introductions and arrangements for the Issue Specific Hearing 4 (ISH4)	**Robbie Owen, for CLdN,** did not make any submissions in relation to this agenda item.
Item 2	
Purpose of the Issue Specific Hearing	**Robbie Owen, for CLdN,** did not make any submissions in relation to this agenda item.
Item 3	
Discussion of the dDCO, involving the Applicant, other Interested Parties and the Statutory Harbour Authority for the Humber/Humber Harbour Master a) Use of the term "Company" as opposed to Undertaker within the dDCO	**Robbie Owen, for CLdN,** stated that from CLdN's perspective, it does not matter which term is used, but what does matter is that the drafting needs to be clear in relation to who has the benefit of the dDCO and the transfer provisions. The current drafting is not sufficiently clear. The definition of "Company" in article 2 refers to article 9 and the drafting needs to be updated. **Mr Owen** said more generally that CLdN has reviewed the dDCO submitted by the Applicant at Deadline 1 **[REP1-005]** and Deadline 3 **[REP3-002]** but retains serious concerns with the lack of precision in the drafting, which prevents clear determination of the parameters of the project and controls surrounding it. CLdN set out its concerns in full in Appendix 2 of its Written Representation **[REP2-031]**. Most of the drafting remains largely unchanged since Issue Specific Hearing 1 (**ISH1**) in July and without significant explanation by the Applicant. **Mr Owen** said that it comes across to CLdN that the Applicant considers that the scale and complexity of the project gives it a reason to bypass the normal procedures. In response to **James Strachan KC, for the Applicant's** statement that they could not respond to the generic criticism of all the articles without details of what the criticisms are, **Mr Owen** reiterated that CLdN's comments were specific in Appendix 2 to its Written Representation **[REP3-002]**. However, the revised dDCO produced at Deadline 3 **[REP3-002]** by the Applicant did not contain any substantive adjustments despite the specific concerns that had been expressed. The Examination is almost halfway through and CLdN would like to see some change in approach to the drafting of the DCO from now onwards.
b) the drafting and provisions of the Articles, including	**Robbie Owen, for CLdN,** explained that in relation to s.33 of the 1847 Act, CLdN understands from the Applicant that they seek to incorporate this whilst also preserving the powers under article 22. The purpose of this application is to provide a facility for Stena, so Mr Owen queried how article 22 is consistent with s.33. The Applicant's response

consideration of Article 22 (Power to appropriate)	to action point 12 **[EV2-004]** and the updated Explanatory Memorandum does not assist. CLdN is interested in understanding the justification for this. <u>Article 6</u> In relation to article 6 (maintenance of the authorised development), **Mr Owen** said that while the definition of "maintain" contained in article 2(1) may be well precedented, it is not clear from the Applicant's Environmental Statement (**ES**) that it has assessed the full scope of the power to maintain that it seeks. For example, paragraphs 3.2.22 to 3.2.25 of the ES Chapter 3 **[APP-039]** provide some interesting background on how renewal projects have extended the lifetime of infrastructure originally installed in the late 1960s and early 1970s, but it is not clear from this chapter how the Applicant has assessed the likely significant environmental effects or habitats effects arising from future renewal projects of the development for which it is now seeking development consent. **Mr Owen** added that the key point is that there is a mismatch between what has been assessed in the ES and the Habitats Regulations Assessment (**HRA**) and the powers sought by the dDCO to maintain. The fundamental principle is that powers sought in the dDCO should be the same as the project's assessment in relation to construction, operation and maintenance. CLdN seeks clarity from the Applicant on this. In response to the ExA's question as to whether the word "reconstruct" in the maintenance definition is causing issues, **Mr Owen** confirmed that this is a particular concern to CLdN. The wording is not unusual, but the point being made is that CLdN has not seen evidence from the EIA or HRA that the full breadth of this power has been assessed. CLdN wishes to understand that this has all been assessed in terms of the impact of "maintaining" in all its aspects. It is not clear to CLdN that this fundamental principle has been taken on board. **Mr Owen** added that it is not good enough for the Applicant to request that CLdN tells them what they may have missed. The Applicant must supply evidence that it has assessed the full scope of the powers it is seeking. **Mr Owen** agreed with the ExA, in that clarity is needed in the ES as to precisely what the maintenance works are (i.e. those covered by article 6(2)). Article 6(2) does not answer the point CLdN is making, because it is not clear from the ES what maintenance has actually been assessed. CLdN has made it clear from the beginning that its concern is surrounding the wider environmental effects, not just habitats. <u>Article 7</u> In relation to article 7 (limits of deviation), **Mr Owen** said that as raised in ISH1 by CLdN, there is a lack of clarity in relation to vertical limits of deviation in article 7. The reference point from which the power to deviate may be exercised is the levels shown on the Engineering sections, drawings and plans. However, these are marked as "indicative" and there is no clear labelling telling the reader the maximum height of the structures, or clarifying whether the levels are to be scaled from existing or proposed ground levels. Put simply, there is no firm point of reference to determine the starting point of the 2m

	upwards limit of deviation. Consequently, as drafted, there can be no confidence that the development that would be authorised by the dDCO, if made, will be within the parameters of its environmental assessment and therefore enforceable. The Applicant's response to Action Point 11 **[EV2-004]** submitted at Deadline 1 **[REP1-008]** does not address this concern. <u>Article 21</u> In relation to article 21 (operation and use of development), **Mr Owen** said that CLdN will wait to see what comes out of the transport discussions, but CLdN wants to look at what the maximum daily figure is in a peaking scenario (i.e. a throughput of more than 1,800 units). It is also not clear what the necessary consents and approvals are in paragraph (2) of article 21. Additionally, **Mr Owen** added that the tailpiece in paragraph (2) is subject to imprecise and uncertain drafting in connection with "obtaining all necessary consents and approvals". It is unclear what these consents and approvals are, alongside who will be granting them. If the provision is to be subject to them, they ought to be clearly specified. ***Post Hearing Note:*** *Article 21 would authorise the operation and use of the authorised development for the import and export of Ro-Ro units up to a maximum of 660,000 units per year together with occasional use by passengers. The Explanatory Memorandum **[REP1-006]** at paragraph 8.3 confirms that this throughput volume is a parameter by which the environmental assessment has been fixed.* *Paragraph (2) appears to be intended to limit the volume of occasional passengers, but it is subject to the tailpiece "unless otherwise agreed in writing with the relevant local authority and subject to obtaining all necessary approvals."* *The tailpiece causes significant concerns to CLdN. The Planning Inspectorate's Advice Note 15 at paragraphs 17.4 and 17.5 cautions against the use of tailpieces:* *"17.4 Therefore, adding a tailpiece (a tailpiece is a mechanism inserted into a condition (or by analogy a Requirement) providing for its own variation) such as the one below would not be acceptable because it might allow the discharging authority to approve a change to the scope of the Authorised Development applied for and examined, thus circumventing the statutory process:* *"The authorised development must be carried out in accordance with the principles set out in application document [x] [within the Order limits] unless otherwise approved in writing".* *17.5 On the other hand, a Requirement might make the development consent conditional on the discharging authority approving detailed aspects of the development in advance (for example, the relevant planning authority approving details of a landscaping scheme). Where the discharging authority is given*

	power to approve such details it will be acceptable to allow that body to approve a change to details that they had already approved. However, this process should not allow the discharging authority to approve details which are outside the parameters authorised within any granted DCO." *This tailpiece falls squarely in the latter category, permitting the discharging authority to approve matters which are outside the parameters authorised by the dDCO and assessed in the ES and Habitats assessment, thereby subverting the clear statutory process for applying to change a development consent order and the need for further environmental information and assessment and consultation. The fact that the provision appears in an article rather than in a requirement contained in a Schedule to the dDCO makes no difference in terms of enforceability. This provision would still permit the relevant local authority to take a decision that goes beyond the scope of the development consent that would be granted by the Secretary of State if the Order is made.* <u>Article 22</u> With regard to article 22 (power to appropriate), **Mr Owen** said that the Applicant has clarified that it seeks to incorporate the "open port" duty in section 33 of the Harbours, Docks and Piers Clauses Act 1847 via article 4 of the dDCO whilst also preserving the power under this article to disregard that duty and devote "any part" of the authorised development to a single operator. The Explanatory Memorandum merely explains that there "may be circumstances when the Applicant may wish to appropriate the use of all or part of the proposed development for the benefit of a specific operator." The Applicant's case for the need for the project set out in section 4 of the Planning Statement **[APP-019]** and in oral hearing submissions (notably at Issue Specific Hearing 3 yesterday) relies on the needs of one operator, Stena, to be serviced by its proposal. It would appear clear, by the Applicant's own stated case, that the Proposed Development would in reality not be an "open port". The Applicant has not explained why it is incorporating the "open port" duty contained in section 33 of the 1847 Act given the Applicant's case that the Proposed Development is in fact intended to serve just a single operator. As a result, doubt is cast on the nature of the development proposed by the Applicant. If it is intended to serve just a single operator, as the Applicant says, then **Mr Owen** queried why the Applicant is seeking to incorporate the open port duty contained in section 33 of the 1847 Act at all. The Applicant's response to Action Point 12 **[EV2-004]** submitted at Deadline 1 **[REP1-008]** and its updated Explanatory Memorandum does not assist with these concerns. **Mr Owen** added that s.33 is not concerned with and does not confer any power to charge; that power comes via the Harbours Act 1964. <u>Article 28</u>

	With regard to article 28 (agreements with highway authorities), **Mr Owen** said that the drafting in this article is relatively standard and is included in numerous DCOs. However, it is not clear why it has been included in this dDCO, as the only provision of the dDCO that contains powers in relation to streets is this very article. It is unclear what power is proposed to be exercised pursuant to an agreement under sub-paragraphs (1)(a) and (2)(a). The Explanatory Memorandum **[REP1-006]** does not assist with this question. ***Post Hearing Note:*** *CLdN also notes that the Applicant's Consents and Agreements Position Statement **[APP-110]** table 1, row 7 on page 12, makes reference to entering into agreements under the Highways Act 1980 with North Lincolnshire Council "and / or" North East Lincolnshire Council which are "required to allow any works to public highway". CLdN presumes that this is a reference to works in the highway to mitigate the adverse transport effects of the proposed Scheme.* *The fact is that such measures are not included within the dDCO, and so would potentially:* • *require planning permission under the TCPA 1990 and assessment of the environmental effects of such highway works;* • *require the relevant Highways Act 1980 agreements to be entered into; and* • *require the applicant to secure the interests in land necessary to carry out such works.* *This calls into question the Applicant's ability to deliver the mitigation necessary for the Scheme and the adequacy of the environmental information. Neither the Applicant's response to Action Point 13 **[EV2-004]** submitted at Deadline 1 **[REP1-008]** nor its updated Explanatory Memorandum **[REP1-006]** assist with addressing these concerns.* <u>Article 29</u> With regard to article 29 (defence to proceedings in respect of statutory nuisance), **Mr Owen** said that the terms of article 29(3) would mean the local environmental health officer would not be able to take action to abate a statutory noise nuisance (the threshold for which under the Environmental Protection Act 1990 is effects being *prejudicial to health*) in relation to noise that is "a consequence of the construction, operation, maintenance or use of the authorised development" and which "cannot reasonably be avoided". The Applicant cited in its Explanatory Memorandum **[REP1-006]** the precedents of the High Speed 2 Acts and a range of other railway Transport and Works Act Orders as precedents, but this is not a "standard" DCO provision as evidenced by the precedents the Applicant itself cites. The relevance and necessity of those precedents, given that they relate to significant railway projects in urban environments, is not clear.

	CLdN urges the ExA to carefully consider the inclusion of this provision in the dDCO. With it in place local environmental health officers will have their statutory powers to protect environmental health significantly curtailed. Such a provision should not be included in a DCO lightly and without careful scrutiny of the justification for its inclusion. Neither the Applicant's response to Action Point 14 **[EV2-004]** submitted at Deadline 1 **[REP1-008]** nor its updated Explanatory Memorandum **[REP1-006]** assists with these concerns. In response to the Applicant, **Mr Owen** acknowledged that this provision is precedented, but it is not a standard DCO provision and the Applicant has provided no justification as to why it is necessary and proportionate to this particular DCO. The Applicant needs to provide this justification.
c) the drafting and provisions of the Requirements in Schedule 2, including: • In connection with Requirement 8, whether the submitted Construction and Environmental Management Plan (CEMP) [REP2-004] should be considered as being a draft or final version CEMP; • The enforceability of Requirement 10 (Noise insulation); and • How it is intended Requirement 18 (impact protection measures for the Immingham Oil Terminal) would operate	**Robbie Owen, for CLdN,** stated that CLdN has particular concerns with the wording of the following requirements: <u>Requirement 4 (construction hours – associated development)</u> This requirement purports to control working hours. It contains significant flaws that undermine confidence in it being able to effectively serve that purpose. While the lack of a definition for "associated development" has now been remedied by the Applicant, of greater concern to CLdN are the grounds listed in paragraph (2) on which the Company can disregard those working hours. Paragraph (2)(a) tells us that working hours restrictions can be ignored for "works that cannot be interrupted" with no corresponding duty on the Company to endeavour to plan such works so as to respect the working hours restrictions. Paragraph (2)(d) tells us that working hours restrictions can be disregarded where noise levels do not exceed "maximum permitted levels of noise at each agreed monitoring location to be determined with reference to the ABC Assessment Method…". It is unclear who permits the "maximum permitted levels of noise", nor with whom the "monitoring locations" are to be agreed. All that is provided, via another tailpiece, is that the relevant local authority may agree to the Company ignoring those permitted levels at those monitoring locations whilst disregarding the working hours. The Applicant's Explanatory Memorandum **[REP1-006]** sheds no light on what is proposed with these exceptions and neither does it include any justification for them. The draft requirement is lacking in the precision and certainty necessary to give confidence to it acting as an appropriate control for construction noise. This is especially concerning when considered alongside the Applicant's proposed protection from enforcement for statutory noise nuisance discussed earlier in relation to article 29. It seems to CLdN that a proportionate approach to any works outside of the defined working hours restrictions would be to define a scheme of noise control with necessary approvals and controls that could be notified, monitored and enforced. That would at least afford the relevant local authority an appropriate degree of control and certainty, if none can be provided by the Applicant at this stage. This is particularly important in the light of CLdN's representations earlier in relation to article 29 of the dDCO **[REP3-002]**.

	Requirement 6 (piling and marine construction works restrictions) The Applicant has revised requirement 6 such that it wishes to be entitled to undertake capital dredging "without restriction as to timing or day" **[REP1-005**, requirement 6(3), Part 1 of Schedule 2**]**. It is not clear whether the Applicant has fully considered and assessed either the environmental and habitats impacts of such activities on migratory species within the Humber estuary (*most notably the SAC river lamprey population and the various migratory birds supported by the SPA, as well as important breeding populations of bittern Botaurus stellaris, marsh harrier Circus aeruginosus, avocet Recurvirostra avosetta and little tern Sterna albifrons during the summer months*), the terrestrial environment (*noting that the marine works would fall to be regulated by the MMO under the DCO's deemed marine licence*) or the impacts of such unrestricted works on navigational efficacy and safety. CLdN seeks assurance from the Applicant that the power it is seeking has been assessed properly. ***Post Hearing Note:*** *The below contains a summary of the remaining concerns CLdN has on the drafting of the dDCO (ISH4 Action Point 12* ***[EV7-006]****.* *Requirement 8 (construction environmental management plan)* *CLdN has had regard to the minor updates at Deadline 3 in respect to this requirement.* *This requirement simply states that the authorised development must be constructed in accordance with the construction environmental management plan. That document is a mere outline and is lacking in the level of detail that is required to be enforceable in its current form, which would be the case were the dDCO made in these terms.* *There are a lot of measures therein which provide that they will be set out more fully in a subsequent document, but there is no DCO Requirement to that effect.* *See REP3-020 whereby CLdN's response to D2 submissions is as follows:* *"While the Applicant's CEMP may not have the words "Outline" or "Framework" in its title, it is clear that it does not contain the level of detail that is expected from a fully developed CEMP where it would be appropriate for it to be free of any further regulatory review or input. The CEMP expressly envisages the document, or aspects of it, being developed after the issue of development consent, or matters being agreed with the relevant statutory bodies."* *CLdN then gave 3 examples of the shortcomings of the CEMP in its current form. As drafted it would envisage that the Applicant's contractor is simply left to develop the detail required with no further regulatory input or oversight. In other words, the Applicant is left to mark its own homework, without any oversight.* *A fourth example is as follows:*

	The proposal at paragraph 2.11 of the CEMP for a stakeholder management plan (SMP) for managing communications with "stakeholders and communities" including parties "ABP considers" are likely to be affected by traffic management measures. This would be developed by the Applicant's contractor (thoughtfully) "in conjunction with ABP". The SMP would be "based on ABP's knowledge and existing relationships". It will also include "a piling specific community liaison protocol". There is absolutely nothing at all about how the SMP would be subject to any independent approval (one would expect by the LPA) and related indication re which IPs would be parties to it or consulted on its preparation or how that would be taken into account. The Applicant has complete discretion regarding what it includes, who they communicate with and on what, and what might go into it. *Setting aside the concerns of the generally high-level nature of the contents of the CEMP, this approach raises concerning procedural issues. For example, the CEMP does not provide:* • *where a relevant statutory body is to be consulted:* o *what information will be provided to it to assist it in developing its response; *minimum periods of time within which a response is required; or* o *what regard the Applicant's contractor is to have to such responses; or* • *where a matter is to be "agreed" with a relevant statutory body:* o *what information will be provided to obtain that agreement;* o *the time period the statutory body is to be afforded to determine whether to supply its agreement;* o *the form such an agreement would take and how it would be accessible to members of the public; or* o *what would happen if such a body refused to supply its agreement.* *The Applicant's CEMP is clearly outline in nature and is not suited to the pure "compliance-only" approach envisaged by the drafting of Requirement 8.* *As currently drafted, requirement 8 merely requires compliance with a high-level document, places no duty on the Applicant to develop that outline document into a full construction environmental management plan, contains no provision requiring the input of relevant statutory consultees and leaves it solely to the Applicant to comply with a high level and outline document.* *A more appropriate approach, and one that is taken on the majority of development consent orders, is for the CEMP to be subject to approval as a pre-commencement requirement. It would also be appropriate, and consistent with established DCO practice, for the subject matter of the subsidiary plans referred to in this response above to be*

	subject to their own Requirements. Together this approach would ensure that there is appropriate regulatory oversight of the development of the detail of the mitigation measures so that there can be confidence that the Applicant's project stays within the envelope of its assessed environmental effects. *The ExA and ultimately the Secretary of State can have no confidence in the mitigation recommended in the environmental statement and any control measures necessary for Habitats protection being secured through this means.* *As CLdN said during ISH1, the normal approach where the details of mitigation remain to be developed is to require in the DCO that the outline construction environmental management plan provided should be developed into a full plan and submitted for the approval of the relevant authority prior to works commencing. Consideration should also be given to whether a similar requirement is appropriate to adequately control the "permitted preliminary works", noting that the definition of that term includes substantial works such as utility diversions. This would enable the relevant authority to have an appropriate degree of oversight of the Applicant's proposals and, where appropriate, consult other key statutory bodies such as Natural England and the Environment Agency. Instead, the Applicant has simply deleted reference to those statutory bodies that possess the relevant expertise to provide input to the development of a full Construction Environmental Management Plan.* *As currently drafted, requirement 8 merely requires compliance with a high-level document, places no duty on the Applicant to develop that outline document into a full construction environmental management plan, contains no provision requiring the input of relevant statutory consultees and leaves it solely to the Applicant to comply with a high level and outline document. The Applicant's response to Action Point 22* ***[EV2-004]****, wherein it explains that a single paragraph in the high-level CEMP document is sufficient to address concerns in relation to a Materials Management Plan, needs to be seen in the context of a requirement that requires no relevant authority determination as to the effectiveness of such a plan before any works take place. If there were issues during construction, and the relevant authority wished or needed to take action, all it would have to enforce against would be a very high-level outline construction environmental management plan. This is not acceptable and is unlikely to be enforceable.* *Should the Applicant decide to redraft this Requirement to oblige itself to prepare for subsequent (i.e. post DCO) approval a full / detailed CEMP, CLdN would wish that Requirement to provide for CLdN to be consulted by the Applicant on the full / detailed CEMP before it is submitted for approval.* *<u>Requirement 15 (construction and operational plans)</u>* *The drafting of this requirement is beset by the same issues as is referred to in relation to requirement 8, in that it lacks appropriate oversight by the relevant authority. It is also exacerbated by the standard of compliance required by this requirement, which is only "general accordance" rather than "accordance" under requirement 8. It is not clear why the Applicant has chosen to require two different standards of compliance with its construction environmental management plan, nor why the important documents listed at sub-paragraphs (a) to (e) covering such critical and key issues as navigation safety and flood risk merit only "general accordance".*

	<u>Requirement 17 (materials management plan)</u> *As drafted this requirement is uncertain and unenforceable. It requires the materials management plan to be submitted to a Qualifying Person before the works to which that plan relates are commenced. If no plan is produced or submitted, CLdN queries how the relevant authority can know whether or not the Applicant intended or ought to prepare such a plan. Furthermore, the requirement does not oblige the Company to actually comply with the material management plan.* *<u>Requirement 18 and Action Point 2 **[EV2-004]** – Roles and responsibilities of the statutory harbour authorities</u>* *The Applicant's The Port of Immingham and River Humber – Management, Control and Regulation **[REP1-014]** submitted at Deadline 1 helpfully sets out the Applicant's understanding of the navigation's regulatory regime. The Applicant notes at paragraph 8.1, in relation to its functions as (i) owner and operator of the Port of Immingham and statutory harbour authority; (ii) the statutory conservation and navigation authority and Humber statutory harbour authority; and (iii) the competent harbour authority, that "it would be somewhat disingenuous to suggest that each component, whilst falling under the corporate umbrella ABP, undertakes its obligations and carries out its functions separately and distinct from the other."* *The note also confirms at paragraphs 10.23 that the ABP Harbour Authority Safety Board, while being a separate board from the "main ABP Board", comprises the same membership. That is to say, not only is it the same corporate body, it is the same natural persons that carry out these functions.* *This is a very different set of circumstances than those that sometimes prevail where, for example, a local planning authority is determining whether or not to grant planning permission to itself. In those cases there are clear statutory procedures to ensure an appropriate degree of functional separation. The particular importance of such functional separation in cases subject to environmental impact assessment has been emphasised by the High Court in London Historic Parks and Gardens Trust v Secretary of State for Housing, Communities and Local Government [2020] EWHC 2580 (Admin) where the Secretary of State's handling arrangements for the Holocaust Memorial planning application were found to be inadequate. The full judgment of this case can be found at **Appendix 1** of this Post Hearing Note.* *Here the Applicant expressly makes a virtue of the absence of such handling arrangements and so the efficacy of this state of affairs must, CLdN suggests, be treated with a considerable degree of caution by the ExA.* *<u>Action Point 16 **[EV2-004]** – Public access to information related to the discharge of requirements</u>* *CLdN is disappointed to note that the dDCO does not appear to contain any provisions relevant to publicising information and decisions relevant to the discharge of requirements and nor does there appear to be any explanation in the Deadline 1 submissions as to why the Applicant considers it to be inappropriate to make such provision.*

d) the deemed Marine Licence (Schedule 3) and the current position with respect to drafting issues raised by the Marine Management Organisation	**Robbie Owen, for CLdN,** did not make any submissions in relation to this agenda item.
e) Protective Provisions (Schedule 4) and the current position with respect to agreeing the proposed Protective Provisions	**Robbie Owen, for CLdN,** explained that the protective provisions were a matter that CLdN had wanted to deal with in detail at ISH4 and would also be contacting Mr Brian Greenwood in due course in relation to them. CLdN was extremely disappointed that the Applicant had not engaged with CLdN in respect of the protective provisions. CLdN is operating a nationally significant port terminal and felt that warranted more respectful consideration from the Applicant. **Mr Owen** added that CLdN hoped to make more progress on this matter but, if not, would need to bring its concerns back to the ExA. ***Post Hearing Note:*** *CLdN retains concerns that the Proposed Development risks significant adverse impacts on its operations and business continuity, particularly:* *1. Continuity of its scheduled services upstream to the Port of Killingholme or downstream out of the Humber Estuary. This is a concern that has been elevated by CLdN's review of the navigational risk and safety assessment that has been undertaken by the Applicant and the subject of further scrutiny and submissions by other interested parties, notably at Issue Specific Hearing 3.* *2. Concern with respect to the potential accumulation at disposal site HU060 (Humber 3A/Clay Huts) as a consequence of dredging works at IERRT. CLdN holds the benefit of a 10 year marine licence carrying reference L/2016/00242/2 dated 22 December 2016 (and varied on 23 April 2020). There is a risk that the Applicant's dredging works and proposals for disposal at HU060 will intensify its use and capacity and could have the potential to impact on CLdN's use of the disposal site for its own deposits in the future. Specifically, CLdN requires protection should, as a consequence of the intensification of use of HU060, the MMO decide that it is necessary for CLdN to use a different site for further disposal (and which could be further away from the Port of Killingholme and mean higher disposal costs). It is notable that this issue could come to a head relatively soon with CLdN's marine licence permitting disposal at HU060 due to expire in December 2026.* *3. Until such time as transport matters have been adequately addressed, specifically those unresolved matters that CLdN identified at Agenda Item 4 in Issue Specific Hearing 3 (including a change request to cap annual throughput at 525,000 units so as to align with the maximum daily throughput assessed (1800 units) in the TA), concerns with respect to the potentially significant impact that the Proposed Development could have on the delivery of freight to the Port of Killingholme via the surrounding highway network.* *4. Pursuant to a lease with Network Rail, the Applicant has control of the Network Rail owned network between Killingholme and the rest of the network. Whilst CLdN accepts that the railway works proposed in the dDCO are*

	narrow in scope and are not intended to facilitate the delivery of freight by rail to IERRT, it is foreseeable that the Applicant may nevertheless choose to revive its rail rights for such purposes in the future. This could restrict CLdN's own statutory rights to access the railway network. [Note that the letter referred to below and attached in Appendix 2 contains more detail in this regard.] *These matters plainly have the potential to cause very serious disruption to CLdN's operations (operations that are underpinned by a statutory undertaking) and could result in substantial loss of income or additional costs. As a result, CLdN must secure protective provisions to safeguard its interests, operations and established operational port capacity.* *Following CLdN's issued letter to the Applicant's solicitors on 31 August 2023, which proposed the terms of potential protective provisions and related justification (also detailed in CLdN's Written Representation **[REP2-031]** at pages 13 to 16), CLdN is disappointed with the Applicant's response received on 7 September 2023, in which the Applicant rejected the entirety of CLdN's proposals and made no attempt to engage with the legitimate concerns raised.* *CLdN has provided a further response to the Applicant (as per ISH4 Action Point 22 **[EV7-006]**) and a copy of this letter to the Applicant's solicitors is appended to this Post Hearing Note, at **Appendix 2**, for reference. The letter reinforces the justification for the protective provisions, which in summary is as follows:* 1. *The need for protective provisions due to concerns identified above with respect to the adequacy of the Applicant's assessments (for example to do with navigation and traffic matters, which CLdN knows are unresolved) and therefore uncertainty exists regarding the impact of the proposals on CLdN's operations, as well as weaknesses in the control measures in the dDCO (as summarised above).* 2. *That special consideration must be given to the impact on CLdN given its status as a statutory undertaker and the potential impact on Port of Killingholme as an existing nationally significant project.* 3. *Precedent in existing development consent orders (notably measures to protect CLdN in Part 6 of Schedule 9 of the Able Marine Energy Park DCO 2014). This includes measures for the recovery of expenses associated with dredging impacts of the DCO development and measures to protect CLdN's railway rights.* 4. *That the agent of change principle in National Planning Policy Framework (NPPF) at paragraph 187 applies. This specifies that "Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or 'agent of change') should be required to provide suitable mitigation before the development has been completed."* *The letter also appends draft protective provisions for the Applicant to consider. CLdN awaits the Applicant's response to the letter at **Appendix 2** and is hopeful that the Applicant will reconsider its approach.*

Item 4	
Review of matters and actions arising	**Robbie Owen, for CLdN,** did not make any submissions in relation to this agenda item.
Close	

3. **APPENDIX 1**

JUDGMENT IN *LONDON HISTORIC PARKS AND GARDENS TRUST V SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT* [2020] EWHC 2580 (ADMIN)

Case List

Neutral Citation Number: [2022] EWHC 829 (Admin)

Case No: CO/3041/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2022

Before :

THE HONOURABLE MRS JUSTICE THORNTON DBE

- -

Between :

THE LONDON HISTORIC PARKS AND GARDENS TRUST

Claimant

-and-

(1) THE MINISTER OF STATE FOR HOUSING

(2) WESTMINSTER CITY COUNCIL

Defendants

-and-

(1) THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

(2) LEARNING FROM THE RIGHTEOUS

Interested Parties

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Richard Drabble QC and **Meyric Lewis** (instructed by **Richard Buxton Solicitors**) for the **Claimant**

Timothy Mould QC and **Matthew Henderson** (instructed by **Government Legal**) for the **First Defendant**

Douglas Edwards QC (instructed by **Bi-borough Legal Services**) for the **Second Defendant** (written submissions only)

Christopher Katkowski QC and **Kate Olley** (instructed by **Government Legal Department**) for the **Secretary of State for Housing Communities and Local Government**

Zack Simons (instructed by **Richard Max & Co LLP**) for **Learning from the Righteous**

Hearing dates: 22nd and 23rd February 2022

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Approved Judgment

The Hon. Mrs Justice Thornton :

Introduction

1. This is a claim for statutory review, pursuant to s. 288 of the Town and Country Planning Act 1990, of the decision by the Minister of State for Housing to grant planning permission for the installation of the United Kingdom Holocaust Memorial and Learning Centre at Victoria Tower Gardens in Millbank, London.

2. The proposal for a UK Holocaust Memorial and Learning Centre ('the Holocaust Memorial') was first announced in January 2015 in the Holocaust Commission's Report, 'Britain's Promise to Remember':

> "*there should be a striking new memorial to serve as the focal point for national commemoration of the Holocaust. It should be prominently located in Central London to attract the largest possible number of visitors and to make a bold statement about the importance Britain places on preserving the memory of the Holocaust."*

3. All parties before the Court support the principle of a compelling memorial to the victims of the Holocaust and all those persecuted by the Nazis during those years when, "*humanity was tipped into the abyss of evil and depravity*". The memorial is an essential part of "*Britain's Promise to Remember*" (Holocaust Commission Report). The Trust explained to the Court that many of its supporters are Jewish people whose families were either forced to flee the Holocaust or who perished in it.

4. The issue dividing the parties is the proposed location of the Memorial in Victoria Tower Gardens. Victoria Tower Gardens has considerable cultural, historical and heritage significance. It is located on the north bank of the River Thames immediately south of and adjacent to the Palace of Westminster and Black Rod Garden. It is a Grade II Registered Park and Garden. It contains within it three listed structures; the statue of Emmeline Pankhurst (Grade II listed), the statue of the Burghers of Calais (Grade I listed) and the Buxton Memorial Fountain (Grade II* listed). The site has contained a garden for public recreation since approximately 1880.

5. It is important to emphasise that the merits of the Memorial's proposed location in Victoria Tower Gardens are not a matter for the Court. Its location there may raise matters of legitimate public debate, but they are not matters for the Court to determine. The role of the Court in judicial review is concerned with resolving questions of law and ensuring that public bodies act within the limits of their legal powers.

6. The three issues that arise for consideration by the Court in this challenge are:

    1) Did the inspector err in his assessment of harm to the historic environment of the Gardens; in particular the setting of the Buxton Memorial?

2) Does the London County Council (Improvements) Act 1900 impose a statutory prohibition on locating the Memorial in the Gardens?

3) Did the inspector err in his treatment of alternative sites for the Memorial?

Background

The parties

7. The Claimant is the London Historic Parks and Gardens Trust ('the Trust'). It is a small charity with the principal object of preserving and enhancing the quality and integrity of London's green open spaces. The First Defendant is the Minister of State for Housing ('the Minister') and decision maker on the planning application. The Second Defendant is Westminster City Council, the local planning authority for the area. The First Interested Party is the Secretary of State for Housing, Communities and Local Government and the applicant for planning permission. The Second Interested Party is Learning from the Righteous, a Holocaust Education Charity concerned to highlight the contemporary relevance of Holocaust Education.

The Holocaust Memorial and Learning Centre

8. On 27 January 2014, on Holocaust Memorial Day, the then Prime Minister launched the Holocaust Commission. Its task was to examine what more should be done in Britain to ensure that the memory of the Holocaust is preserved and the lessons it teaches are never forgotten. In January 2015, the Commission published a report titled 'Britain's Promise to Remember'. The report concluded that there should be a striking memorial prominently located in Central London. It would serve as the focal point for national commemoration of the Holocaust. A location in Central London would attract the largest possible number of visitors. The aim would be to make a bold statement about the importance Britain places on preserving the memory of the Holocaust.

Victoria Tower Gardens

9. Victoria Tower Gardens is a Grade II Registered Garden and area of accessible public open space, located on the north bank of the River Thames, immediately south and adjacent to the Palace of Westminster and Black Rod Garden. The site is bounded by Abingdon Street and Millbank to the west, the River Thames to the east and Horseferry Road/Lambeth Bridge to the south.

10. Within the Gardens there are three listed structures: the statue of Emmeline Pankhurst (Grade II listed), the statue of the Burghers of Calais (Grade I listed) and the Buxton Memorial Fountain (Grade II* listed). The Grade II listed River Embankment from the Houses of Parliament to Lambeth Bridge forms the eastern (river) edge of the Gardens.

11. The site is also within the setting of a number of other listed buildings and structures, including the Grade I listed Palace of Westminster, Lambeth Bridge (Grade II listed), Victoria Tower Lodge and Gates to Black Rod Garden (Grade I listed), Norwest House,

Millbank (Grade II listed), The Church Commissioners (Grade II* listed) and Lambeth Palace (Grade I listed).

12. The site is located within the Westminster Abbey and Parliament Square Conservation Area and is immediately south of the Palace of Westminster and Westminster Abbey including St. Margaret's Church World Heritage Site. The site is to the east of the Smith Square Conservation Area.

Site selection

13. The UK Holocaust Memorial Foundation was established with cross-party support to deliver the recommendations of the Holocaust Memorial Commission. Its work included a call for potential sites.

14. In 2015, after studying the available options, three central London sites were identified; the Imperial War Museum; Potter's Field and Millbank. They were all regarded as fulfilling the Commission's objective to provide a striking new memorial prominently located in Central London.

15. In January 2016, the then Prime Minster announced that the memorial would be built in Victoria Tower Gardens. A design competition was launched in September 2016 and in October 2017 it was announced that Adjaye Associates, Ron Arad Architects and the landscape architects Gustafson Porter + Bowman had been selected to design the Memorial and Learning Centre for the Gardens.

16. The selection of Victoria Tower Gardens as the site was controversial. In its closing submissions to the planning inquiry, the Trust expressed concern that the Gardens were chosen without any professional assessment to support the choice of the site and no public consultation as to its suitability, acceptability or desirability as a location. Proper consideration of alternative sites were said to have received scant consideration. The Trust expressed further concern that the site search process was not a matter for scrutiny in the public inquiry. These concerns formed part of the Trust's submissions to the Court on the Inspector's approach to alternative sites.

Planning application

17. In January 2019, the Secretary of State for Housing Communities and Local Government applied to the Council for planning permission for the Memorial to be located in the Gardens. Plans of the design illustrate the Memorial as comprising 23 bronze fins honouring the millions of Jewish men, women and children who lost their lives in the Holocaust, and all other victims of persecution, including Roma, gay and disabled people. The 23 bronze fins will create 22 pathways into and from the Learning Centre which will be constructed below ground.

18. In November 2019, the then Minister for Housing directed that the planning application be referred to her for determination, pursuant to section 77 of the Town and Country Planning Act 1990. Given the Secretary of State was the applicant for planning permission handling arrangements were put in place at the Government Legal Department and the Department for Levelling Up, Housing and Communities (as

renamed since the decision under challenge) to ensure there was, and is, a functional separation between the persons bringing forward the proposal and the persons responsible for determining the proposal. Following a successful legal challenge by the Trust to the decision making arrangements the arrangements were revised and published (London Historic Parks and Gardens Trust v the Secretary of State for Housing Communities and Local Government [2020] EWHC 2580 (Admin)).

The Planning inquiry

19. A public inquiry was held into the application by an Inspector appointed by the Minister for Housing between 6 – 23 October 2020 and 3 – 13 November 2020.

20. The Trust appeared at the inquiry and was formally represented. Whilst supporting the principle of the Memorial, the Trust, and other parties with whom they made common cause, opposed its location in Victoria Tower Gardens on the basis that it represents an exceptionally serious intrusion into a green public open space of the highest heritage significance. The Trust called expert evidence on harm to heritage assets; harm to the character, amenity and significance of Victoria Tower Gardens as a Registered Park and Garden; harm to the mature trees surrounding the park as well as on the availability of an alternative site for the memorial at the Imperial War Museum.

21. Westminster City Council appeared as the local planning authority. Whilst supportive of the principle of the memorial, it opposed its location in the Gardens on the basis of the sensitivities of the location and the impact on the historic environment and the risk of impact to the established trees on the west side of the Gardens. The Council considered that the Gardens might be a suitable location for a more modestly sized scheme.

22. Learning from the Righteous appeared in support of the application and was formally represented at the inquiry. It supported the location of the Memorial in Victoria Tower Gardens.

The Planning Inspector's Report

23. The Inspector's report to the Minister of State for Housing, dated 29 April 2021, is 243 pages long, with 60 pages of analysis. The Inspector identified the main considerations as including:

    a) The effect of the proposal on designated and non-designated heritage assets, including of specific relevance to the challenge; whether the proposed development would preserve the setting of the Buxton Memorial, a Grade II* listed building;

    b) Other material considerations, including any public benefits the proposals might bring; the principle of the proposed development; Victoria Tower Gardens as a location for the memorial, the consideration of alternative sites for the Memorial and the timing and content of the proposals.

24. In summary; the Inspector's main conclusions and recommendations on the issues relevant to this challenge were as follows:

    a) the harm from the development to the Buxton Memorial and the Gardens did not approach anything near the NPPF policy threshold of 'substantial harm' (IR 15.69; 15.94 and 15.117).

    b) Nonetheless, the measure of harm to the Buxton Memorial should be assessed as being of great importance and the weight to that harm should be characterised as considerable. The weight to be apportioned to the (moderate) harm to the Registered Park and Garden should be characterised as considerable (IR 15.69; 15.94 and 15.117).

    c) In terms of public benefit, the proposal fully meets the Holocaust Memorial Commission recommendation for a striking new memorial prominently located in central London. Location of the Memorial adjacent to the Palace of Westminster is a public benefit of great importance. These factors merited considerable weight in the heritage and planning balance (IR15.155-15.161).

    d) Alternative locations should be taken into account when determining the acceptability of the proposal if they would avoid an environmental cost (IR15.164).

    e) Whilst seeming to offer a benign alternative, the Imperial War Museum site lacks a detailed scheme that would meet the core requirements of the HMC and has clear constraints that may hamper delivery. The weight to be afforded to it was therefore very limited (IR15.169).

    f) The two other sites merited still lesser weight than the site at the Imperial War Museum (IR15.169).

    g) Achieving a memorial within the lifetime of survivors of the Holocaust has a resounding moral importance that can be considered a material consideration and a public benefit of great importance meriting considerable weight in the planning balance (IR15.170 -172).

    h) Weighing the public benefits of the proposal (including its location next to Westminster and the delivery of a Memorial within the lifetime of survivors) against the identified heritage harms, and taking account of the limited viability of alternative locations, the balance can be seen to clearly and demonstrably weigh in favour of the proposals (paragraph 196 (now 202) NPPF)(IR 15.186-15.189).

    i) On a fine balance, overall, the proposals cannot be judged to be in accordance with the development plan when read as a whole (IR15.279).

    j) However, the significant range of truly civic, educative, social and even moral, public benefits the proposals offer would demonstrably outweigh the identified harms the proposals have been found to cause. The outcome of this balance amounts to a material consideration of manifestly sufficient weight to indicate

in this case that determination other than in accordance with the development plan is justified (IR15.283).

25. The Inspector recommended that the application be approved, and planning permission granted.

The decision to grant planning permission

26. Following consideration of the Inspector's Report, the Minister granted planning permission by a decision letter dated 29 July 2021. The decision under challenge is the decision of the Minister. However, in the decision letter the Minister agreed with the Inspector's conclusions and recommendation. Accordingly, for the purposes of the present appeal it is not necessary to do more than look at the Inspector's report.

Grounds of challenge

27. The Trust applied for judicial review on five grounds, of which permission was granted on two Grounds:

> Ground 1 – The Planning Inspector (and Minister) applied the wrong legal test to the issue of whether there will be 'substantial harm' to the heritage assets within the Gardens. The correct application of the test would have led inevitably to the conclusion that the harm to the significance of the Buxton Memorial was substantial and which would have led in turn to a very different test for the acceptability of the proposal.
>
> Ground 4 – The Inspector (and Minister) erred in law in considering that in order to attract significant weight, the merits of any alternative sites must be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.

28. Permission was refused on a third ground:

> Ground 3 – The Inspector (and Minister) failed to address the provisions of the London County Council (Improvements) Act 1900, which creates a straightforward prohibition on using the Gardens for the provision of the Memorial in the manner proposed.

29. The Trust subsequently applied to renew its application for permission for judicial review on Ground 3. The parties agreed that the Trust's application should be considered on a rolled-up basis at the substantive hearing into Grounds 1 and 4. In his application to renew, Mr Drabble focussed on section 8(1) of the 1900 Act rather than section 8(8) which had been the focus of submissions before the Permission Judge. As refined by Mr Drabble, the ground is arguable, and I grant permission. Given the refinements to the Trust's case as developed during oral submissions at the hearing, including the production of the Local Law (Greater London Council and Inner London

Borough) Order 1965, I considered it appropriate (and of assistance to the Court) to allow the parties the opportunity to make short written submissions after the hearing.

The Court's jurisdiction under s288 Town and Country Planning Act

30. The correct approach to statutory reviews pursuant to s. 288 TCPA 1990 was summarised by Lindblom LJ in St Modwen Developments Limited v Secretary of State for Communities and Local Government [2011] EWCA Civ 1643, [2018] PTSR 746 at [6]. In summary; the relevant principles of focus in submissions by the parties are that:

    1) Decisions of the Secretary of State and his Inspectors are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues.

    2) The reasons for the decision must be intelligible and adequate enabling one to understand why the appeal was decided as it was and what conclusions were reached on the principal important controversial issues.

    3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision maker. They are not for the Court. An application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an Inspector's decision.

    4) The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision maker. Statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context.

Ground 1: Harm to heritage assets

The Planning Inspector and Minister applied the wrong legal test to the issue of whether there will be 'substantial harm' to the heritage assets within the Gardens. The correct application of the test would have led inevitably to the conclusion that the harm to the significance of the Buxton Memorial was substantial and which would have led in turn to a very different test for the acceptability of the proposal.

Legal framework

31. The legal framework for consideration of the impact of a proposed development on relevant heritage assets was common ground:

    a) In considering whether to grant planning permission the decision maker is under a general duty to pay special regard to the desirability of preserving the listed buildings potentially affected by the proposals, their settings and any features of special architectural or historic interest which they may possess (Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990). In

this case, the Listed buildings include the Buxton Memorial (Grade II* listed building).

b) The significance of a heritage asset derives not only from an asset's physical presence, but also from its setting. Great weight should be given to the asset's conservation. The more important the asset, the greater the weight that should be given to conservation. Harm to the significance of a designated heritage asset requires clear and convincing justification (NPPF 199, 200).

c) Where potential harm to designated heritage assets is identified, it needs to be categorised as either 'less than substantial' harm or 'substantial' harm (which includes total loss) in order to identify which policies in the NPPF apply (NPPF 200-202). Accordingly, the key concept is whether the harm will be 'substantial'.

d) Substantial harm to grade II listed buildings or registered gardens (which would include Victoria Tower Gardens) should be exceptional. Substantial harm to assets of the highest significance, notably grade II* listed buildings (which will include the Buxton Memorial) should be wholly exceptional. For development that will lead to substantial harm to a designated heritage asset, consent should be refused unless it can be demonstrated that the substantial harm is necessary to achieve substantial public benefits that outweigh that harm (NPPF paras 200-201).

e) Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal (NPPF 202).

f) Whether a proposal causes 'substantial harm' or 'less than substantial harm' will be a matter of judgment for the decision-maker, having regard to the circumstances of the case and the policy in the National Planning Policy Framework. In particular; the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker. This is subject to the decision maker giving considerable importance and weight to the desirability of preserving the setting of a heritage asset (Catesby Estates Ltd v Steer [2019] 1 P. & C.R. 5 per Lindblom LJ at [30]).

g) Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene. This kind of case is a good test of the principle stated by Lord Carnwath in Hopkins Homes Ltd. v Secretary of State for Communities and Local Government [2017] 1 W.L.R. 1865 (at paragraph 25) – that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly" (Catesby Estates Ltd v Steer [2019] 1 P. & C.R. 5 per Lindblom LJ at [30]).

Impact of the development on the historic environment – the Inspector's approach

32. In order to understand the Inspector's approach to the question of harm, it is necessary to understand how matters were put to him. The main parties disagreed on the correct approach to the assessment of harm to the significance of heritage assets. The position of the applicant, the Secretary of State, was that for substantial harm to be demonstrated "*very much if not all of the significance is drained away or that the asset's significance is vitiated altogether or very much reduced"*. This was said to be the threshold for substantial harm set down in the case of Bedford Borough Council v Secretary of State [2012] EWHC 4344 Admin. In contrast, the local planning authority, Westminster Council relied on the Planning Practice Guidance and the guidance that 'substantial' harm to the significance of a heritage asset can arise where the adverse impact of a development "*seriously affects a key element of (the asset's) special architectural or historic interest*" (paragraph 18)

33. The Inspector recorded the differences between the parties and his view of matters at IR15.11 and 15.12:

> *"15.11 In addition to disagreements on the magnitude of harm to DHAs between the parties, there is also divergence in the methodology to be applied to its calibration. The Applicant relies on the definition of substantial harm (and the calibration of lesser harms that flow from it) set out in the Bedford case, broadly defined as a high test. WCC on the other hand (though not making express reference to it in written evidence) prefer to rely on the example of substantial harm set out in paragraph 018 of the PPG, a definition, as I understand it from their oral evidence, which sets the test at a lesser height. Although also reliant on the PPG definition (but again with no reference in written evidence) TIS.SVTG & LGT apply a further, different approach, based on consultancy-developed methodologies for characterising the magnitude of harm. Lastly, other parties present a similar Bedford-based approach to harm calibration, though conclude that the magnitude of harm, specifically with regard to VTG as an RPG, should be judged as substantial."*
>
> *"15.12 My interpretation of this point, also bearing in mind paragraph 018 of the PPG has been formulated in light of the Bedford judgement, is that there is in fact little to call between both interpretations. Bedford turns on the requirement for the harm to be assessed as 'serious' (with significance needing to be very much, if not all, 'drained away') in order that it be deemed substantial. Alternatively, paragraph 018 indicates that an important consideration would be whether the adverse impact 'seriously' affects a key element of special interest. In both interpretations, it is the serious degree of harm to the asset's significance which is the key test. Moreover, in accordance with the logic of the Bedford argument, paragraph 018 explicitly*

acknowledges that substantial harm is a 'high test'. (emphasis added)

34. Mr Drabble submitted that the issue has been bedevilled by the application of the language to be found in the judgment of Jay J in Bedford Borough Council v Secretary of State for Communities and Local Government [2013] EWHC 2847 (Admin) at [24] which apparently requires the impact on significance to be such that "*very much if not all, the significance [is] drained away for harm to be regarded as substantial*." He submits that there is no justification for this gloss and there is accordingly an obvious danger that if one regards the requirement of substantial harm as being synonymous with much if not all of the significance of the asset being drained away then too high a test is being imposed. It is, he submitted, apparent from the Inspector's Report that this is what has happened in this case.

35. In my assessment, however it is apparent from IR15.12 that, having set out the parties' views, the Inspector came to his own interpretation of the relevant test for substantial harm which he expressed as "*the serious degree of harm to the asset's significance*." Mr Drabble accepted he could not object to this formulation of the test which reflects the wording of the Planning Practice Guidance and is an expression of Government policy. Similarly, he accepted that no issue could be taken with the Inspector equating 'substantial' with 'serious'.

36. The Inspector continued his analysis of the task before him at IR 15.13. He went on to describe, in practical terms, the identification of the measure of harm to the designated heritage assets individually and cumulatively and the apportionment of appropriate weight to the harm:

> *15.13 It is a high test indeed and I address these matters in detail below, calibrating the degree of harm identified to each DHA and the weight to be apportioned accordingly. The sum of such harms is then duly considered against any public benefits in the heritage balance anticipated in paragraphs 195 or 196 of the NPPF and, where appropriate, development plan policy."* (emphasis added)

37. It was common ground that no issue can be taken with the Inspector's statement that the test is a 'high test'.

38. Mr Drabble went onto submit that whatever view of matters the Inspector expressed in IR 15.12 - 13, the approach he actually adopted in his task of assessing harm was to apply a test of significance draining away. In this regard Mr Drabble pointed the Court to several passages in the Report (IR15.88; 15.117; and 15.187).

39. I am not however persuaded that the Inspector fell into the error suggested by Mr Drabble.

40. The Inspector assesses the harm to the setting of the Buxton Memorial at IR15.65 – 15.69 as follows:

"The Setting of the Buxton Memorial (BM), a Grade II Listed Building*

15.65 There is no purpose in repeating the assessments of the BM's special architectural and historic interest and significance previously set out in evidence. It is listed at Grade II, reflecting not only the conspicuous idiosyncratic flair of its designer, but also the nationally and internationally important events it memorialises. Despite its relocation from its intended place in Parliament Square, its present location in VTG, commemorating the courageous actions of lawmakers serving in the Palace of Westminster just to the north, remains an element of its special interest and significance.*

15.66 Beyond these primary attributes, it is clear that the open spatial context to the memorial is a constituent of its significance. One element of this significance is the formal, though opportunistic perspective of Dean Stanley Street, where the monument may be viewed and appreciated in framed long perspective. But a more relevant contributor is the sense of space around the structure, allowing the viewer to at first perceive its distant presence, then be drawn by its 'fanciful' play of forms, detail and colour and then, when close, appreciate its memorial purpose and importance.

15.67 As set out above, the safeguarding of the setting of the BM would be most successfully mediated in views looking north along the Embankment path, and along the Embankment itself. Here, the monument would retain its pre-eminence within its wider context. However, from other points, most particularly when viewing the older monument from within the UKHMLC courtyard, or from other points in close proximity to it, its setting would visually become quickly congested. More specifically at this point the radically differing aesthetic moods of existing and proposed structures would collide in uneasy and discordant juxtaposition. And so here, decisively, the visual dominance of the UKHMLC would unsettle and crowd the BM, significantly infringing the viewer's opportunity to settle and contemplate its purpose and architecture, and thus fully appreciate its multi-facetted significance. The wider effects of this relationship on the character and special interest of the park are explored below. (15.91-15.93)

…

15.69 Notwithstanding these effects, the BM would remain physically unaffected by the proposal, and in this respect, its special architectural and historic interest would be preserved. That said, this outcome would fail to preserve the setting of the

BM, a Grade II listed building, in accordance with the expectations of the Act, such a consideration the Courts anticipate being given considerable importance and weight. It would also be contrary to those of paragraphs 193 and 194 of the NPPF, which anticipates great weight being given to the conservation of DHAs and their settings. Accounting for these considerations, I characterise this harm to the setting of the Grade II* memorial as being of great importance. Although this measure remains well below the threshold of substantial, I nevertheless afford this a measure of considerable weight in the heritage balance."*

41. He further considers the impact of the development on the Buxton Memorial in the context of the Registered Park and Garden at 15. 90 – 15.94:

"15. 90 However, as I have determined above, despite the best efforts of the Applicant's multi-disciplinary design team, a successful relationship between the proposed structure and the BM has not been fully achieved. The setting of the Grade II structure would not be preserved, and it is necessary to consider this again here to understand the effect this could have the significance of the RPG.*

15. 91 It is clear to all that the present location of the BM, a relocation after its storage following removal from Parliament Square, has been chosen with some care and that its installation in 1957 represents one of the more prominent post-war interventions into the park. Arguably the location chosen on the axis of Dean Stanley Street at the end of an existing path within the park was one not too difficult to arrive at. After all, such axial devices have been used before in the park, for example in the initial siting of the Pankhurst Memorial on that of Great Peter Street immediately to the north. Such a location borrows the force and symmetry of existing views, whilst giving the monument sufficient space from the others already populating the park to the north (albeit that these had arrived at their respective locations only the year before).

15. 92 Despite the sense that the "fanciful" Gothic of Teulon's expressly architectural structure may have always felt more comfortable amid the hard urban enclosure of Parliament Square (it's intended initial location), it has nevertheless found its place within the park, a point of quiet remove, close to the Embankment and anchored by the axis of the path and streetscape to the west. The compelling logic of this location perhaps also explains a reticence about relocating the memorial as part of the present proposals. However, this too presents a no less difficult challenge: that of safeguarding the setting of the

existing structure whilst delivering the UKHMLC to its design brief.

15.93 This reconciliation is nevertheless pursued through demarking the immediate context of the existing structure, scribing the enclosure of the proposed precinct around it and softening the visual interface between the two with planting. Whilst this would seek to establish an honest and inevitably intimate new relationship between the two, it would not be achieved convincingly. The exuberance of Teulon's structure would sit uncomfortably with the more sober and restrained modernity of the proposal. Moreover, the space such an expressive historic structure needs to be properly appreciated would be demonstrably curtailed. This sense of awkward stylistic juxtaposition and visual congestion would be most obviously understood from views within the UKHMLC complex, but would also have resonances in other views from the north down the Embankment path and the new sinuous route. Whilst these adverse effects would be partly mitigated by the more open and appreciative way the BM would be experienced when viewed from the Embankment walk, it would be impossible to escape the sense that the existing structure's open setting would be materially compromised by the presence of the UKHMLC. It is agreed that the special interest of the BM and the contribution its setting makes to its significance represents a constituent element of that of the park. It follows as a matter of logic therefore that any harm to that significance in turn affects that of the RPG.

15.94 All these matters in respect of VTG as an RPG require drawing together. I conclude that the effect of the proposed development on the significance of VTG, a Grade II RPG, can be best summarised as follows: the primary cause of identified harm to the special interest and significance of the RPG would result from the adverse effect the proposals would have on the setting of the BM. This is compounded, to a very limited degree, by the potential harm to a limited number of trees within the park. However, this degree of harm must also be considered in the context of the sum of the significance of the RPG as a whole. Accounting for this calculation, and also allowing for the range of positive factors that would enhance the character of VTG as an RPG, I conclude that the measure of harm overall would be moderate. Nevertheless, accounting for the expectations of paragraph 193 of the NPPF that great weight be afforded to the conservation of DHAs, I afford this harm considerable weight in the heritage balance."

42. The Inspector draws his conclusions together on the effect on designated heritage assets as follows:

> *"…In respect of each key DHA, the BM, the RPG and the WAPSCA, the modest degree of harm to trees has been added to the final sum of harm in each…in no case, does this aggregated degree of harm to each asset individually approach anything near the substantial threshold established by either Bedford or the PPG. Furthermore, even when the individual harms to DHAs are considered cumulatively, as required, they again still fall well below the substantial threshold established by Bedford and the PPG. Having fully considered such harms, I now turn to the public benefits."* (IR15. 117) (emphasis added)

43. In support of his case, Mr Drabble placed emphasis on the reference to Bedford in the extract quoted above. He also referred to the section of the Report in which the Inspector conducted the heritage balancing exercise required by the NPPF (then paragraph 196 now paragraph 200) and the Inspector's reference to:

> *"15.187 Let us remember, for comparison, that substantial harm requires, in the case of Bedford, that the harm be assessed as 'serious' with significance needing to be very much, if not all, 'drained away'. Alternatively, paragraph 018 of the PPG indicates that an important consideration is whether the adverse impact would 'seriously' affect a key element of special interest. My reasoned judgement is that this bar has not been reached here and, contrary to the views of objecting parties, the harm, calibrated cumulatively at no greater than a medium degree above moderate, (still accounting for the great importance apportioned to the harm to the setting of the BM) would not come close to substantial for any asset, by either measure."*
> (emphasis added)

44. Finally, he pointed the Court to IR 15.88 in the context of the wider analysis of harm to the Registered Park and Garden) and to the Inspector's observation that *"claims that such effects…would in fact vitiate or substantially drain away the significance of the RPG, even justifying deregistration, are in my view considerably overstated…"* as further evidence in this regard.

45. In my judgment, the passages set out above demonstrate the Inspector performing his own straightforward, careful estimation and characterisation of the harm to the Buxton Memorial and, as a consequence, to the Garden. His analysis is a sophisticated and, at times, poetic calibration of the harm. He begins by acknowledging the architectural and historic significance of the Buxton Memorial and the open spatial context in which it sits (IR 15.65/6). Turning to harm, he expresses the view that the '*radically differing aesthetic moods of existing and proposed structures would collide in uneasy and discordant juxtaposition'*. The '*visual dominance of [the memorial] would unsettle and crowd the BM'* (IR15.67). He concludes that whilst the Buxton Memorial would remain physically unaffected by the proposal, it would fail to preserve its setting which he directs himself (correctly) as being of great importance and considerable weight, albeit that the harm '*remains well below the threshold of substantial'* (IR15.69). In the context

of the wider garden, he arrives at the view that "*the exuberance of the Teulon's structure would sit uncomfortably with the more sober and restrained modernity of the proposal*", albeit that "*these adverse effects would be partly mitigated by the more open and appreciative way the BM would be experienced when viewed from the Embankment walk*". He concludes that the measure of harm to the RPG would be moderate (IR15.94).

46. In this context, read fairly and as a whole, his references to the 'Bedford test' alighted on by Mr Drabble at IR15.117 and 15.187 are no more than the Inspector confirming, or cross checking his analysis, conducted by reference to his view of the test as the 'serious degree of harm to the asset's significance', by reference to the case advanced before him. In the case of IR15.88 the reference is no more than the Inspector repeating back the submissions made to him, to dismiss them as '*considerably overstated'*. It follows that I do not accept Mr Drabble's submission that the Inspector's reasoning was dependent on Bedford and thus in error. The Inspector formulated his own test, namely '*the serious degree of harm to the asset's significance'*. This is unimpeachable and Mr Drabble did not attempt to impeach the formulation or propose an alternative formulation.

47. Moreover, the exercise conducted by the Inspector is entirely consistent with the approach to paragraphs 195 and 196 (now 201 and 202) of the NPPF, stipulated by the Court of Appeal in City & County Bramshill Limited v Secretary of State [2021] 1 WLR 5761. The question whether there will be substantial harm to a heritage asset is a matter of fact and planning judgment and will depend on the circumstances. The NPPF does not direct the decision maker to adopt any specific approach to identifying harm or gauging its extent beyond a finding of substantial or less than substantial harm. There is no one approach to the question:

> *"74 The same can be said of the policies in paragraphs 195 and 196 of the NPPF, which refer to the concepts of "substantial harm" and "less than substantial harm" to a "designated heritage asset". What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. Whether there will be such "harm", and, if so, whether it will be "substantial", are matters of fact and planning judgment. The NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. It distinguishes the approach required in cases of "substantial harm … (or total loss of significance …)" (paragraph 195) from that required in cases of "less than substantial harm" (paragraph 196). But the decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting."*

48. On behalf of the Secretary of State, Mr Katkowski suggested that I should approach Bramshill with caution and he submitted that paragraph 74 cited above is obiter. Whilst

that might, strictly speaking, be true given the facts of the case, Lindblom LJ's observations directly concern the interpretation of the test of substantial harm and are, in any event, consistent with a line of authority from the Court of Appeal emphasising the self-effacing role of the Court in respecting the expertise of Planning Inspectors and guarding against undue intervention in policy judgments within their areas of specialist competence which do not lend themselves to judicial analysis. (See in this context Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37 and (R (Samuel Smith Old Brewery) v North Yorkshire County Council [2020] PTSR 221)).

49. Before leaving this ground, it is necessary to say a few words about the judgment of Jay J in Bedford Borough Council v Secretary of State [2013] EWHC 2847 (Admin). This is because Mr Drabble submitted the judgment has been misinterpreted, whilst on behalf of the Secretary of State, Mr Katkowski submitted that the ratio of the case is to be found, in part, at the end of paragraph 24 (the impact on significance was required to be serious such that very much if not all of the significance was drained away).

50. In Bedford, the question as to whether the Inspector had misconstrued or misapplied the policy concept of substantial harm was in issue before the Court ([11]). Jay J saw the epithets "*substantial*" and "*serious*" as essentially synonymous in the policy context: see [21] and [26]. In [25], he observed that the decision maker was looking for – *"… an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced"*.

51. Read in context, the final sentence of [24] is Jay J's encapsulation of the Inspector's application of the test of substantial harm in the decision letter which was before him to review.

> *24 "…What the inspector was saying was that for harm to be substantial, the impact on significance was required to be serious such that very much, if not all, of the significance was drained away.*
>
> *25 Plainly in the context of physical harm, this would apply in the case of demolition or destruction, being a case of total loss. It would also apply to a case of serious damage to the structure of the building. In the context of non-physical or indirect harm, the yardstick was effectively the same. One was looking for an impact which would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced.*
>
> *26 …I have considered whether the formulation "something approaching demolition or destruction" is putting the matter too high in any event. "Substantial" and "serious" may be regarded as interchangeable adjectives in this context, but does the phrase "something approaching demolition or destruction" add a further layer of seriousness as it were? The answer in my judgment is that it may do, but it does not necessarily. All would*

> *depend on how the inspector interpreted and applied the adjectival phrase "something approaching". It is somewhat flexible in its import. I am not persuaded that the inspector erred in this respect."*

52. It is plain that Jay J saw the Inspector's approach as essentially the same as the approach that he (Jay J) endorsed in [25] as a correct basis for addressing the question, i.e. a decision maker would properly both interpret and apply the concept of substantial harm in the NPPF, if s/he assessed whether the impact of the proposed development was sufficiently serious in its effect that the significance of the designated heritage asset, including the ability to appreciate that asset in its setting, was (if not vitiated altogether) at least very much reduced. Jay J considered the reference to significance being *"very much ...drained away"* as no more than an alternative, metaphorical means of expressing the concept of substantial harm. In considering that "substantial' and 'serious' may be regarded as interchangeable adjectives in this context" [26], his judgment is consistent with the advice in the Planning Policy Guidance that, when considering whether or not any harm is "substantial", an important consideration would be whether the adverse impact seriously affects a key element of special architectural or historic interest

53. Accordingly, read as a whole and in context, Jay J's judgment does not import a test of 'draining away' to the test of substantial harm. He was not seeking to impose a gloss on the term. The judgment in Bedford accords with the approach stated by the Senior President of Tribunals at [74] in Bramshill. It is clear from cases like Tesco v Dundee [2012] UKSC 13; R(Samuel Smith) v North Yorkshire County Council [2020] UKSC 3; Bramshill and others, that a word like 'substantial' in the NPPF means what it says and any attempt to impose a gloss on the meaning of the term has no justification in the context of the NPPF. The policy framework and guidance provide a steer that relevant factors include the degree of impact, the significance of the heritage asset under scrutiny and its setting. It is not appropriate to treat comments made by a Judge assessing the reasoning of an individual decision maker, when applying the test of 'substantial harm' to the circumstances before him/her, as creating a gloss or additional meaning to the test.

54. Accordingly, Ground 1 fails.

Ground 3: The London County Council (Improvements) Act, 1900

A failure to address the provisions of the London County Council (Improvements) Act 1900, which creates a straightforward prohibition on using the Gardens for the provision of the Memorial in the manner proposed.

The legal principles of statutory construction

55. In interpreting a statute, the Court is "*seeking the meaning of the words which Parliament used*". A phrase, or passage, must be read in the context of the section as a

whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained (R (O) v Home Secretary [2022] UKSC 3 (Lord Hodge at 29)).

The wording of the Act

56. It was common ground that the London County Council (Improvements) Act 1900 is a private Act of Parliament, promoted by London County Council, which provided the Council with statutory authority to carry out improvement works to the Thames Embankment area. The long title of the Act is:

> *"An Act to empower the London County Council to make an extension of the Thames Embankment and a new street and improvements at Westminster to widen Mare Street Hackney and to make other street improvements and works in the administrative county of London and for other purposes."*

57. The preamble states that *"Whereas it is expedient to confer on the London County Council (herein-after called "the Council'") powers to make the improvements and works herein-after described and it is also expedient to confer on the Council such powers as are herein-after set forth with regard to the raising of money for the purposes of this Act:"*

58. Sections 4 & 5 details the relevant improvements and works authorised by the Act which include:

> *"1) Thames Embankment Extension and Improvements at Westminster*
>
> *An embankment wall and an embankment on the foreshore of the River Thames in continuation of the existing river embankment south of the Houses of Parliament commencing at the present termination of the existing embankment at the south eastern comer of the Victoria Towne Gardens and terminating at the northern side of Lambeth Bridge*
>
> *A new street consisting in parts of widening of Abingdon Street and Millbank Street commencing in Abingdon Street opposite or nearly opposite the entrance to the Peers Office Court of the House of Lords and terminating at the western end of Lambeth Bridge"*

59. Section 6 entitles the Council to enter upon, use and take specified lands. Section 7 makes provision in relation to the construction of the embankment wall.

60. For present purposes, the critical section is Section 8, the side note to which states: "*For protection of the Commissioners of Works*". The recitals to the section state:

> *"8. Whereas the works authorised by this Act under the heading "Thames Embankment Extension and Improvements at Westminster" (herein-after referred to as "the Westminster improvement") will involve the occupation of certain lands vested in Her Majesty or vested in or under the control of the Commissioners of Works and will also necessitate some interference with the garden adjoining the Houses of Parliament known as the Victoria Tower Garden:*
>
> *……*
>
> *And whereas it has been agreed between the Commissioners of Works and the Council that the said works shall only be executed subject to and in accordance with the provisions herein-after set forth:*
>
> *And whereas for the purposes of the Act a plan has been prepared (in the section referred to as "the signed plan") which for purposes of identification has been signed by the Right Honourable Lord Brougham and Vaux the Chairman of the Committee of the House of Lords to whom the Bill for this Act was referred a copy of which plan has been deposited in the Office of the Clerks of Parliaments."*

61. Section 8(1) to 8(8) provide as follows:

> *(1) "The lands lying to the eastward of the new street described in this Act as consisting in part of widenings of Abingdon Street and Millbank Street which is in this section called "the new street" and between the said street and the new embankment wall shall be laid out and maintained in manner herein-after provided for use as a garden open to the public and as an integral part of the existing Victoria Tower Garden subject to such byelaws and regulations as the Commissioners of Works may determine:*
>
> *(2) The Council shall construct the new embankment wall to the satisfaction of and in accordance with plans approved by the First Commissioner of Works:*
>
> *(3) The Council shall to the satisfaction of the First Commissioner of Works clear and make up to a level suitable to the laying out of the garden the surface of the land between the new street and the new embankment wall to be laid out as a garden (which land is hereinafter referred to as "the new garden land") and in default of their doing so the Commissioners of Works may do all work necessary for that purpose and all costs incurred by the*

Commissioners in relation thereto shall be repaid to the Commissioners by the Council But nothing in this section shall authorise the Council to remove any trees now standing within the garden:

(4) The Council shall do all things necessary to vest the new garden land in the Commissioners:

(5) As soon as that land is so vested in the Commissioners of Works the Commissioners shall remove the existing railings and kerb on the west side of Victoria Tower Garden southward of a point thirty yards southward of the centre of the existing entrance to the Victoria Tower Garden opposite Great College Street and shall erect along the eastern side of the new street southward of the said point from which the existing railings and kerb are to be removed a kerb and railings of a suitable and for that purpose may if they think fit use the existing kerb and railings:

(6) The Commissioners of Works shall lay out as a garden the new garden land so vested in them and may also make such alterations in the paths bedding and turfing of the existing Victoria Tower Garden (in so far as any portion of it is not thrown into the new street) as they may think necessary to secure uniformity of design in the Victoria Tower Garden as extended under the provisions of this section:

(7) The Council shall pay to the Commissioners of Works the cost of the works to be executed by the Commissioners in respect of the removal and erection of railings and kerb and of altering and laying out the garden as before in this section mentioned Provided that the sum so payable shall not exceed five thousand pounds:

(8) The Commissioners shall maintain the garden so laid out and the embankment wall and kerb and railings enclosing it:"

(emphasis added)

62. Sections 8(8) – (14) make provision in relation to a variety of matters including the purchase of a house; identifying land to become part of the widened Street and vacant possession.

63. Sections 8(15) – (18) provide as follows:

"(15) The Council shall not under the powers of this Act alter the level of any streets or places which are under the charge management or control of the Commissioners of Works without having previously obtained the consent in writing of the First Commissioner to such alteration and the Council shall bear the

expense of adapting or adjusting the said streets or places to the requirements of the improvements:

(16) No building fronting the new street at the junction therewith of Great College Street shall be so erected that the main front wall at the north-east corner thereof shall be placed nearer than 80 feet to the line of the existing railings on the west side of the Victoria Tower Garden:

(17) Subject to the provisions of any future Act of Parliament with reference to the reconstruction of Lambeth Bridge and the approaches thereto the frontage of the buildings at the termination of the new street on the western side shall not project in front of the line marked H I on the signed plan:

(18) No new or additional building (including any addition to the height of a building) shall be erected on the west side of the new street other than buildings on the property of Her Majesty or the Commissioners of Works until the elevations and exterior design of such buildings have been approved by the Council and as regards buildings lying to the north of the line marked F G on the signed plan also by the First Commissioner of Works."

64. Subsequent clauses detail provisions for the protection of the Conservators of the River Thames; the London Hydraulic Power Company and other organisations as well as making provision for consequential matters.

65. In 1965, the Local Law (Greater London Council and Inner London Boroughs) Order (SI1965/54) was laid before Parliament and came into operation. Article 5 provides that: *"The enactments specified in Schedule 3 are hereby repealed to the extent mentioned in the third column of that schedule." S*chedule 3 provides that the London County Council (Improvements) Act 1900 is repealed "*other than sections 1 and 7 to 9 and so much of section 2 as is necessary to give effect to those sections."* Accordingly, section 8 of the Act remains in force.

Submissions of the parties

66. Mr Drabble submits that Section 8 (preamble) and section 8(1) provide in mandatory terms for the laying out and maintenance of the relevant land referred to in the Act as the 'new garden land' (s.8(3)) as a garden for the public. Overall, the new garden land is an integral part of Victoria Tower Gardens, and cannot even be used as a separate or distinct garden with a different design. Consistent with the statutory obligation, the new garden land has been maintained for the past century by the Commissioners and its statutory successors in title as a garden open to the public and as an integral part of Victoria Tower Gardens. That obligation currently falls on the Secretary of State for Culture Media and Sport as the owner of the new garden land and ultimate statutory successor to the Commissioners of Works.

67. Mr Mould (whose submissions were endorsed by Mr Katkowski for the Secretary of State) submits that the legislative purpose of the protective provision enacted under s.8(1) of the 1990 Act was (i) the incorporation into the then existing Victoria Tower Gardens of the area of land to the south formed by the extension of the Thames Embankment to the riverside and the re-alignment of Millbank Street to the west; and (ii) the laying out and maintenance of that land as a public garden forming an integral part of Victoria Tower Gardens, subject to regulation by the Commissioners, in whom the land was to be vested under s.8(4) of the 1990 Act. That legislative purpose had been fulfilled by no later than 1914, as is apparent from an Ordnance Survey map of that year. By that date and no doubt earlier, the new garden land had been laid out and was already under maintenance as a garden open to the public and as an integral part of Victoria Tower Gardens as it existed in 1900 (see s.8(1) of the 1990 Act). The statutory objective in s. 8(1) was achieved when Victoria Tower Garden was laid out and vested in the Commissioners to maintain. Or, to use the express language of s.8(1), to maintain "*as hereinafter provided*" as a garden open to the public. Those words plainly look forward to s.8(8) of the 1900 Act and the maintenance obligation therein stated. No further provision was needed to be made for the protection of the Commissioners as the owners of the new garden land – they were plainly to be trusted to control the future use or development of Victoria Tower Gardens in accordance with those byelaws and regulations which they saw fit to impose. There was neither need nor any purpose in Parliament imposing a statutory prohibition on the future use or development of the new garden land, in those circumstances the legislature entrusted such matters to the Commissioners' judgment. The plain words of s.8(1) of the 1900 Act impose no prohibition on development with the new garden land, or indeed any prohibition. Section 8(1) is concerned with requiring things to be done. It is not in any way (expressly or impliedly) concerned with prohibiting things from being done. Had Parliament intended s.8(1) to prohibit things being done in Victoria Tower Gardens after the new garden land had been laid out and integrated into the extended public garden, Parliament would have expressed itself in those terms. Mr Mould invited the Court to compare and contrast ss.8(15)(16)(18)(20)(21) of the 1900 Act, which contain express prohibitions. It is fanciful, he submitted, to suggest that Parliament nevertheless intended s.8(1) to operate as a prohibition by implication.

Analysis

i) Interpretation of Section 8 of the Act

68. The preamble to section 8 of the Act explains that the improvement works would necessitate the occupation of land under the control of the Commissioners or the Crown and interference with the garden already in existence (Victoria Tower Gardens as it was before the extension authorised by the 1900 Act). Accordingly, "*For protection of the Commissioners of Works*" (the side note to s.8 of the Act) it was agreed between the Commissioners and the Council that the works '*shall only be executed subject to and in accordance with'* the provisions of section 8. Section 8 includes, as is common ground, an extension (the new garden land) to the existing Gardens. The preamble refers to a plan signed by the Chairman of the Committee of the House of Lords. The Court was taken to an (unsigned) copy of plan which shows the new garden land coloured in

green. This is in contrast to an earlier Ordnance Survey map which shows a cement works, a wharf and other buildings in the same area.

69. Sections 8(1) - 8(8) create a cascade of obligations which include as follows:

- Section 8(1) provides in mandatory terms that the land shall be laid out and maintained for use as a garden for the public and integral part of Victoria Gardens.

- Section 8(3) provides for London County Council to carry out the clearance and levelling works to the satisfaction of the Commissioner of Works and to vest the land in the Commissioners.

- Section 8(6) provides for the Commissioners to lay the land out as a garden and do related works to secure uniformity of design in the extended Victoria Tower Gardens and

- Section 8(8) provides for the Commissioners to maintain the garden so laid out.

70. Laying out of the land as a public garden integral to the existing gardens was carried out and completed but section 8(1) and (8) provide a continuing obligation to maintain it. Section 8 has not been repealed and accordingly the obligation subsists. The question that arises is whether 'maintained' is to be understood as meaning that the land must be kept for use as a public garden or whether it is limited to meaning to the garden must be kept in good repair/maintenance for so long as it is used as a public garden.

71. I am of the view that the wording of Section 8(1) "*The lands…shall be laid out and maintained…for use as a garden open to the public"* is to be read as a continuing obligation to keep the land in use as a public garden. Mr Mould relied on the words 'in manner herein-after provided' in section 8(1) (*"The lands …shall be laid out and maintained in manner herein-after provided for use as a garden open to the public").* He submitted that the words look forward to s.8(8) of the 1900 Act and the maintenance obligation therein stated ("*The Commissioners shall maintain the garden so laid out and the embankment wall and kerb and railings enclosing it.")*. Thus, he submitted, the statutory objective in s. 8(1) was achieved when Victoria Tower Gardens was laid out and vested in the Commissioners to maintain. However, in my judgment, significance is to be attached to the use of 'maintained' in Section 8(1). Section 8(1) lays down the purpose and object of the section whilst subsections (2) – (8) contain the detail. It is not clear why section 8(1) which sets out the statutory purpose of the section would need to refer to 'maintained' if the word is to read as the relatively trivial obligation to keep the garden in good repair or tidy. It would suffice for 'maintained' to appear in section 8(8) alone. Further, the language in section 8(8) is similar to section 8(1) and the latter refers to 'hereinafter provided'. In my view the language of both section 8(1) and 8(8) is to the same effect – the land must be laid out and thereafter kept as a public garden.

72. Mr Mould's submissions rest on there being a temporal limit to the obligation for the land to be 'laid out and maintained' in section 8(1) of the Act but the words "*shall be laid out and maintained*" do not, of themselves, incorporate within them any sort of time limited expiry date. They suggest the opposite, namely an ongoing obligation ('laid out and maintained). There is, for example, no express wording to the effect that the garden must be kept in good repair, for so long as it remains a garden, which would have supported Mr Mould's interpretation.

73. I do not accept sections 8(15)-(18) of the Act merit the significance which Mr Mould sought to attach to them. He submitted that where Parliament considered it was regulating the future it said so expressly, as with section 8(17) which makes reference to 'subject to the provisions of any future Act of Parliament'. However, in my judgment sections 8(15)-(18) simply impose controls on works that could be carried out, or were not the subject of any absolute prohibition. Their existence does not address the issue of whether sections 8(1) and (8) are to be read as simply requiring a garden to be laid out which could thereafter be used or built upon as the Commissioners desired, or as requiring that the land be thereafter kept for use as a public garden.

74. I accept Mr Mould's submission that the plain words of s.8(1) of the 1900 Act do not impose a prohibition on development in the new garden land. He is correct to say that Section 8(1) is concerned with requiring things to be done but the words create a statutory purpose, which has the effect of imposing a fetter on activities that conflict with the statutory purpose.

75. Mr Mould relied on the reference in Section 8(1) to "*subject to such byelaws and regulations as the Commissioner of Works may determine*" ("*the land .....shall be laid out and maintained in manner herein-after provided for use as a garden open to the public…subject to such byelaws and regulations as the Commissioners of Works may determine")* to submit that future regulation of the Garden is left to the good sense of the Commissioners and no further provision needed to be made for the future or their protection. However, on the basis of the wording of section 8(1), I am of the view that the ordinary and natural reading is that the byelaws and regulations are intended to regulate the detail of the overall purpose, which is the provision of a garden for public use.

ii) Conclusion on the construction of section 8 of the Act

76. Accordingly, I arrive at the following construction of section 8 of the 1900 Act:

    1) On its ordinary and natural meaning, Section 8(1) of the 1900 Act imposes an enduring obligation to lay out and retain the new garden land for use as a public garden and integral part of the existing Victoria Tower Gardens. It is not an obligation which was spent once the Gardens had been laid out so that the land could be turned over to some other use or be developed or built upon at some point after it had been laid out whenever it suited those subject to the obligation.

2) Section 8(8) cannot be read as only covering repair or upkeep. The language is very similar to s.8(1) and the latter says in manner-hereinafter provided. Sections 8(1) and 8(8) are both to the same effect. They require the land to be laid out and thereafter kept as public gardens.

3) The detailed prohibitions in Section 8(15)-(18) do not detract from the substantive obligation in section 8(1). Sections 8(15) - (18) simply impose controls on works that could be carried out (or were not the subject of any absolute prohibition).

4) The repeal of the larger part of the 1900 Act, save for the prospective and continuing obligations in ss. 7-9, confirms the enduring nature of the obligations imposed by them.

5) As was common ground by the end of the hearing, the advent of the modern planning system has no bearing on the obligations in the 1900 Act.

iii) The pre-legislative material

77. The Trust produced evidence from Dr Gerhold, a former House of Commons Clerk and a Fellow of the Royal Historical Society and the Society of Antiquaries. In his witness statement, he stated that he was familiar with the Parliamentary process and with archival work. He explained that he undertook research on the history of the Act using the London Metropolitan Archives and the Parliamentary Archives. The bulk of the material relied on comprises Minutes of the London County Council Improvements and Parliamentary Committees. There are also minutes from Westminster Council (Westminster Vestry) and a letter from the First Commissioner of Works, a position within Government (later to become a Government Department). Dr Gerhold produced a detailed chronology of the history of the Act with references to the documents he had drawn upon to produce the chronology.

78. Mr Drabble submitted that his primary case on section 8 rested on the meaning of the words in the section and was not reliant on the pre-legislative materials produced by Dr Gerhold. Nonetheless, he submitted, the contemporaneous contextual evidence supported his interpretation.

79. No objection was taken at the hearing to Dr Gerhold's evidence by the other parties. His evidence was relied on by Mr Mould for his submissions in relation to the fulfilment of the statutory purpose of section 8(1) once the improvement works had been completed and the garden laid out as a garden, which I consider below. No party submitted before me that the Court could not have regard to the material produced by Dr Gerhold. The context of the Act as a whole includes its legal, social and historical context (Principles of Statutory Construction: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020) (11.1, 11.2 and 11.3)).

80. I turn to Dr Gerhold's chronology of the Act, supplemented with quotes from the documents he relied upon from the archives.

81. In 1867, the northern part of the Gardens was purchased by the Government of the day under the Houses of Parliament Act 1867 (0 & 31 Vict, cap 40). The land was purchased and cleared to reduce the fire risk to the new Palace of Westminster. The Act made no provision about the use of the land. In 1879, the Rt Hon W.H. Smith MP donated £1000 towards laying it out for public use. A further £1400 was voted for by Parliament. W.H. Smith MP asked the then Office of Works to record in a minute that the sum had been accepted to level, turf and gravel the ground "*in order that it may be thrown open to the public and become available as a recreation ground*". The minute requested has not been traced, but later correspondence around negotiations for the 1900 Act, refers to the Government being "*pledged to an agreement with the late Rt Hon WH Smith for the Gardens to be maintained as a public recreation ground*."

82. In 1898, a private syndicate proposed a scheme for rebuilding the Millbank area. The scheme was rejected by the Commons, partly because the plan involved building on the riverside rather than extending the existing open space:

> *"... the bill of the syndicate came on for discussion in the House of Commons. It was strongly opposed by representatives of the Council. Great objection was raised in the debate to the proposal in the bill to rebuild on the area to be cleared of wharves and buildings between Millbank-street and the river. It was contended that this should be laid out as an extension of the Victoria-tower-garden. The representatives of the Council, while not* [illegible but thought to be 'not'] *pledging it to any such scheme undertook that a scheme should be presented for the widening of Millbank-street and the embankment of the river, and that the Council would carefully consider whether it would not be possible to lay out the land between the street and the river as a garden. The bill was rejected by a large majority. It is to be feared, however, that, in the event of the Council not proposing a scheme of its own, the syndicate's scheme will be revived."*
>
> (Further Report of the County Council Improvements Committee, 25th May and 15th June 1898).

83. Prompted by the activity of the private syndicate, London County Council decided to bring forward its own scheme and instructed its Improvements Committee to prepare their own scheme for the area:

> *"Thames-embankment extension at Westminster*

The Council, on 29th March, 1898, passed the following resolution – "That it be referred to the Improvements Committee to prepare and bring up to the Council, at the earliest date practicable a scheme for the embankment of the Thames from the Victoria-tower-garden to Lambeth-bridge, including the widening of Millbank-street, and the utilisation of any surplus land which remains after the carrying out of the improvement."

(Further Report of the Improvements Committee, 25th May and 15th June 1898)

84. On 15 June 1898, the Improvements Committee reported on initial proposals to the Council. They assumed that the existing garden would be extended to Lambeth Bridge. They estimated that the net cost of the scheme would be £642,000. They commented that if, instead of laying out a garden, the land was built on, the cost would only be £71,900. They noted that the difference in cost of £570,600 could not be justified for four acres of land unless Parliament was willing to contribute:

"In pursuance of this reference we have carefully considered a scheme… We also assumed for the purpose of the scheme that all the houses and wharfs east of Millbank-street would be removed, and that the existing garden to the south of the Houses or Parliament would be extended to Lambeth-bridge. If such a scheme were undertaken, Millbank-street being increased in width to 60 feet, the estimated net cost of the necessary property, after deducting recoupment, would be £601,500. To this must be added the cost of constructing the embankment, and making up the widened road, such cost being estimated at £41,000. The total net cost of the scheme is therefore estimated at £642,500.

If in lieu of laying out the land to the east of the street as a garden, the site should be let on building leases, the new buildings to have a frontage to the river and a road between them and the river, the recoupment would be enormously greater and the estimated net cost of the scheme would then be no more than £71,900. The difference between this and the £642,500 (i.e., £570,600) represents the cost to the Council of laying out the land east of Millbank-street as a garden. The area of this land is some 184,000 square feet, or about 4 acres. While recognising the importance of such an improvement in throwing open Millbank-street to the river and extending the public garden, we feel that having regard to other public improvements required in all parts of London, the outlay of £570,600 on the acquisition of about 4 acres of garden could not be justified unless Parliament should be prepared to make a large contribution towards the cost, in view of the importance of improving the access to the Houses of Parliament from the south, and of removing further from them the buildings in Millbank-street."

(Further Report of the Improvements Committee, 25th May and 15th June 1898,

85. The County Council then proposed a scheme in which the land between Millbank and the river would be laid out as a garden. However, in order to increase the County Council's bargaining power with the Government, the Council amended the wording of the resolution so that it would not be committed to laying out the land by the river as a garden:

> *"... the chairman of the Improvements Committee accepted, and the Council adopted, a further amendment moved by Sir Arthur Arnold and seconded by Mr Verney, to provide that Millbank-street should be widened to either 70 or 80 feet, and* ***substituting the words "deal with" for the words "lay out as a garden" in recommendation (a)."***
>
> (Improvements Committee Adjourned Report, 13 March 1900,
>
> *"In the discussion in the Council the opinion was expressed by some members that the Government ought to contribute more to the whole scheme, and* ***we understood that the object of Sir Arthur Arnold's amendment was to assist us in our further negotiations with the Government and the local authority****. When the chairman of the Committee accepted the amendment in the Council he stated that the Chancellor of the Exchequer considered that the Government was not interested in the extension of the garden, but the chairman expressed his willingness to accept the amendment which would enable further negotiations to be opened up with the Government."*
>
> (Improvements Committee Adjourned Report, 13 March 1900, (emphasis added).

86. On 4 July 1899, the Council approved the proposal for submission to Parliament:

> *"Resolved – That, subject to the Council being relieved from widening Abingdon-street, and subject to a contribution by the local authority of £100,000, the Council do apply to Parliament in the session of 1900 for powers to embank the Thames from Victoria-tower-garden to Lambeth-bridge, to widen Millbank-street to 70 or 80 feet****, to acquire and deal with the land between the river and Millbank-street,*** *and to acquire and deal with the property between Millbank-street and Tufton-street, in general accordance with the scheme shown on the plan approved by the Improvements Committee on 7th June, 1899."*

(London County Council Minutes, 4 July 1899) (emphasis added)

87. On 12 July 1899, Westminster Vestry agreed to contribute £100,000 on the condition that the land between Millbank and the river would be converted into a public garden:

> *"Resolved – That this Vestry, recognising…the Westminster Improvement Scheme communicated to them by the London County Council… (3) assent to a contribution of £100,000 towards the Westminster Improvement Scheme of the London County Council, subject to the understanding:…that the space on the East of Millbank-street from the Victoria Tower-garden to Lambeth-bridge be converted into a public garden."*
> (Westminster Vestry minutes, 12 July 1899) (emphasis added)

88. On 11 October the Improvements Committee proposed an amended scheme. The new scheme included a realignment of Millbank so that it was closer to the river. This made more land available for building and reduced the overall cost of the scheme.

> *"Our negotiations with the Government have been somewhat protracted, but we are glad to be in a position to report that by slightly amending the original plan we have obtained the approval of the Government to the scheme, and an undertaking on their part to assist with the Abingdon-street portion. The amendment in question consists chiefly in the alteration of the line of the proposed street.* ***By somewhat altering the line so as to bring the street nearer the river than was originally proposed, a larger amount of land will be available for the purpose of recoupment, and the cost of the scheme to the Council will be accordingly reduced.*** *This amended plan involves the acquisition for the purpose of addition to the public way, of a narrow strip of the existing Victoria-tower-gardens. For the scheme to be complete it is also necessary that portions of the sites of five houses in Abingdon-street, four of which belong to the Government, should be given up, and we have now received a letter from the Lords Commissioner of HM Treasury approving this amended scheme."*
>
> (Report of the Improvements Committee, 11 October 1899) (emphasis added).

89. The Council approved the amended scheme. In around November to December, the Bill was deposited before Parliament accompanied by a plan which did not specify that the land by the river was to become a garden.

90. On 14 December the First Commissioner of Works wrote to the Council objecting that the Bill did not specify the land by the river becoming a garden:

> *"I am to mention, however, that the draft Bill does not fully or accurately provide for carrying out the arrangement provisionally agreed to by the First Commissioner and the Treasury. In particular, the First Commissioner notices that* ***it is not specified that there shall be a Public Garden****, to be formed and maintained by the Council,* ***between the east side of the diverted roadway and the River, in continuation of the Victoria Tower Garden, down to Lambeth Bridge.*** *This public benefit was, in the mind of the First Commissioner, one of the principal considerations in favour of giving up a strip of the existing garden."*
> (Letter on behalf of the First Commissioner of Works to the LCC, 14 December 1899) (emphasis added)

91. On 23 February 1900, the First Commissioner of Works wrote to the Council again insisting that the Bill had to provide for the land by the river to become a garden:

> ***"The Bill should provide, as part of the improvement, for a continuation of the Ornamental Garden****, called the Victoria Tower Garden,* *as far south as Lambeth Bridge, over the space between the new roadway of Millbank Street and the Embankment.* ***This public benefit, as in the first place proposed to the First Commissioner, was one of the principal considerations in his mind in favour of giving up a strip of the existing garden, to maintain which as a public recreation ground the Government are pledged by an agreement with the late Rt. Hon. W.H. Smith M.P. who contributed a great part of the cost of laying it out****."*
> *"As regards the future maintenance of the garden, the First Commissioner considers it essential, in order to ensure uniformity in appearance and regulation between the present garden and its continuation, that both should be under one management… to be maintained by this Board as a garden for public recreation".*
> (First Commissioner of Works' letter dated 23 February 1900) (emphasis added).

92. On 28 February 1900, the Council's Improvements Committee advised the Council's Parliamentary Committee of the First Commissioner's proposed amendments. The Improvements Committee agreed with the First Commissioner, on the basis the Council

had approved plans showing the land as a garden in July and October 1899 which had been the basis for negotiation:

> ***"(1) The First Commissioner contends that the Bill should make it clear that the land between the new road of Millbank Street and the Embankment is to be kept as a garden and is not to be built upon as this was the understanding upon which he agreed to give up the strip of the Victoria Tower Garden.***
> ***The Improvements Committee fully concur*** *with the insertion in the Bill of such a clause, particularly as the Council, on 4th July and 24th October, 1899, decided that the application to Parliament should be made in accordance with the plan submitted to the Council on those dates. On each occasion the plan shewed the land between the new Millbank Street and the river as intended to be kept as a garden. This, in fact, formed the basis of the negotiations with the Government and with the local authority in regard to the improvement, and a condition attached to the offer of the local authority to contribute £100,000 towards the cost of the scheme."*
> (Minutes of Improvements Committee Meeting, 25 February 1900) (emphasis added)

93. A report by the Improvements Committee emphasised that the intention all along had been to extend Victoria Tower Gardens and the Government's decision to give up a small part of the existing Victoria Tower Gardens and five houses in Abingdon Street required for the scheme was conditional on the provision of a garden, as was Westminster Vestry's contribution of £100,000. It noted that it would not be justifiable for the Council to claim a concession from the Government but keep a discretion to either lay the land out as a garden or to build on it. The report also stated that Parliament would be certain to reject the bill given that the private syndicate's plan was rejected because they proposed to build on the land:

> *"From what we have stated it will be seen that the amended scheme approved by the Council was based on the laying out of the land as a garden, that the Government contribution of the strip of the Victoria-tower-garden and the five houses in Abingdon-street was on the same basis, and that the Westminster Vestry made it a condition of their promise to contribute the £100,000. It could not for a moment be contended that the Council would be justified in claiming from the Government the concession of this strip of the Victoria-tower-garden and the five houses in Abingdon-street,* ***leaving it open to the Council either to lay out the land between the road and the river as a garden or to build upon it at its discretion***. ***It is certain that a scheme to build on the land would not obtain the sanction of Parliament,*** *as the scheme introduced by the syndicate was rejected because it was proposed to so deal with the land.*

We have accordingly expressed to the Parliamentary Committee our unanimous opinion that the land should be kept as a garden, and we have asked that Committee to insert the necessary clauses in the Bill.

...

The scheme for which parliamentary sanction is sought, however, will, after deducting the contribution from the local authority and allowing for amounts to be received by the levying of an improvement charge, cost the Council only about £300,000. For this sum a great public improvement will be effected, completing the most important of the very few remaining links in the embankment of the Thames from Blackfriars to Chelsea, widening the approach to the Houses of Parliament and Lambeth-bridge, and getting rid of the reproach which Millbank-street now presents, and greatly improving the district between this street and St. John's Church. ***We feel therefore that we are fully justified in asking the Parliamentary Committee to advise the Council to insert the necessary clauses in the bill making definite provision for the land between the new Millbank-street and the river being kept as a garden for the use of the public for ever."***

(Report of the Improvements Committee, 13 March 1900)

(emphasis added)

94. On 1 March 1900, on the Second Reading of the Bill in the Commons, the First Commissioner said that the bill must be amended to provide that the land between Millbank and the river be laid out as a garden, and that he would otherwise ask the House to reject the bill on its Third Reading.

"THE FIRST COMMISSIONER OF WORKS

(Mr. AKERS DOUGLAS (Kent, St. Augustine's)

I desire to state to the House the attitude of the Government with reference to this measure. We recognise that it aims at a great improvement, but at the same time there are some important Amendments which we must insist on having introduced into the Bill. ***One of the Amendments is that the whole space between the proposed new road and the river should be laid out in continuation of the Victoria Tower Gardens****.* ***There is really no difference in principle between the Government and the County Council as regards the nature of the Amendments.*** *The County Council and the Government would be sorry to see the improvement scheme checked, and I do not propose to object to*

the Second Reading, but I reserve to myself the right to ask the House to reject the Bill on the Third Reading unless the Amendments are inserted."

(Hansard, Volume 79, debated on 1 March 1900) (emphasis added).

95. On 20 March 1900, the Council agreed to accept a clause specifying that the land between Millbank and the river was to be laid out as a garden:

"The Council considered the following recommendation in the report brought upon 6th March –

London County Council (Improvements) Bill – Westminster improvement

2 – That the Parliamentary Committee be authorised to insert in the London County Council (Improvements) Bill a clause to provide that the land between the new Millbank-street to be formed in connection with the Westminster improvement, and the embankment, shall be laid out as a garden. [Adopted]"

(London County Council Minutes, 20 March 1900)

96. Between 2 and 4 May 1900, the Westminster improvements clauses of the bill were considered by the Commons Select Committee on the London County Council (Improvements) Bill. The Committee agreed the amendments to the Bill. On 11 July 1900 the Lords Select Committee on the London County Council (Improvements) Bill considered the Bill. The [Lords] Committee rejected the proposed realignment of Millbank.

97. On 24 July 1900, the Council considered reports from its Improvements and Parliamentary Committees. It agreed to accept the Lords' Committee's proposal and proceed with the improvements on the condition that the Committee approved the plan first proposed by the Improvements Committee in June 1899:

"Resolved – That the Council do proceed with the Improvements Bill, subject to the Select Committee of the House of Lords agreeing that the new street from the southern end of Abingdon-street to Lambeth-bridge shall be carried out in general accordance with the route shown upon the plan approved by the Improvements Committee on 7th June, 1899, sanctioned by the Council on 4th July, 1899, and as shown by blue lines upon the cartoon plan now submitted to the Council, including the widening of the northern end of Abingdon-street as already arranged."

(Special Report of the Improvements Committee, 24 July 1900,

98. On 26 July the Lords Committee implicitly agreed to the June 1899 plan. On 6 August 1900 the Bill received Royal Assent.

iv) Analysis of the historical context

99. The archived documents uncovered by Dr Gerhold bring the Preamble to section 8 of the Act, to life. In particular, they demonstrate that the use of the land in question for a garden was a central part of negotiations during the passage of the 1900 Act. As the First Commissioner explained in his letter of 14 December 1899 *the 'public benefit'* of a public garden *'was, in the mind of the First Commissioner, one of the principal considerations in favour of giving up a strip of the existing garden."*

100. Mr Mould relied on the context in submitting that in return for the disadvantages to the Commissioners of the works, section 8 ensured the land was developed as a garden and not given over to buildings as it had been previously. However, once Millbank had been widened and the gardens laid, as envisaged in the plan in 1900, the legislative purpose of s.8(1) had been fulfilled. The statutory objective in s. 8(1) was therefore achieved when the Garden was laid out and vested in the Commissioners to maintain. This had happened, he submitted, by the latest in 1914 as is apparent from an Ordnance Survey map of 1914. In this context he submitted that no further provision was necessary for the future regulation of the Garden, which could be left to the good sense of the Commissioners using their powers under bylaws and regulations.

101. Mr Mould relied on an Ordnance Survey Map of 1914 which added cogency to his submission that the statutory objective had been fulfilled by the laying out of the Garden. However, the Ordnance Survey map in question post-dates the Act by 14 years. In my judgment, Mr Mould's submissions fall to be tested by their implication that as soon as the improvement works were completed, the protective provision in section 8(1) fell away, with the result that the new garden land could be used for another purpose or built upon again. Viewed from the perspective of 120 years later, this may seem unobjectionable. However, in my judgment, the context demonstrates that it would not have been considered acceptable to those involved in the negotiations of the Act that, say, four – six months after Millbank had been widened and the Garden laid out as extended, the new garden land could be used for some other purpose or built upon. The provision of a garden was of central importance to the negotiation of the Act and its passage into law. A scheme for rebuilding the Millbank area, proposed by the private syndicate in 1898, had been rejected by the Commons, partly because the plan involved building on the riverside rather than extending the existing open space. Mr Mould submitted that the future of the garden could be left to the good sense of the Commissioners. However, the context reveals that it was not just the Commissioners who had an interest in the use of the land as a garden. Westminster Vestry had donated £100,000 to the scheme conditional on the provision of a garden. Moreover, in 1879, the Rt Hon W.H. Smith MP donated £1000 towards laying it out for public use. A further £1400 was voted for by Parliament. W.H. Smith MP asked the then Office of Works to record in a minute that the sum had been accepted to level, turf and gravel the

ground "*in order that it may be thrown open to the public and become available as a recreation ground*". The minute requested has not been traced, but later correspondence around negotiations for the 1900 Act, refers to the Government being "*pledged to an agreement with the late Rt Hon WH Smith for the Gardens to be maintained as a public recreation ground*." In my judgment, the historical context is clear and supports Mr Drabble's interpretation of the wording of section 8 as providing an enduring obligation to keep the land for use as a public garden.

102. Both Mr Drabble and Mr Mould made submissions on the following extract from the Report of the Council's Improvements Committee dated 13 March 1900:

> *"We feel therefore that we are fully justified in asking the Parliamentary Committee to advise the Council to insert the necessary clauses in the bill making definite provision for the land between the new Millbank-street and the river being kept as a garden for the use of the public for ever."* (emphasis added)

103. Mr Drabble did not seek to rely on the extract for his primary case but submitted that, to the extent that the Court considered it necessary to resort to external aids, the reference in the extract to the land 'being kept as a garden for the use of the public for ever" supported his interpretation. Mr Mould submitted in response that the absence of any reference to 'for ever' in the Act indicated that Parliament had not accepted the Committee's aspiration that the garden should be forever. The Trust was, he submitted, asking the Court to infer that, notwithstanding that those words are notably absent from s.8(1) of the 1900 Act, nevertheless they are to be read into that enactment as representing Parliament's true intention. That contention was, he said, simply unsustainable.

104. Both Counsel were, at this juncture, using pre-legislative material to elucidate meaning, rather than context. In R(O) v Secretary of State Lord Hodges expressed the view that "*none of these external aids displace the meanings conveyed by the words of a statute that after consideration of the context are clean and unambiguous and which do not produce absurdity"* [30], Lady Arden was however prepared to consider that: "*There are occasions when pre-legislative material may, depending on the circumstances, go further than simply provide the background or context for the statutory provision in question. It may influence its meaning*." [64]. She considered the benefit of doing so as enabling the Court to reach a better-informed interpretation of a provision [66]).

105. The difficulty in the present case is that the material relied on to elucidate meaning is the minutes of a Committee of the Promoter of a private Bill, a category of material not in the contemplation of Lord Hodge and Lady Arden in R(O) v Secretary of State. The parties did not address me on the admissibility of the material. My conclusions on the construction of section 8 of the Act, do not rely on the pre-legislative material. However, to the extent the Court is able to rely on the pre-legislative material to elucidate meaning

(in addition to context) then, in my view, it provides strong support for the interpretation I have arrived at on the basis of the wording of section 8.

106. Finally, I address briefly, the submission by Mr Mould and Mr Katkowksi that the Gardens had accommodated a number of structures over the years, including the Buxton Memorial, which had not been considered to be contrary to the 1900 Act. I do not consider factual developments since the passage of the Act to be of assistance to my task of ascertaining the meaning of the wording of section 8 of the 1900 Act.

The 1900 Act as a material consideration

107. Mr Drabble submitted that the existence of the 1900 Act makes the Holocaust Memorial effectively undeliverable. Deliverability was a material consideration which the Inspector failed either adequately, or at all, to take into account. This failure has led to an error of law. Mr Mould disputed this analysis. Restrictions in other statutes are ordinarily not material considerations which the planning decision maker is obliged to consider. Mr Mould pointed in this regard to R v Solihull Borough Council, Ex parte Berkswell Parish Council (1999) 77 P. & C.R. 312, considering the Berkswell Enclosure Act 1802. By analogy with that case, no party to the public inquiry into the planning application advanced the alleged statutory restriction as a material consideration which the planning decision maker must take into account and evaluate. If and insofar as s. 8 of the 1900 Act may be found to impose an impediment on the delivery of the Memorial in accordance with the planning permission, that is a matter for those responsible for construction of the Memorial.

108. It is trite law that in deciding whether or not to recommend the grant of planning permission the Inspector (and subsequently the Minister) were obliged to have regard to material considerations (section 70(2) of the Town and Country Planning Act 1999).

109. I accept Mr Mould's submissions to the extent that, in general terms, the grant of planning permission sanctions the carrying out of a development which otherwise would be in contravention of the statutory prohibition against, in general, the carrying out of any development of land without planning permission. It establishes that the construction of a scheme is satisfactory on planning grounds. That decision is without prejudice to any further consents which may or may not be required for implementation of the planning permission. Someone who obtains planning permission may have to overcome any number of hurdles when seeking to implement the permission.

110. However, in this case, when considering the credibility and viability of alternative sites, the Inspector identified the deliverability of the proposal and, in particular its timing as a material consideration meriting considerable weight:

> *"Timing*
>
> *15.170 The HMC report is entitled 'Britain's Promise to Remember'. Now, 75 years after the liberation of the camps, for many in the Jewish community and most poignantly for survivors themselves, this proposal heralds a commitment by the British*

Government to fulfil the recommendations of the HMC. As such, this would represent not only a commitment to honour the memory of the millions lost to the Holocaust, but also a testament to the courage and resilience of those who survived it. This is a matter of importance and, though unusual in planning terms, it is of material weight that such a monument should be raised within the lifetime of at least some of those survivors so that this commitment is seen to be honoured in their living memory.

15.171 In the event the Minister was to refuse permission for the UKHMLC in VTG, as BD points out, this would, in all probability, not be the end of the project. It is suggested that this would be a "beneficial outcome", and that it would probably be sited "at the Imperial War Museum or some other more suitable site". This may or may not be the case. What is clear however is that the detailed process of selection, evaluation, preparation, design, consultation and formal consideration of a new proposal would begin anew, with all the gestation time this implies. If the programme for the current project is applied, this suggests approximately five years of further work. We know that a number of survivors who saw the outcome of the HMC will not have lived long enough to learn of the outcome of this Inquiry. Another five years of renewed planning would only but add to their number.

15.172 Whilst the matter of timing alone would not be of determinative weight, any such new scheme and its location must after all achieve HMC expectations and meet development plan and statutory planning requirements. But achieving a memorial within the lifetime of survivors, so seeking to honour the living as well as the dead, has a resounding moral importance that can legitimately, in my view, be considered a material consideration and a public benefit of great importance, meriting considerable weight in the planning balance in this case."

111. If, as I consider to be the case, installation of the Memorial in the Gardens is contrary to the statutory purpose of section 8 of the 1900 Act then in my judgment this is a material consideration, given the Inspector's emphasis on the importance of the need to deliver the Memorial within the lifetime of the Holocaust survivors. I note that, in May 2020 at least, the Government Legal Department appeared to be of the same view:

"....All substantive matters relating to the planning application will be for the appointed Inspector to consider and to report to the Minister of State in accordance with the procedure laid down by The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules"). Those matters include section 8(1) of the 1900 Act, insofar as it is engaged by the planning application. The Inspector must consider all material considerations, including any relevant

> *legislation, in preparing the inquiry report under rule 17 of the Inquiries Procedure Rules. All parties to the inquiry will have the opportunity to make submissions on those matters to the Inspector at the inquiry."*
>
> (pre-action correspondence dated 18 May 2020)

Raising a new point on appeal

112. The third aspect of Mr Mould's response on this ground was that the Inspector cannot be criticised for not considering the 1900 Act when it was not raised before him. The Trust was well aware of the point of statutory construction, having raised it with the Minister in advance of the inquiry but it did not pursue the matter at the inquiry. It is, he submitted, not tenable to sustain an argument under s288 of the Town and Country Planning Act that the Court should now interfere with the decision of the Minister to grant planning permission on the basis of the disputed effect of private legislation, a point that was only raised in the present proceedings after the decision to grant planning permission had been made. The Inspector cannot be criticised for not considering a matter which the Trust did not raise when it had the opportunity to do so.

113. In response, Mr Drabble submitted that there is no general rule preventing a party from raising an argument in a planning challenge that was not advanced by the party before the Inspector. A person with standing is entitled to a lawful decision. Mr Drabble relied on the following dicta of the Deputy High Court Judge in South Oxfordshire DC v Secretary of State for the Environment Transport and the Regions [2000] 2 All ER 667:

> *"I do not think that there can be any general rule that a party to a planning appeal decision is to be prevented from raising in a challenge to that decision an argument that was not advanced in representations made on the appeal. If the inspector has omitted a material consideration which could have affected his decision the decision may on that account be rendered unlawful, notwithstanding that the matter was not raised in the representations…"*
>
> *"In an appeal against the refusal of planning permission…the issue, defined by the appeal, is whether planning permission should be granted; and the test of materiality is essentially that of relevance (see Stringer v Minister of Housing and Local Government [1970] 1 WLR 1281 at 671 (j) - 678 (b))."*

114. In response, Mr Mould pointed out that the Deputy High Court Judge had nonetheless refused permission for the introduction of other arguments which could have been, but were not, raised, at the inquiry and which would have necessitated factual inquiry:

"the grounds of challenge were set out in the notice of motion. In the course of the hearing, Mr Harper sought permission to amend the notice by adding additional grounds. There was no objection to certain of the proposed additions by Mr David Elvin for the First Respondent and Mr David Holgate QC for the Second Respondent, and I allowed those. I refused permission for the other amendments because they sought to advance arguments that could have been raised, but were not raised, at the inquiry. If they had been raised, the Second Respondent would almost certainly have wished to call further evidence and/or have advanced arguments to deal with them. I will say what the points were later. It is sufficient for me to say now that I did not consider the interests of justice required that the council should be allowed to pursue them on this application" (671 at g) -h))

115. The same point about the significance of factual inquiry was made in Trustees of the Barker Mill Estates v Test Valley Borough Council [2016] EWHC 3028:

"77 In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information…" (Holgate J)

116. Turning to the facts and circumstance of the present case.

117. Firstly, as per the stipulation of Holgate J in Trustees of Barker Mills, I have examined the nature of the point raised and I have concluded that, in my judgment, the 1900 Act is a material consideration because of the impediment it presents to delivery of the Memorial in Victoria Tower Gardens and the importance attached by the Inspector to the delivery of the Memorial in the lifetime of Holocaust survivors. In South Oxfordshire, the Judge identified the omission of a material consideration as a scenario in which the Inspector's decision could be rendered unlawful notwithstanding that the point had not been raised in representations.

118. Secondly, the point was raised at the inquiry. It was raised by Mr Gerhold. The Inspector's decision letter records that 131 written representations were received at the appeal stage. He summarises the representations including the following:

> *"These changes would breach the condition of the donation of £1,000 made by the benefactor W H Smith in 1879, that the land was kept a made by the benefactor W H Smith in 1879, that the land was kept as a garden for the use of the inhabitants of Westminster. It would be in direct contravention of the 1900 Act under which the land was to be used as a park in perpetuity. (12.15)"*

119. I was provided with a copy of Mr Gerhold's written objection which states as follows:

> *"Building on VTG as proposed would be illegal under the Act by which the southern part of it was acquired, as the Act requires that the land be maintained as 'a garden open to the public' (London County Council (Improvements) Act 1900, section 8, still in force). The Government was apparently unaware of this until it was brought to its attention in March 2019 (parliamentary answer 229633). This may not be in strict terms a planning matter, but it provides evidence of an inadequately prepared scheme."*

120. In my view, Mr Mould is in difficulty therefore in submitting that the point was not before the Inspector. It was before the Inspector, albeit it in modest fashion, via written representations and not from one of the main parties. Mr Mould sought to rely on Dr Gerhold's assessment of the point as "*not be[ing] in strict terms a planning matter*". Dr Gerhold is, however, a historian not a lawyer. Moreover, the implication of Mr Mould's submission is that the views of members of the public attract less weight. This runs contrary to the recognised importance of the public to participate in environmental decision making (see for example the UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters). Procedural fairness at a planning inquiry requires the Inspector to consider significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so. To hold otherwise would undermine the value of public participation in environmental decision making (Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145 and Secretary of State v Claire Engbers) [2016] EWCA Civ 1183))

121. Thirdly, the Secretary of State, the applicant for planning permission, was on notice of the point and could reasonably have anticipated that it might be material. On 31 July

2019, the Trust's solicitors wrote to the Secretary of State contending that locating the Memorial in the Gardens would breach s. 8(1) of the 1900 Act:

> *"…there is an important legal impediment which prevents the proposal proceeding at all…*
>
> *Section 8 of the London County Council (Improvements) Act 1900, the statute empowering the LCC to create the southern part of VTG and to pass it to (what was then) the Commissioners of Works, requires that the area in which the Memorial is proposed to be built "shall be laid out* ***and maintained****…for use* ***as a garden open to the public and as an integral part of the existing Victoria Tower Garden****". We have taken advice form counsel Mr Thomas Seymour of Wilberforce Chambers. He has reviewed the proposal and plans and confirms that developing a substantial part of the land as a Memorial and Learning Centre would, unarguably, be in breach of that provision.*
>
> *It would accordingly be unlawful for the Secretary of State, who has ministerial responsibility for the Holocaust Memorial project, to seek to proceed with a proposal in breach of a statutory prohibition. It would likewise be unlawful for the Secretary of State for Culture Media and Sport, to whom title to VTG has passed from the Commissioners of Works, and to whom we are copying this letter, to permit the development to proceed."*

122. The Secretary of State replied on 31 October 2019, stating that the provision of the memorial complied with the 1900 Act:

> *"We are of the view that the proposal for a Holocaust Memorial and Learning Centre compiles with Section 8 of the London County Council (Improvements) Act 1990 and will not be withdrawing the planning application..."*

123. In May 2020, the Trust raised the same point in pre-action correspondence in relation to the call in of the application:

> *"On 31 July 2019 Richard Buxton Solicitors (RB), representing one of the other Rule 6 parties, wrote to the Secretary of State and MHCLG pointing out that the building of the VTG Proposal would infringe the terms of the London County Council (Improvements) Act, 1900, which requires the preservation of VTG. MHCLG replied by stating that it would comply with the relevant section of that Act"*

124. The Government Legal Department replied as follows:

> *"The 1900 Act*
>
> *17. The lawfulness of the decision to call in the planning application is unaffected by section 8(1) of the London County Council (Improvement) Act 1900 ("the 1900 Act"). It is a decision as to the statutory procedure to be followed for the purpose of determining the planning application under Part 3 of the Act. It does not engage section 8(1) of the 1900 Act. Your proposed claim, if pursued, will not place "issues relating to the VTG proposal" before the Court. All substantive matters relating to the planning application will be for the appointed Inspector to consider and to report to the Minister of State in accordance with the procedure laid down by The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 ("the Inquiries Procedure Rules"). Those matters include section 8(1) of the 1900 Act, insofar as it is engaged by the planning application. The Inspector must consider all material considerations, including any relevant legislation, in preparing the inquiry report under rule 17 of the Inquiries Procedure Rules. All parties to the inquiry will have the opportunity to make submissions on those matters to the Inspector at the inquiry."*

125. My attention was also drawn to the following question asked in Parliament of the Secretary of State in March 2019:

> ***"Question:** To ask the Secretary of State for Housing, Communities and Local Government, on what date (a) the Government and (b) the UK Holocaust Memorial Foundation were first informed about the potential application of section 8 (1) of the London County Council (Improvements) Act 1900 to the proposed location of the Holocaust Learning Centre. (229633)*
>
> ***Answer, 14 March 2019: Mrs Heather Wheeler**: The Environmental Statement (Volume 3) submitted with the planning documents in December 2018 identifies that proposals for enlarging Victoria Tower Gardens were adopted under the London County Council (Improvements) Act 1900."*

126. In HJ Banks & Co Ltd v Secretary of State [1997] 2 PLR 50, Lord Woolf was prepared to accept that:

> *"Speaking in general terms, and recognising there are always going to be exceptional situations, it seems to me that, although*

this court should be cautious to avoid encouraging points to be taken for the first time in this court, it is perfectly proper for this court, as a matter of discretion, to allow points to be argued before us, if the material is before this court to enable those matters properly to be considered. In relation to the point which Mr Horton wishes to raise on this particular appeal, which was not raised in the court below, that appears to me to be the position. It also seems to me desirable that we should express an opinion upon the point because, if we do not do so, it will leave an area of uncertainty in relation to planning matters of this nature which would be undesirable, because there are likely to be other appeals where the same point will arise."

127. For the reasons set out above, in the facts and circumstances of the present case, I consider it proper, as a matter of my discretion, to allow the point to be raised.

128. Accordingly, in conclusion on Ground 3, in my judgment, Section 8(1) of the 1900 Act imposes an enduring obligation to retain the new garden land as a public garden and integral part of the existing Victoria Tower Gardens. The potential impediment to delivery of the scheme is a material consideration which was not considered at the inquiry.

129. Ground 3 succeeds.

Ground 4: error of law in relation to alternative sites

The Inspector erred in law in considering that in order to attract significant weight, the merits of any alternatives must be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.

The relevant legal principles

130. The principles on whether alternative sites are an obviously material consideration which must be taken into account are well established. Where there are clear planning objections to development then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere. This is particularly so when the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it (Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300).

131. These principles are of obvious application in the present case. As was common ground, locating the Memorial in Victoria Tower Gardens will give rise to harm to the setting of the Buxton Memorial and, as a consequence, the Registered Park and Garden.

The potential of the Imperial War Museum to deliver the acknowledged benefit of the Memorial at a location that will arguably avoid that harm or at least lessen it to a material degree is a material consideration. The Inspector acknowledged the point at IR15.164:

> *"It is reasonable to suggest that if there are alternative locations for a proposal which would avoid an environmental cost, then these should be taken into account when determining the acceptability or otherwise of the proposal at hand. This is a particularly attractive prospect if it is held that there are viable alternatives sites that could accommodate the proposal without attendant harm."* (IR15.164)

132. However, the Inspector went onto express caution about the prospect of alternative sites:

> *"But such an approach has to be treated with caution. Whilst (as the Courts have determined) the desirability of having alternative proposals before the Inquiry may be "relevant and indeed necessary", (though not always essential), in order that it may garner significant weight, the merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.* [501] *[8.62, 9.65]"*

133. This extract formed the basis of Mr Drabble's submission under this ground. He submitted that the passage demonstrates an error of law in that it places a burden of proof on an objector to demonstrate the existence of a feasible alternative scheme showing how a prominent and striking memorial can be provided with less harm than at Victoria Tower Gardens. The application of the error is said to be evident in the Inspector's conclusion that the weight to be afforded to the Imperial War Museum site as an alternative in the planning balance is "*very limited*" as, "*whilst seeming to offer a benign alternative, it lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery*" (IR15.169). There is, Mr Drabble submitted, no legal requirement or burden of proof on an objector to identify and establish the existence of a specific site as a preferable alternative before an application can be refused on the basis that a particular need can be satisfied elsewhere (Trusthouse Forte at 300-301 and South Cambridgeshire DC v SoSCLG [2009] PTSR 37). In the context of a proposal such as the Memorial, and the site selection process that proceeded it, the burden placed on any objector may well prove impracticable to discharge. The particular facts of this case and the concerns around the lack of transparency in the site selection exercise meant this was a case where the burden in relation to alternative sites was firmly on the developer because of the site selection process. The Secretary of State had it in his power to produce detailed schemes but did not do so. On the very specific facts of this case the Inspector's reliance on the absence of detailed schemes for the alternative sites was unlawful.

134. Case law provides that the extent to which it will be for the developer to establish the need for his proposed development on the application or appeal site rather than for an objector to establish that such need can and should be met elsewhere will vary and is a matter of planning judgment (Trusthouse Forte at 301). The point is amplified in R (Langley Park School for Girls Governing Body) v Bromley London Borough Council. In that case Sullivan LJ referred to Trusthouse Forte when considering when it may be necessary to identify a specific alternative site and said at [52] – [53]).

> *"52. […] There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.*
>
> *53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. […]"*

135. I did not understand Mr Drabble to dispute the proposition that the issue is a matter of planning judgment. His complaint focuses on the alleged impermissibility of an escalation by the Inspector of a matter of planning judgment to a hard-edged principle which places the burden of proof on an objector.

The Inspector's approach to alternatives

136. Before turning to alternative sites, the Inspector considered the suitability of Victoria Tower Gardens as the proposed location for the Memorial:

> *"15.154 The precise process by which VTG became the preferred and definitive location for the UKHMLC is not clear. The apparent realisation of its potential as such a site has*

subsequently been framed as a "moment of genius" (by those on both sides of the argument). But whether bathetic or not, such a choice may well have reasonably been driven by a conclusion that the sites hitherto identified were not adequately meeting the HMC report recommendation requirements, and that further alternatives were necessary.

15.155 What is clear though is how closely the VTG site meets the core expectations of the recommendation…

by virtue of this aesthetic and semiotic boldness combined with its location, the proposal would make a clear and unequivocal statement about the degree of importance we as a nation place on preserving the memory of the Holocaust. A statement moreover that would readily serve as a focal point for its national commemoration. Expressing these attributes, it would indeed stand as an affirmation of the universal human values, and so those also, unashamedly, of British society.

15.156 Such questions of location do however beg the wider questions as to why we raise such memoria, and why we put them where we do. The diverse monumental denizens of Whitehall, Parliament Square, and VTG itself, are all witness to significant national and international events, people or causes. All too, seem held in space by the gravitational mass of the Palace of Westminster, for so long the very epicentre of national and global power. Even to one familiar with these places, the passing observer is compelled to ask of each memorial, "why are you here?" We also know that there are great sensitivities around the relocation of these memoria, such as those to the Pankhursts and to Buxton.

…

15.158… If, as the clear greater majority of those offering a view at the Inquiry and more widely, believe that the commemoration of the Holocaust (and learning of its horrors and contemporary legacy) is profoundly significant, then it follows that the UKHMLC should be located in a place of primary national and indeed international importance. So, locating the combined structure in central London, the nation's capital, adjacent to the Palace of Westminster, the very epicentre of national law-making, would have an inescapable resonance. It should be recalled that this semiotic appeal was not lost on the HMC, who identified one of the merits of the Millbank site as being its relative proximity to the Houses of Parliament. It should also be recalled that the HMC also concluded that the IWM was also very highly regarded, being within easy reach of Westminster. Moreover, if one accepts the primacy of location in recognising

the importance of the Holocaust, it follows that the selection of a less significant location connotes a lesser degree of significance to the purpose of that commemoration. (15.158)

15.159 In addition, the juxtaposition of the UKHMLC with the Palace of Westminster as an ever-present reminder to lawmakers of the dangers of complacency may be considered trite. But as a lesson to nation and Parliament that, in exploring Britain's relationship with the Holocaust, reflecting on its finer moments, its failures, and the terrible consequences of opportunities not taken, honestly and candidly, would remind us of the fallibility of democracy's assumed righteousness, and our responsibility, if not duty, to others in safeguarding it. Such an approach underscores the direct connection between action, or the lack of it in Parliament, and the consequence in relation to the unfolding cataclysm of the Holocaust. The UKHMLC would make tangible that linkage, amplifying the commemorative and cognitive purpose of the combined structure. Lastly, the idea of the Memorial offering a sense of commemorative citizenship (to those from which it was robbed), a symbol that says "British Jews (and others of minority ethnicity and sexuality) are British; your history is our history; your security is a British concern, you belong here", has a very powerful resonance, and one that should indeed be heard in the context of the Palace of Westminster. 15.159

15.161 In broader locational terms therefore, the proposals would fulfil the expectations of the recommendation of the HMC. More specifically, the location next to the Palace of Westminster not only has a resonance with a key positive attribute of the Millbank and IWM sites, it would offer a powerful associative message in itself, which is consistent with that of the memoria of its immediate and wider context. As a measure of the importance attached to the commemorative task it has, and for all the reasons set out above, I conclude that the location of the UKHMLC adjacent to the Palace of Westminster can rightly be considered a public benefit of great importance, meriting considerable weight in the heritage and planning balance. (15.161)"

137. On behalf of Learning from the Righteous, Mr Simons sought to distinguish the present case from other case law on alternatives. The depth and profundity of meaning in locating the Memorial in Victoria Tower Gardens, next to the Houses of Parliament, is exceptional. The Inspector found, he submitted, that the Memorial will not function in the same way or fulfil the same purpose in a different location. This amounts to a material distinction from the many examples in the authorities. Thus: Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P. & C.R. 293 was about a proposal for a new hotel near Bristol; R(Mount Cook Land Ltd) v Westminster City Council [2017] P.T.S.R. 1166 concerned external alterations to a department store on Oxford Street in London; R (Save Stonehenge World Heritage Site Limited) v Secretary

of State for Transport [2021] EWHC 2161 (Admin) was about the construction of a new route for the A303 in Wiltshire; R (J (A Child)) v North Warwickshire BC [2001] P.L.C.R. 31 was about a proposal for eight affordable bungalows for older people; Derbyshire Dales DC v Secretary of State for Communities and Local Government [2010] 1 P. & C.R. 19 concerned a proposal for 4 wind turbines; and R (Langley Park School for Girls Governors) v Bromley LBC [2010] 1 P. & C.R. 10 was about re-building a school in Kent. These examples - a hotel; school building; affordable bungalow; wind turbine – may be located in any number of places and still function in the same way.

138. I accept Mr Simons' submission that the depth of meaning associated with locating the Holocaust Memorial next to the Houses of Parliament sets the present case apart from the other case law on alternatives put before the Court. The Inspector accepted that the proposed location in Victoria Tower Gardens meets the core expectations of the recommendations of the Holocaust Commission's report. Its location would help the scheme to make a "*clear and unequivocal statement about the degree of importance we as a nation place on preserving the memory of the Holocaust*" which would "*readily serve as a focal point for its national commemoration*". He accepted that there is an explicit and direct relationship between the significance and prominence of any given site and the value and status that individuals assign to the events commemorated (IR15.157). The Scheme's location next to Parliament in a place of "*national and indeed international importance*" was found to be justified (15.158). The Inspector continued in the same paragraph that: *if one accepts the primacy of location in recognising the importance of the Holocaust, it follows that the selection of a less significant location connotes a lesser degree of significance to the purpose of that commemoration*." Nonetheless; I did not understand Mr Simons to be proposing a new legal proposition to reflect the distinction. The matter remains one of planning judgment for the Inspector who found in this case that the location in Victoria Tower Gardens merits considerable weight. I agree with Mr Simons that this sets the context for the exercise of his planning judgment in the consideration of alternative sites for the Memorial.

139. Having reached his conclusion on the suitability of Victoria Tower Gardens, the Inspector made the following observation in which he accepted the relevance of alternative sites:

> *"15.163 the belief that if the proposals were moved to another location, specifically the IWM, the clouds of such controversy would lift and a universal consensus on the merits of that location be achieved is, to say the least, optimistic. From what I heard at the Inquiry and saw during my site visit, the debate over the merits of that location, the relationship of its purpose to its host, and the environmental and social costs it might entail, would still prevail. Nevertheless, a consideration of such alternative sites is reasonable and justified in light of the matters raised at the Inquiry." (IR 15.163)* (emphasis added)

140. He further directed himself on the materiality of alternative sites at IR 15.164 whilst expressing caution about the prospect of alternative sites, which, as mentioned, formed the basis of Mr Drabble's submissions on this ground:

> *"It is reasonable to suggest that if there are alternative locations for a proposal which would avoid an environmental cost, then these should be taken into account when determining the acceptability or otherwise of the proposal at hand. This is a particularly attractive prospect if it is held that there are viable alternatives sites that could accommodate the proposal without attendant harm." "But such an approach has to be treated with caution. Whilst (as the Courts have determined) the desirability of having alternative proposals before the Inquiry may be "relevant and indeed necessary", (though not always essential), in order that it may garner significant weight, the merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative. 501 [8.62, 9.65]"*

141. Having identified the three primary alternative sites (IR 15.165) he narrowed his focus to the site at the Imperial War Museum stating that it is on this site *"that the hopes of those opposing the VTG proposal are focused as a credible alternative worthy of weight in the planning balance… Such an interest is not without justification" (IR 15.166)*. He went on to address the relative merits and disadvantages of the Imperial War Museum site. As to its merits: the Imperial War Museum site was one of the sites identified in the Holocaust Memorial Commission report; there are obvious synergies with the existing and proposed Holocaust content of the museum; it is an institution familiar with handling large numbers of people; it has a landscape context that could accommodate a combined Memorial and Learning Centre, and there is a provisional scheme by a distinguished architectural practice testing its feasibility, albeit this is limited in scope. Moreover, the Holocaust Memorial Commission saw the advantage of the site, as previously stated, in it being "*within easy reach of Westminster*". He then turns to address the disadvantages of the site including his view that '*there are serious questions'*, as to whether it would meet the critical Holocaust Memorial Commission requirement for a prominent and striking memorial (IR15.167). Further; he went on to state that *'it is at least apparent to me that the IWM site is not free from constraint.'* He listed the constraints as including: a Grade II listed building and works which could affect its special interest; a conservation area; potential impact on two mature trees on the site; loss of public open space and early years play and learning facility; less well developed security infrastructure and implications for local residents. He concluded that "*Clearly, achieving a combined facility here would also involve the balancing of benefits against possible harms, some not dissimilar to those at VTG"* (15.168). This is the context in which he arrives at the view that *"whilst seeming to offer a benign alternative, IWM lacks a detailed scheme that would meet the core requirements of the HMC and carries clear potential constraints that may hamper its delivery. Together this suggests that the weight to be afforded the IWM alternative in the planning balance is very limited."* (IR 15.169). He then turns to consider timing of construction/installation of the Memorial and the importance of delivering the Memorial during the lifetime of Holocaust survivors, a matter to which considerable

weight should be attached. If the scheme at Victoria Tower Gardens were to be refused, work may have to begin on the scheme at an alternative with consequent further delay (IR15.170-172 set out in full above).

Analysis of Ground 4

142. Mr Drabble's case on this ground is based on one sentence in IR 15.64 by which he seeks to derive a quasi-legal test said to be applied by the Inspector, at IR 15.69. The Courts have on many occasions cautioned against a forensic and overly legalistic focus on individual sentences in the context of, as in this case, a lengthy, sophisticated and nuanced report. The Report must be read as a whole and in proper context.

143. In this respect, the key building blocks to the Inspector's approach to alternative sites were as follows:

1) Great weight should be given to locating the Memorial in Victoria Tower Gardens, next to the Houses of Parliament, given the profound connection between the location and the purpose of the Memorial.

2) There are obvious constraints on locating the Memorial in the Imperial War Museum including that it does not appear able to fulfil a key Commission requirement for a striking and prominent Memorial.

3) Other constraints on the Imperial War Museum site include potential impact on heritage assets; security and impacts on local residents.

4) The suggestion that locating the Memorial in the Imperial War Museum will be free from controversy is optimistic.

5) Though unusual in planning terms, it is of material weight that the Holocaust Memorial should be raised within the lifetime of at least some of those survivors.

6) In the event the Minister was to refuse permission for the Memorial in Victoria Tower Gardens the detailed process of selection, evaluation, preparation, design, consultation and formal consideration of a new proposal would begin again. This suggests approximately five years of further work, which will add to the number of survivors who do not live to see the outcome.

7) Achieving a memorial within the lifetime of survivors has a resounding moral importance that can legitimately be considered a material consideration and a public benefit of great importance, meriting considerable weight in the planning balance in this case."

144. I am not persuaded that the Inspector fell into the error suggested by Mr Drabble in impermissibly elevating a matter of planning judgment into a hard-edged principle about the burden of proof in relation to alternative sites. The first to third sentences of IR 15.64 are unobjectionable and the Trust makes no complaint about them. Mr Drabble focusses on the fourth sentence "*in order that it may garner significant weight, the*

merits of such alternatives must, logically, be underpinned by a good measure of evidence demonstrating their viability and credibility as such an alternative.501 [8.62, 9.65]". However, at the end of the sentence, the Inspector inserts a footnote and two cross references. The footnote refers to Trusthouse Forte Hotels Ltd v Secretary of State for Environment (1987) 57 P. & C.R. 293. The first cross-reference is to IR 8.62 where the Inspector records Westminster Council's submission, supported by the Council's reference to Trusthouse Forte, that the absence of detailed and worked up alternatives before the inquiry is not a reason for discounting alternative sites:

> *"WCC believes that the absence of detailed and worked up alternatives before the Inquiry is not a reason for discounting this principle, as the Court said "Although generally speaking it is desirable and preferable that a planning authority (including, of course, the Secretary of State on appeal) should identify and consider that possibility by reference to specifically identifiable alternative sites, it will not always be essential or indeed necessarily appropriate to do so"".*

145. He also cross-referred to IR 9.65 recording the submission by the Trust, made again by reference to Trusthouse Forte that *"[i]t is not accepted that the existence of an alternative proposal or site is only a material consideration if there is a specific scheme in existence (such as occurs in a conjoined planning appeal or otherwise)*".

146. The Inspector's approach accords with Trusthouse Forte and reflects "*the spectrum*" explained in Langley Park *per* Sullivan LJ at [52] – [53] that "*how far evidence in support of [a] possibility, or the lack of it, should have been worked up by the objectors or the applicant for permission [are] all matters of planning judgment"*. His approach at IR 15.164 is an example of the application of planning judgment to that question as it arose in the case before him. He expressly recognises that it is not necessary for a specific alternative site to be placed before the inquiry ("*though not always essential"*) before indicating, unremarkably, that the weight to be given to a proposed alternative will be affected by the evidence of its credibility and viability as an alternative vehicle to meet the need for which the proposed development has been brought forward. The Trust does not identify any authority for the proposition that the credibility and viability of delivery of a proposed alternative is not relevant to the evaluation of an alternative site. It is simply as aspect of the Inspector's planning judgment.

147. Accordingly, I accept Mr Mould's submission that it is incorrect to characterise the Inspector's approach as being to place a burden on objectors to produce a detailed scheme for an alternative location for the proposed development. In the light of the authorities, it was legally permissible for him to evaluate the strength of the case for rejecting the planning application before the Minister by considering (amongst other matters) the level of information before him on proposed alternative schemes, including the extent of the evidence in support of a particular alternative site when determining the weight to be afforded to that alternative in the planning balance.

148. In short, the Inspector accepted that the benefits associated with locating the Holocaust Memorial in Victoria Tower Gardens simply could not be achieved elsewhere or within the same timescale. I accept the submissions by Mr Mould, Mr Katkowski and Mr Simons that, properly understood, the challenge on this ground is an attack on the weight which the Inspector afforded to the alternative site at the Imperial War Museum. In this context, Mr Katkowski took the Court to various references to weight by the Inspector in his assessment of alternatives (IR 15.165; 15.122; 15.126, 15.169 and 15.189.) I also note that the Inspector visited the sites proposed as alternatives and his site visit to the Imperial War Museum was informed by a conceptual design in the Environmental Impact Statement and a comparative analysis which assessed the competing claims of alternative sites. I remind myself that where an Inspector's conclusions are based on impressions received at a site visit, anyone seeking to question those conclusions faces a particularly daunting task (R (Newsmith Stainless Ltd) v Secretary of State [2001] EWHC 74 (Admin) at [8]).

149. As advanced by Mr Drabble, Ground 4 therefore fails. However, I have concluded in relation to Ground 3 that, section 8 of the 1900 Act imposes an enduring statutory obligation to maintain Victoria Tower Gardens as a public garden, This is a material consideration in the context of the Inspector's emphasis on the importance of the need to deliver the scheme within the lifetime of the Holocaust survivors. The Inspector considered the question of alternative sites and the implications of their deliverability without assessment of the deliverability of the location in Victoria Tower Gardens in the context of the issues now presented by the Court's construction of the 1900 Act. In the circumstances, as a consequence, to this extent, Ground 4 succeeds.

Remedy

150. On behalf of the Trust, Mr Drabble submitted that the Court should conclude that the erection and use of the proposed Memorial would plainly contravene the terms of section 8 of the 1900 Act including placing the Secretary of State in breach of the continuing statutory obligation under section 8 to maintain the new garden land as a garden open to the public and an integral part of Victoria Tower Gardens. In his submission, the appropriate remedy is for the Court to quash the decision.

151. For the Secretary of State, Mr Katkowski submitted that, in the event that the Court agreed with the Trust on the point of statutory construction this could not justify quashing the decision as to do so would be wholly disproportionate in relation to a point that wasn't even argued by the Trust at the inquiry. At most, the Court should issue a declaration as doing so would leave the ability to remove the obstacle by repealing the relevant remaining provisions of the 1900 Act.

152. Section 288(5) of the Town and Country Planning Act defines the relief available on an application under the section in the event the Court is satisfied of the unlawfulness of a relevant decision. The Court's discretion extends to a quashing order, not a declaration.

153. In considering the exercise of my discretion, I take into account the existence of an Act of Parliament (the 1900 Act) which specifically regulates the land in question and the statutory basis on which the land must be held (a public garden).

154. In assessing the suitability of the Gardens and in placing little weight on alternative sites, the Inspector placed considerable weight on the timing of deliverability of the Scheme. In his submissions on Ground 4 (alternative sites), Mr Katkowski described the timing aspect of deliverability as a 'powerful' aspect of the Inspector's analysis. However, the Inspector did so without any appreciation of the deliverability issue raised by the 1900 Act.

155. I was not addressed on the mechanics of if, how or when the 1900 Act might be repealed. Mr Drabble posited that it may require hybrid legislation. It was not disputed that the issue raises factual questions of some difficulty and detail which may require exploration of the relative speed of delivery of each site.

156. Mr Drabble submitted it is plain that the proposed scheme will breach the requirements of the 1900 Act, which are that the land be retained as a public garden and integral part of Victoria Tower Gardens. He pointed to the requirement in section 8(6) for uniformity of design in the Gardens.

157. Mr Katkowski pointed me to passages of the Inspector's report which he submitted demonstrated a measured, sensible and nuanced assessment of the likely impact and overall position in relation to the Gardens from the proposals, leading to a conclusion that the Gardens would continue to function as a garden for the public. However, the passages in question do not address the impact in the context of the provisions of the 1900 Act (integral garden; public use; uniformity of design). Moreover, the Inspector's assessment includes the following analysis:

> *15.206 "The UKHMLC has been designed to as far as possible integrate with its context. Nonetheless, its purpose would be to both command attention and generate an emotional response to seeing and visiting it. It would attract large numbers of visitors. From the current highest recorded occupancy level of almost 400, this is anticipated to increase to a maximum of 1,269 people at any one time. The peak number of visitors accessing the secure area per day is estimated as 3,000, with a further 7,000 per day estimated as entering the park to view the Memorial only. Whilst these would be peak rather than typical use figures, it is inevitable that the significant increase in visitor numbers to the park would have an impact on its character and functionality, particularly during the Memorial opening hours proposed as between 09:30-17:30.*

15.207 The degree to which the park could be used in a relaxed and informal way would be constrained by the reduction in size and division of the open flat green space, and inevitably to some extent by the increase in visitor numbers. Its quality as a peaceful breathing space would, to a degree, be diminished and it would become a busier and more structured environment. This would include lighting of the Memorial, and the footpaths leading to it, at night."

158. Given this assessment, it cannot be said that the existence of the 1900 Act makes no difference to the outcome of the decision. On the information before the Court, Mr Drabble's contention is a proper one with real prospects of success. Accordingly, the appropriate remedy is to quash the decision, so as to enable further consideration of the implications of the London County Council (Improvements) Act 1900 for the proposed scheme.

Conclusion

159. For the reasons explained above, the claim fails on Ground 1 (heritage impacts) but succeeds on Ground 3 (London County Council (Improvements) Act 1900) and on Ground 4 (alternative sites), to the extent that the Inspector's assessment of alternative sites was conducted without an appreciation of the implications of the London County Council (Improvements) Act 1900. The Minister's decision is quashed.

Postscript: Permission to appeal

160. After the judgment was circulated in draft to the parties, the Court received applications for permission to appeal from the Minister and the Secretary of State. Submissions in response were filed by the Trust. Having considered the submissions carefully, I refuse permission to appeal for the following reasons.

161. I am not persuaded that the submissions made by the Minister in relation to the construction of the 1900 Act raise points with a real prospect of success. Section 8(1) of the Act provides that the land "*shall be laid out and maintained...for use as a garden open to the public"*. Section 8(1) remains in force. It is the use (as a public garden) that has to be maintained, not just its physical characteristics.

162. Mr Mould seeks to draw an analogy between provisions in the 1900 Act, which predates modern planning control, which regulate the performance and future maintenance of the improvement works, with conditions in a modern planning permission which state and define the ambit of the planning control. However, unlike the modern planning Acts, section 8 of the 1900 Act is specific to Victoria Tower Gardens. The historical context revealed by the passage of the Act, which the appeal

submissions do not address, is clear. It supports the construction of section 8(1) as imposing an enduring restriction on the use of the land. Victoria Tower Gardens is an example of land with a statutory restriction (like, for example, much of National Trust land may be declared inalienable, pursuant to Act of Parliament). Any change to its use as a public garden requires parliamentary approval. If recourse may be had to pre-legislative material for meaning, then the reference in the Report of the Improvements Committee (13 March 1900) to the land being kept as a garden for the use of the public forever' puts the matter beyond doubt. Given the detail available in the archival material, one would have expected to see a great deal written on the matter, had the 'forever' point been controversial.

163. As regards the exercise of discretion to allow Ground 3 to be argued: Mr Mould places reliance on the statement in Trustees of Barker Mills Estates v Test Valley Borough Council [2016] EWHC that "*one factor which weighs strongly against allowing a new point...is that if it had been raised in the earlier inquiry...it would have been necessary for further evidence to be produced and/or additional factual findings or judgments by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions"*. Mr Mould submits that this was precisely the case here. However, there is a clear distinction between the present case and the Barker Mills case. In Barker Mills the point in question had not been raised by any party during the examination, a point the Judge placed emphasis on (*"Furthermore, no one suggests that it was raised by any other party"* (70)). Here, the point was raised by a party and in terms which directly invoke the central point about legality ("*Building on VTG…would be illegal under the Act…as the Act requires that the land be maintained as 'a garden open to the public"*" (extract from the relevant submission)). Having been raised, the Act needed to be grappled with, but it was not. This is the context in which Mr Mould's submission that the parties have been denied an opportunity to adduce evidence on the matter falls to be assessed. In the circumstances of this case, any such missed opportunity cannot amount to a countervailing factor against the exercise of the discretion.

164. On the unusual facts of this case, the 1900 Act was a material planning consideration, for the reasons explained in paragraphs 110, 111, 143, 149 and 154 of the judgment. The Act affects the deliverability of the Memorial in Victoria Tower Gardens and the desirability of implementing the Memorial within a reasonable timescale was an integral part of the Inspector's reasoning.

165. In the absence of a real prospect of success on appeal, there are no other compelling reasons for the appeal to be heard. A 'compelling' reason must be a legally compelling reason. Public interest in the project does not suffice. The argument about construction of section 8 is specific to the present application for planning permission. This is not a case where there is a need to elucidate the legal policy behind section 8 or to investigate the implications of the construction in other factual scenarios.

4. **APPENDIX 2**

LETTER FROM PINSENT MASONS LLP (ON BEHALF OF CLDN) TO CLYDE & CO LLP (ON BEHALF OF THE APPLICANT) REGARDING PROTECTIVE PROVISIONS

Pinsent Masons

BY E-MAIL

STRICTLY PRIVATE AND CONFIDENTIAL

Mr B Greenwood
Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London
EC3A 7AR

Your Ref: BG/10276966
Our Ref: 143071462.2\700642.07000
Pinsent Masons LLP
30 Crown Place
Earl Street
London
EC2A 4ES
DDI [redacted]

E [redacted]

09 October 2023

Dear Brian,

CLDN PORTS KILLINGHOLME LIMITED
IMMINGHAM EASTERN RO-RO TERMINAL - PROTECTIVE PROVISIONS

I refer to your letter dated 7th September 2023 (and submissions at Issue Specific Hearing 4 on 28th September 2023) which confirmed that Associated British Ports (**the Applicant**) has rejected the entirety of the proposals for protective provisions for the benefit of CLdN Ports Killingholme Limited (**CLdN**).

At the outset, CLdN is surprised and disappointed with the response from the Applicant. It is particularly regrettable that the justification set out in your letter dated 7th September makes very limited attempt to engage with the legitimate concerns identified by CLdN. Rather, the focus of the Applicant's response has been to question CLdN's motives for objection and, it must be said, to adopt a particularly cynical interpretation of its proposals for protective provisions.

It bears repeating: CLdN is a statutory undertaker which operates its own nationally significant project upstream on the river Humber from the proposed development and where there is clearly potential for significant marine and terrestrial disruption. Whilst CLdN has a commercial interest in freight terminal operations on the Humber, that does not mean that its legitimate concerns regarding the interaction between its operations (and related scheduled services) and the proposed development are not well founded and do not still need to be addressed in the same way as concerns raised by other interested parties. The former cannot be held up by the Applicant as justification for dismissing the latter.

Contrary to how the Applicant has sought to characterise CLdN's proposals, CLdN does not consider that the protections it has sought are unreasonable or out of the ordinary for the protection of a statutory port undertaker affected by a neighbouring (and nationally significant) new development. We would (once again) emphasise that there is precedent in the Able Marine Energy Park DCO 2014 (**AMEP DCO**) for the majority of the protections that CLdN has requested.

Furthermore, we do not accept the Applicant's proximity / lack of proximity argument for dismissing the request for protective provisions. The risk of disruption and potentially severe consequences for CLdN and its customers plainly exist in the present circumstances. To this end the fact there is a greater distance between the Port of Killingholme and the proposed development compared to the Port of Killingholme and the Able Marine Energy Park is irrelevant.

We have provided a full reply to your letter of 7th September in relation to each of the protective provisions sought by CLdN (including details of relevant precedent) at **Appendix 1**.

We respectfully request that the Applicant considers each of these responses and revisits its position with respect to the need for the related protective provisions. If the Applicant intends to maintain its current stance, we request that full justification is provided that properly engages with CLdN's position as set out in this letter.

Furthermore, and in the spirit of cooperation and to move forward discussions constructively, we enclose at **Appendix 2** a draft set of protective provisions for the Applicant to consider.

CLdN intends to submit the draft protective provisions into the Examination at Deadline 4 so that the ExA can see the current position in relation to protective provisions.

I look forward to hearing from you shortly.

Yours sincerely

Robbie Owen
Partner
for Pinsent Masons LLP

This letter is sent electronically and so is unsigned

APPENDIX 1: DETAILED REPLY TO LETTER DATED 7TH SEPTEMBER 2023

Protective provisions sought	ABP response	CLdN reply
1. Notification, consultation and a right of approval by CLdN as to the nature and timing of works details (acting reasonably) and rights for CLdN to impose reasonable conditions related to such works.	ABP does not understand the justification for such a proposal save perhaps that, in the context of our client's proposed development, as CLdN is self-evidently a commercial competitor both in terms of the Port of Immingham generally and the potential operator of the new facility, namely Stena Lines, your client is simply attempting to secure a right effectively to interfere with and delay the development process. To be frank, to give your client such protections would effectively hand control of the new Ro-Ro project to a direct competitor.	CLdN has proposed protective provisions covering notification of the timing of works in Appendix 2. The Applicant should note that CLdN is not seeking to be consulted on the content of works details or the approval of works details. We have responded in further detail to the Applicant's response below. However, CLdN would request that the Applicant specifically considers the protective provisions with respect to notification of works set out in Appendix 2. In our previous letter dated 31 August 2023, we explained that there was potential for the Proposed Development to interfere with CLdN's business operations and particularly continuity of its scheduled services upstream to the Port of Killingholme and downstream out of the Humber Estuary (a concern that has been elevated by CLdN's review of the navigational risk and safety assessment that has been undertaken by the Applicant and the subject of further scrutiny and submissions by other interested parties, notably at Issue Specific Hearing 3 on 27th September 2023). These matters have the potential to cause very serious disruption to CLdN's operations (operations that are underpinned by a statutory undertaking) and could result in substantial loss of income and related costs. Until such time as transport matters have been adequately addressed, specifically those unresolved matters that CLdN identified at Agenda Item 4 in Issue Specific Hearing 3 on 27th September 2023 and that are the subject of discussion in the proposed Statement of Common Ground between the parties' respective transport consultants, the same principle applies with respect to the potentially significant impact that the Proposed Development could have on the delivery of freight to the Port of Killingholme via the surrounding highway network. Within that context, it is surprising and disappointing that the response from the Applicant (the party who is promoting the DCO proposal and who has a duty to mitigate its impact) makes no attempt at all to engage with these legitimate concerns and meaningfully consider CLdN's proposals (indeed the Applicant has instead chosen to deflect discussion onto CLdN's status as a "competitor"). As the Applicant should be aware, it is common for interested parties to have the benefit of protective provisions that require notice of works to be given. By way of example, the Applicant is directed to the protective provisions for the benefit of CLdN's predecessor C.RO Ports (Killingholme) Limited) in the AMEP DCO (see

		below). There are further examples in the standard protective provisions for the benefit of statutory undertakers in Part 1 of Schedule 10 to The Port of Tilbury (Expansion) Order 2019. Such arrangements have clearly not been considered by the Secretary of State to constitute "handing control" of nationally significant projects over to interested parties. The proposals by CLdN in our previous letter to the Applicant dated 31 August 2023 also specified that provisions of this nature are impliedly, if not specifically (as is common in protective provisions secured by development consent orders), subject to a duty to act reasonably. CLdN envisages further checks and balances could be incorporated (for example an arbitration provision in case there was disagreement over the nature and timing of works). CLdN is also willing to narrow the nature and geographical extent of work details that would be subject to such arrangements. These proposals have all been included in the draft protective provisions enclosed at Appendix 2 and which CLdN invites the Applicant to include in the next draft DCO that is submitted into the Examination. **AMEP DCO, Schedule 9, Part 6, paragraphs 58 - 66:** **58.**—(1) Before— (a)submitting any plans and sections for any tidal work in or that may affect the HST approach channel to the Secretary of State for approval under article 23 (tidal works not to be executed without approval of Secretary of State); (b)commencing any operation for the construction of a tidal work in or that may affect the HST approach channel where approval of the Secretary of State under article 23 is not required; (c)submitting any works schedules to the MMO in accordance with Schedule 8 (deemed marine licence) for works in or that may affect the HST approach channel; (d)submitting any plans and sections for any tidal work or operation in or that may affect the HST approach channel to the Conservancy Authority in accordance with Part 1 (for the protection of the Humber Conservancy) of this Schedule;

		(e)submitting any written scheme or proposed alteration in the design drawings that may affect the HST approach channel to the relevant planning authority in accordance with Schedule 11 (requirements); or (f)commencing any operation for the maintenance of a tidal work in or that may affect the HST approach channel the Harbour Authority must consult C.RO in accordance with the procedure set out in sub-paragraph (2). (2) The consultation that the undertaker must carry out with C.RO under sub-paragraph (1) is as follows— (a)not less than 42 days prior to carrying out any activity to which sub-paragraph (1) applies the undertaker must submit to C.RO plans and sections of any tidal works or any written scheme or proposed alteration to the design drawings to which this paragraph applies and such further particulars as C.RO may, within 14 days from the day on which plans and sections are submitted under this paragraph, reasonably require; and (b)the undertaker must allow C.RO a period of 28 days beginning with the date on which the information required under sub-paragraph (2)(a) has been submitted to C.RO for C.RO to respond for the purposes of consultation, or if later a further period of 28 days from when such further particulars as required by C.RO are submitted by the undertaker to C.RO. (3) The undertaker must have regard to any consultation response received from C.RO under sub-paragraph (2) and must forward a copy of that response as part of the material it submits to the Secretary of State or the MMO or the Conservancy Authority or any written scheme or proposed alteration to the design drawings that it submits to

		the relevant planning authority, to which this paragraph applies, together with a statement explaining how it has had regard to any consultation response received from C.RO under this paragraph. **59.** Any operations for the construction of any tidal work approved in accordance with this Order and to which paragraph 58 applies, once commenced, must be carried out by the undertaker so that C.RO does not suffer more interference than is reasonably practicable, and an officer or other appointed person of C.RO is entitled at all reasonable times, on giving such notice as may be reasonable in the circumstances, to inspect and survey such operations.] **60.** The Harbour Authority must not in the exercise of the powers conferred by this Order interfere with any marks, lights or other navigational aids in the river relating to HST without the agreement of C.RO, and must ensure that access to such aids remains available during and following construction of any tidal works. **61.** The undertaker must pay to C.RO the reasonable costs incurred by C.RO of such alterations to the marking and lighting of the navigational channel of the river as may be necessary during or in consequence of the construction of a tidal work or the use of the authorised development, including but without limitation, paying the reasonable costs of C.RO incurred in raising the height of the “IsoGWR.4 s” sector light positioned in the entrance of North Killingholme Haven at HST, in the event that activities related to the construction or operation of the authorised development obscure or obstruct the visibility of this sector light to vessels approaching HST and in its approach channels.

		62. The undertaker must afford to C.RO such facilities as C.RO may reasonably require for the placing and maintenance on any tidal works of signals, tide-boards, tide-gauges or other apparatus for the safety or benefit of navigation. **63.** The undertaker must provide and maintain on any tidal works such fog signalling apparatus as may be reasonably required by C.RO and must properly operate such apparatus during periods of restricted visibility for the purpose of warning vessels of the existence of the relevant works. **64.** After the purpose of any temporary tidal work in or that may affect the HST approach channel has been accomplished and after a reasonable period of notice in writing from C.RO requiring it do so, the undertaker, without unnecessary delay, must remove that work or any materials relating to it which may have been placed below the level of high water by or on behalf of the undertaker and, on its failing to do so within a reasonable period after receiving such notice, C.RO may remove the same and charge the undertaker with the reasonable expense of doing so, which expense the undertaker must repay to C.RO. **65.** If any tidal work is abandoned or falls into decay and is in such a condition so as to interfere or cause reasonable apprehension that it may interfere with navigation in the river so that it may affect HST or access to HST in any way, C.RO may by notice in writing require the undertaker either to repair or to restore the specified work, or any part of it, or to remove the work and restore the site of that work to its condition prior to the construction of the specified work, to such an extent and to such limits as C.RO thinks proper acting reasonably.

		66.—(1) The undertaker must not allow vessels associated with the construction of the authorised development to obstruct or remain in the approach channel when vessels are arriving at and sailing from HST. (2) C.RO must provide the undertaker with a schedule of movements to which sub-paragraph (1) applies on a weekly basis and must give the undertaker reasonable notice of any changes to scheduled sailings or other vessel movements of which it has informed the undertaker.
2. Co-operation provisions, including sharing of information upon request	If your client has any particular queries regarding the construction of the proposed development, ABP will be happy to respond to any reasonable requests that it receives. There is certainly no need for a protective provision to cover that point as it simply represents prudent health and safety and operational practices.	As the Applicant should be aware, cooperation and information sharing arrangements are common where there is a legitimate risk of serious business disruption to a neighbouring operator as a consequence of a new infrastructure project. Again, there are numerous examples in recently made development consent orders. By way of a port development consent order with such provisions, see Parts 11 and 12 of Schedule 10 to the Port of Tilbury (Expansion) Order 2019 where such provisions benefit Cadent and National Grid respectively. It should also be noted that cooperation provisions for the benefit of CLdN would be reciprocal in nature and therefore also benefit the Applicant. At present, the Applicant's response offers no precision as to the nature and extent of such arrangements and no mechanism for enforcing them during the course of construction and operation of the Proposed Development. If the Applicant is content to make such arrangements (as it appears to be) then the mechanism for securing such proposals should be in the form of protective provisions in the DCO. That would seem to be an entirely reasonable request. There is no direct precedent in the AMEP DCO covering cooperation but the protective provisions set out therein clearly demonstrate that cooperation arrangements underpinned the AMEP protective provisions and CLdN sees no harm in formalising in this DCO a reciprocal provision to that effect. CLdN has therefore proposed a cooperation provision in the draft protective provisions enclosed at Appendix 2.
3. A duty on the Applicant to have regard to the	As your client is aware, construction traffic and future operational traffic will enter the	As the Applicant is aware, there are unresolved matters with respect to the adequacy of the Applicant's transport assessment that are the subject of ongoing discussions between the Applicant, CLdN and DFDS's transport consultants. The

	potential disruption, delay or congestion of traffic which may be caused to the affected highways or streets within the vicinity of CLdN's undertaking.	Port of Immingham via the Port's East Gate and your client's Transport consultant will, I trust, be fully aware that there is ample capacity on the dual carriageway A160 link to accommodate any traffic which might inadvertently enter the Port via the West Gate. Indeed, the A160 was recently upgraded (through the NSIP process) and the DCO application included an assumption of significant increases in road traffic to reflect growth not just at the Port of Immingham, but also at the Port of Killingholme. We would suggest that the enhanced capacity on the A160, coupled with the new gyratory system at the A160/Rosper Road junction will be able to accommodate any additional traffic, should it mistakenly use the Port's West Gate entrance.	primary issue relates to whether the Applicant's transport assessment constitutes a reasonable "worst case" scenario. To address this, the parties' transport consultants have now held a number of meetings to discuss the assumptions that underpin the transport assessment and the potential need for additional assessment or sensitivity testing. We understand that a daily peaking factor has been agreed, having been derived from the data that DFDS had submitted to the examination. The Applicant was requested by CLdN and DFDS to either adjust their annual throughput down to support the max daily throughput assessed (1800 units), or increase their max daily throughput and revisit the assessment. The Applicant seems to have opted for the former, with a revised annual throughput of 525,000 – which gives a peak daily demand of 1800 units ((525,000/365)x1.25 peaking factor). However CLdN is not yet in a position to be satisfied that the daily movements of traffic will not remain higher than has been assessed in the Applicant's transport assessment. Further work is also outstanding. Specifically, further evidence is required that the 525,000 cap is an achievable parameter that will not compromise Port and Highway Network operations. DFDS has expressed concerns with the (lack of) landside capacity of the proposed development and the potential to impact on Port operations. CLdN notes DFDS's particular concerns that the TA assessment of the internal road network or gate capacity is inadequate. Equally, the adequacy of the highway network capacity assessment is challenged and the outputs from the junction modelling cannot be considered valid until West Gate assignment (and to a lesser extent solo tractor units) has been adequately addressed. CLdN and DFDS have also requested that: a) a valid sensitivity assessment should be submitted by the Applicant to give confidence that fluctuations in HGV distribution patterns have been assessed and mitigated; b) further controls on HGV movements should be secured by the DCO (e.g. a daily cap) to ensure that the assessed significance is not exceeded; and c) a cumulative sensitivity assessment should demonstrate that fluctuations to the assessed transport parameters will not change the significance of effects. These matters are the subject of ongoing discussion between the parties' respective transport consultants in the Statement of Common Ground on transport matters. However, CLdN is clearly not in a position to agree with the Applicant that there is "ample capacity" to accommodate the level of traffic movements IERRT will generate and that this will not have an adverse impact on operations at the Port of Killingholme. CLdN will of course revisit this conclusion in light of further progress on the terms of the transport SoCG, any change request application from the

		Applicant, any further transport or sensitivity analysis submitted by the Applicant into the Examination as well as adequate updates being made to "control documents" including the Construction Environmental Management Plan, so as to provide confidence that protective provisions covering transport matters are not required. In the meantime CLdN has included provisions covering traffic management arrangements in the draft protective provisions enclosed at Appendix 2. CLdN's position is that such provisions are necessary unless and until adequate assessment is provided, and corresponding mitigation measures are secured, elsewhere in the draft DCO and supporting documents.
4. The submission to, and approval by, CLdN of a construction management protocol to manage construction traffic on the surrounding road network that affect CLdN's operations.	As far as management of construction traffic is concerned, this is the subject of discussions with North East Lincolnshire Council and National Highways and it would be entirely inappropriate for CLdN to be involved in those discussions – bearing in mind also that your client's port operations are on the side of the Port of Immingham furthest from the site of the proposed development – some three kilometres upstream.	CLdN is surprised its participation in discussions on managing construction traffic is viewed by the Applicant as "entirely inappropriate". Given the potential for disruption to CLdN's operations, it would seem to be reasonable (and indeed entirely sensible) to establish a protocol for managing construction traffic on the surrounding network. CLdN would also be content to discuss the specific measures that the protocol should include. However, as a minimum, CLdN would propose a suggested process by which CLdN is kept informed of the timing and number of vehicular movements, including abnormal indivisible loads, expected to access the facility on designated routes during the construction period within a period to be agreed with the Applicant, and details for updates to this information to be communicated to CLdN. A draft provision to this effect has been incorporated into CLdN's draft proposal at Appendix 2. For the avoidance of doubt, CLdN does not seek to fetter the role of North East Lincolnshire and National Highways as the local and strategic highway authority respectively in the vicinity of the Proposed Development. However, CLdN (and its customers) relies on the surrounding highway network to secure delivery of freight to and from the Port of Killingholme and it is reasonable and appropriate that it is kept informed of construction traffic arrangements including diversions or closure of roads. At present, the extent of stakeholder engagement and participation in managing construction stage traffic appears to be limited to the measures set out in the Construction Environmental Management Plan (CEMP) (including a "stakeholder engagement plan"). However the level of detail in the CEMP on construction stage traffic mitigation is extremely limited (a couple of pages) and it is not at all clear that CLdN will be a participant in the stakeholder engagement plan, that this plan would

		include a forum for CLdN to express its concerns with proposals or raise issues during construction or, to the extent that the Applicant receives comments from CLdN, that the Applicant would be obliged to take those comments into account in managing construction stage traffic. As CLdN has already set out at paragraphs 32 to 36 of its Written Representation [REP2-031], it retains serious concerns regarding the scope and enforceability of the CEMP.
5. Obligations to remedy any accumulation or erosion in consequence of the construction, maintenance or operation of the Proposed Development that is having an adverse impact on CLdN's operations, if requested by CLdN acting reasonably.	The impact of the construction and operation of the proposed development has, as you are aware, been comprehensively assessed and it is not considered that any protections are required in terms of your client's operations. If your client is of the view that ABPmer's assessment is incorrect, we would be happy to review your client's evidence and data in this respect. Robust modelling has demonstrated that hydrodynamic changes resulting in geomorphological effects will be muted to the point of being beyond detection and, given the highly dynamic nature of the Humber Estuary, we would suggest that it would be challenging at the very least to attempt to link changes in erosion and deposition processes at the Port of Killingholme with the presence of IERRT.	CLdN's concern relates to the potential accumulation at disposal site HU060 (Humber 3A/Clay Huts) as a consequence of dredging works at the Proposed Development. CLdN holds the benefit of a marine licence carrying reference L/2016/00242/2 dated 22 December 2016 (and varied on 23 April 2020). CLdN's particular concern is that the dredging works and proposals for disposal at HU060 will intensify its use and capacity and could, in turn, have the potential to impact on CLdN's use of the disposal site for its own deposits in the future. Specifically, CLdN requires protection should, as a consequence of the intensification of use of HU060, the MMO decide that it is necessary for CLdN to use a different site for further disposal (and which could be further away from the Port of Killingholme and mean higher disposal costs). It is notable that this issue could come to a head relatively soon with CLdN's marine licence permitting disposal at HU060 due to expire in December 2026. CLdN secured similar protection for the recovery of expenses "in obtaining and depositing in the river such material as is necessary in the reasonable opinion of C.RO (now CLdN) to protect C.RO's operations from the effects of scouring of the river bed consequent upon the execution or maintenance of tidal works" authorised by the AMEP DCO: **AMEP DCO, Schedule 9, Part 6, paragraph 72:** **72.**—(1) C.RO may recover from the undertaker any reasonable expenses however caused which C.RO incur— (a)arising from the approval of plans and the inspection of the construction or carrying out of any tidal work;

		(b)by reason of any act or omission of the undertaker, or of any person in their employ, or of their contractors or workmen whilst engaged upon any tidal work or the construction and operation of the authorised development; (c)in dredging away any accumulation consequent upon the execution or maintenance of a tidal work; **(d)in obtaining and depositing in the river such material as is necessary in the reasonable opinion of C.RO to protect C.RO's operations from the effects of scouring of the river bed consequent upon the execution or maintenance of a tidal work;** (e)in altering any mooring in any way which in the reasonable opinion of C.RO may be rendered necessary by reason of the execution or maintenance of a tidal work; (f)in carrying out reasonable surveys, inspections, tests and sampling within and of the river (including the bed and banks of the river) — (i)to establish the marine conditions prevailing prior to the construction of a tidal work in such area of the river as C.RO have reasonable cause to believe may subsequently be affected by any siltation, scouring or other alteration which the undertaker is liable to remedy under this paragraph; and (ii)where C.RO have reasonable cause to believe that the construction of a tidal work is causing or has caused any siltation, scouring or other alteration as mentioned in sub-paragraph (i); (g)arising from the carrying out of construction of a tidal work or the failure of a tidal work or the undertaking by C.RO of works or measures to prevent or remedy danger

		or impediment to navigation or damage to any property arising from such carrying out of construction, exercise or failure.
6. Measures to cease works where there has been, or is likely to be, an adverse impact on CLdN's operations or infrastructure.	Our client cannot contemplate such a generalised and vague protective provision. Bearing in mind that our client is confident that the proposed development will have no adverse effect on your client's operations, such a provision is not required.	With respect to cessation of works, CLdN envisages that this would be limited to emergency circumstances where construction stage works or operational stage navigation associated with accessing the Proposed Development was frustrating CLdN's operations upstream. Arrangements for cessation of works where there is an impact on a neighbouring operator (or their apparatus) have precedent in DCO protective provisions. The criticism that the proposal is "generalised" and "vague" would plainly be addressed through appropriate drafting of the protective provisions (as CLdN has now included in Appendix 2).
7. Indemnification of losses or costs, which may reasonably be incurred by CLdN, and can reasonably be attributable to the Proposed Development, by reason or arising in connection with alterations CLdN will be obliged to make to navigational arrangements or the timing of services, or due to accumulation or erosion at CLdN's undertaking, or by virtue of changes CLdN may be obliged to make to dredging disposal arrangements, or any remedial works necessary as the	The use of the word "may" demonstrates that your client's request in terms of this protective provision has no substance. As has already been noted, our client's assessment of the proposed development has concluded that the construction of three new berths adjacent to the port, with a single capital dredge, will have no impact on other Port operations on the Humber. If your client is concerned with navigational arrangements or the timing of services, those concerns should be directed to the Harbour Master Humber through Humber Estuary Services. We would add that by the same token, if at any stage in the future CLdN were to decide to change aspects of their operation, ABP would not seek to impose such onerous restrictions on the off chance that marine traffic accessing the upstream estuary infrastructure would be affected. We would consider any changes to be a fundamental right	It is hardly unusual for protective provisions to be secured to protect interested parties from events that *may* happen. The likelihood of such events will vary but it is certainly common for protective provisions to be imposed to guard against events that have a low prospect of occurring but which, if they were to happen, would have a significant adverse impact on the beneficiary. That is entirely standard and CLdN can point to numerous examples (including in the AMEP DCO – see below) where protective provisions have been secured in order to mitigate against *potential* impacts of NSIP proposals. It would plainly be the case that if those events do not occur (as the Applicant asserts as the probable outcome) then no indemnification of CLdN's losses or costs would be required. In this context CLdN also fails to see how its proposals are particularly onerous or unusual. The comparison with the position that the Applicant would adopt were CLdN to carry out further development is evidently weak in that the proposed development is located downstream of the Port of Killingholme and therefore the prospect of the Applicant's scheduled services being meaningfully affected by further development by CLdN is low. The same cannot be said in the present circumstances. With respect to directing concerns as to navigational safety to the Humber Harbour Master, the role of the Humber Harbour Master relates to regulatory control, including safety of navigation, within the river Humber and the Estuary. That is an entirely separate matter to CLdN seeking indemnification of new (and potentially onerous) costs associated with the construction and operation a new freight terminal downstream from the Port of Killingholme. With respect to the basis for such costs being borne by the Applicant, CLdN considers that is fair and reasonable and consistent with the 'agent of change'

	result of contamination being disturbed in, or migrating to, CLdN's undertaking.	for you – and indeed other port operators on the estuary – to operate and grow your business under the regulatory oversight of the Humber Harbour Master.	principle embedded in national planning policy (NPPF, paragraph 187) (and as more fully set out already in our letter of 31st August 2023). **AMEP DCO, Schedule 9, Part 6, paragraph 73:** **73.**—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction, maintenance, operation or failure of the authorised development any damage is caused to any property of C.RO (including HST) or C.RO suffers any loss (including without limitation as a result of the failure by the undertaker to meet its obligations to C.RO under this Part of this Schedule) the undertaker must— (a)bear and pay the cost reasonably incurred by C.RO in making good such damage; and (b)indemnify C.RO against all claims, demands, proceedings, costs, damages and expenses which may be made against, or recovered from, or incurred by it, by reason or in consequence of any such damage or the exercise by the undertaker of the powers conferred by this Order. (2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of C.RO, its officers, servants, contractors or agents. (3) C.RO must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand with such assistance from C.RO as may be reasonably necessary.
8.	Clarity and confirmation that	Our client fails to understand how the introduction of three Ro-Ro	The Applicant controls the Network Rail-owned network between Killingholme and the rest of the network and therefore has the ability to create new connections and

	nothing in the Order affects or prejudices the exercise of CLdN's functions by virtue of, or under, the North Killingholme Haven Harbour Empowerment Order 1994 and the Humber Sea Terminal (Phase III) Harbour Revision Order 2006.	berths at the Port of Immingham can in any way impact the operations authorised by the 1994 and 2006 Orders. Such a provision is clearly unnecessary.	impact on the available train paths. Therefore whilst CLdN accepts that the railway works proposed in the DCO are narrow in scope and are not intended to facilitate the delivery of freight by rail, it is entirely foreseeable that the Applicant may choose to revive its rail rights for such purposes in the future. This could restrict CLdN's own statutory rights to access the railway network. In short, the absence of rail proposals in the DCO itself does not mean that the Proposed Development does not have the potential to have an adverse effect on CLdN's rights. CLdN would stress that the protections it is seeking are "in the event" protections that do not impinge on the proposed development or add additional controls. CLdN would also point out that there is an equivalent protection for the benefit of CLdN under Schedule 9, Part 6 to the AMEP DCO. If the Applicant does not intend to take such steps in the future, and is content to confirm that it would respect CLdN's connection rights, CLdN does not see why the Applicant cannot agree to basic protection for another statutory undertaker to that effect. In providing its response to this request, CLdN would request that the Applicant: a) confirms the extent of its control of and ability to develop the railway network within the Port of Immingham, through its lease from Network Rail; and b) (depending on that) provides assurances that the terms of its lease will not affect CLdN's ability to access the wider railway network. Subject to receipt of this, CLdN retains its position that the protective provision with respect to CLdN's railway rights in Appendix 2 of this letter is reasonable and necessary. **AMEP DCO, Schedule 9, Part 6, paragraphs 68 and 69:** **68.** The undertaker must not in the exercise of the powers conferred by this Order unreasonably prevent C.RO's access to the railway on the Order land in connection with the use of HST. **69.** The construction and operation of the authorised development must not cause unreasonable interference with or unreasonably prevent the free, uninterrupted and safe use by C.RO of the railway crossing the Order land in connection with the use of HST.

9. Confirmation that no powers may be exercised under the DCO which would have the potential to affect CLdN's ability to exercise its legal rights in respect of connecting rail sidings within CLdN's estate to the national rail network pursuant to legal agreements CLdN has the benefit of.	As far as this last proposed protective provision is concerned, we do query whether CLdN has actually taken the time to understand our client's proposals for the IERRT development. First, the new Ro-Ro Terminal will not be making any use of rail traffic. Secondly, the railway line used by CLdN which passes through the Port of Immingham enters and leaves the Port through the western side of the port estate – effectively on the other side of the Port from the site of the proposed development. It should be very evident that the proposed development will not in any way interfere with CLdN's use of the railway line and the proposed protective provision is certainly not required.	See above.

APPENDIX 2: DRAFT PROTECTIVE PROVISIONS FOR THE BENEFIT OF CLDN

PART [12]

FOR THE PROTECTION OF CLDN PORTS KILLINGHOLME LIMITED

1. The provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the Company and CLdN, for the protection of CLdN in relation to the construction, maintenance and operation of the authorised development.

Interpretation

2.—(1) Where the terms defined in article 2 (interpretation) of this Order are inconsistent with sub-paragraph (2), the latter prevail.

(2) In this Part of this Schedule—

"the affected highways" means the following highways: M180 (West of A15), A15 (North of M180), A180 (West of A160 to M180 and East of the A160 to the A1173) A180 (East of A1173) A160 (North of A180 to A1173) A1173 east of A160 to A180), Humber Road;

"the affected junctions" means the following junctions: Kings Road/ A1173 Roundabout, A1173/ Kiln Lane Roundabout, A1173/ SHIIP Roundabout, A160/ Humber Road/ Manby Road Roundabout (Manby Roundabout), A160/ Ulceby Road/ Habrough Road/ East Halton Road Roundabout (Habrough Roundabout), A180/ A1173 Roundabout, A160/ A180 Roundabout (Brocklesby Interchange) including slip roads for entering or exiting the junctions;

"CLdN" means CldN Ports Killingholme Limited, company number 00278815, whose principal office is at 130 Shaftesbury Avenue, 2nd Floor, London, W1D 5EU as statutory harbour authority for and operator of the Port and any successor in title or function to the Port;

"the CLdN disposal site" means Humber 3A/Clay Huts (HU060) disposal site situated adjacent to Clay Huts and Holme Ridge in the river Humber;

"the Port" means any land (including land covered by water) at Killingholme for the time being owned or used by CLdN for the purposes of its statutory undertaking, together with any quays, jetties, docks, river walls or works held in connection with that undertaking;

"specified work" means any work, activity or operation authorised by this Order, by the Town and Country Planning Act (General Permitted Development) Order 2015 or by any planning permission given under the Town and Country Planning Act 1990, and any associated traffic, rail and vessel movements, which may affect the Port or access (including over water) to and from the Port, CLdN's ability to carry out disposal activities at the CLdN disposal site, or the functions of CLdN as the statutory harbour authority for the Port; and

"the West Gate access" means the western access to the Port of Immingham from Humber Road.

Cooperation

3.The Company and CLdN must each act in good faith and use reasonable endeavours to co-operate with, and provide assistance to, each other as may be required to give effect to the provisions of this Part of this Schedule.

Notice of and consultation on works and vessel movements

4.The Company must inform CLdN in writing of the intended start date and the likely duration of the carrying out of any specified work at least 30 days prior to the commencement of the specified work.

5. Any operations for the construction of any specified work, once commenced, must be carried out by the Company so that CLdN does not suffer more interference than is reasonably necessary.

6.(1) The Company must not allow vessels associated with the construction of the authorised development to obstruct or remain in the main navigation channel when vessels are sailing to or from the Port.

(2) CLdN must provide the Company with a schedule of movements to which sub-paragraph (1) applies and must give the Company reasonable notice of any changes to scheduled sailings or other vessel movements of which it has informed the Company.

7.Where CLdN notifies the Company that there is disruption to navigation to or from the Port as a consequence of construction of a specified work, the Company must immediately cease construction of the relevant specified work until such time as it can be resumed without causing disruption to navigation to or from the Port, or otherwise with the consent of CLdN as to how construction of the specified work may resume in a way that will cause minimal disruption to navigation to or from the Port.

Railways

8. The construction and operation of the authorised development must not cause unreasonable interference with or unreasonably prevent the free, uninterrupted and safe use by CLdN of the railway network to which the Port is connected.

Highway access

9.(1) Before the commencement of the authorised development, the Company must submit a construction traffic management protocol to CLdN for approval.

(2) The construction traffic management protocol must include measures to minimise the impact of construction traffic on CLdN including but not limited to—

(a) the procedures to be followed by vehicles and construction workers accessing the Order Limits for the purposes of construction of the authorised development;

(b) the arrangements for informing CLdN of planned closures or diversion of traffic for the purposes of construction of the authorised development;

(c) the proposals for erection of temporary signage at the main junctions to appropriately direct all HGV traffic relating to the proposed development (both accessing and egressing the site) towards the construction compounds;

(d) a suggested process by which advanced notification will be given to CLdN of the number of vehicular movements, including abnormal indivisible loads, expected to access the Order Limits for the purposes of construction within a period to be agreed with CLdN, and for updates to this information to be provided at the end of agreed period, for the next agreed period; and

(e) a suggested process by which variations to construction traffic management protocol are consulted upon and approved by CLdN.

(3) The approval of CLdN under sub-paragraph (1) must not be unreasonably withheld but may be given subject to such reasonable modifications, terms and conditions as CLdN may make for the protection of the Port and its customers, including in respect of their current and future operations, the use of its operational land or the river for the purposes of performing its functions; or the performance of any of its functions connected with environmental protection.

(4) The Company must ensure that its employees, agents and contractors comply with the agreed construction traffic management protocol.

10. The construction and operation of the authorised development must not unreasonably interfere with or obstruct the free, uninterrupted and safe use of the affected highways, the affected junctions or the West Gate access, by vehicles serving the Port, unless in any case an alternative access that is suitable and commodious is provided prior to and for the duration of any such interference.

Indemnity

11. (1) The Company is to be responsible for, and must indemnify CLdN against all losses, costs, charges, damages, expenses, claims and demands however caused, including indirect and consequential losses and loss of profits, which may reasonably be incurred or occasioned to CLdN by reason or arising in connection with—

(a) any obstruction which prevents or materially hinders access into or out of the Port, which is caused by or attributable to the Company or its agents or contractors in exercising the power of this Order;

(b) the undertaking by CLdN of works or measures to prevent or remedy a danger or impediment to navigation or access to or from the Port; or

(c) any additional costs of disposal of dredging arisings from the Port incurred by CLdN as a result of the Company's use of the CLdN disposal site.

(2) Nothing in sub-paragraph (1) imposes any liability on the Company with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of CLdN, its officers, servants, contractors or agents.

(3) Without limiting the generality of sub-paragraph (1), the Company must indemnify CLdN from and against all claims and demands arising out of, or in connection with, such construction, maintenance or failure or act or omission as is mentioned in that sub-paragraph.

Statutory powers

12. Save to the extent expressly provided for, nothing in this Order affects prejudicially any statutory or other rights, powers or privileges vested in or enjoyed by CLdN at the date of this Order coming into force.

13. With the exception of any duty owed by CLdN to the Company which is expressly provided for in this Part of this Schedule, nothing in this Order is to be construed as imposing upon CLdN either directly or indirectly, any duty or liability to which CLdN would not otherwise be subject and which is enforceable by proceedings before any court.

Arbitration

14. Unless otherwise agreed in writing, any dispute arising between the Company and CLdN under this Part of this Schedule is to be determined by arbitration as provided in article [35] (arbitration).