

Neutral Citation Number: [2018] EWHC 657 (Admin)

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 March 2018

**Before:**

**JOHN HOWELL QC**  
Sitting as a Deputy High Court Judge

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**Between:**

**THE QUEEN**  
on the application of

**MELANIE RAINBIRD** Claimant

- and -

**THE COUNCIL OF THE LONDON BOROUGH  
OF TOWER HAMLETS** Defendant

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**Mr Richard Buxton** (instructed by Richard Buxton Environmental and Public Law) for the  
**Claimant**

**Mr Matthew Reed QC** (instructed by the Defendant's Director of Legal Services) for the  
**Defendant**

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**Judgment**

## John Howell QC:

1. This is a claim for judicial review of the grant of conditional planning permission by the Council of the London Borough of Tower Hamlets to themselves for the demolition of the existing buildings at 3-5 Arnold Road and the construction of two new buildings together with amenity space and other facilities. The two new buildings would provide a number of commercial (B1) units on the ground floor of each building with 62 flats on the floors above which would be let as affordable units.

## INTRODUCTION

2. The site of the proposed development lies on the western side of Arnold Road. It has a frontage to that road of 98 metres. The existing building on the site, the William Brinson Centre, is up to two storeys in height. Only the ground floor, which is used as an adult day centre, is occupied.
3. The Claimant, Mrs Melanie Rainbird, was granted permission to bring this claim by Gilbert J. She does not object to a redevelopment of the application site but she is concerned about the impact that the new buildings proposed would have given their scale on the sunlight and daylight enjoyed by her house and others on the western side of Tomlins Grove. The houses that will be affected are part of a late nineteenth century terrace, listed as being of special architectural or historic interest, which lies within the Tomlins Grove Conservation Area. The houses are to the east of the application site, separated from it by Arnold Road itself; a railway line on a substantial viaduct, and by their own rear gardens. The houses are predominantly two storeys, with dormers, basements and rear extensions. It should be noted, however, that the rooms in the rear of the basements appear to be at roughly the same level as the rear gardens, with doors to it, with the result that some of those rooms are apparently used as kitchens, living or dining rooms. Currently little or nothing of the existing low building on the application site can be seen above the railway viaduct from the lower floors of the terrace.
4. The proposed development consists of two linear blocks facing Arnold Road, eight storeys (40.3m) in height to the south and six storeys (33.7m) in height to the north, with a communal open space between. The new southern building would be about between 35 metres (at its northern end) and 47 metres (at its southern end) from the rear of the properties in Tomlins Grove, and the new northern building would be about 28 metres from them. The new buildings proposed would be visible from, and would obstruct the passage of sunlight and daylight to, a number of windows in the terrace. A report produced by Waldrams Limited and submitted in support of the application for planning permission ("*the S&D report*") examined the likely impact of the proposed development on the sunlight and daylight enjoyed in the terrace. The data in it indicated that, in twelve houses, daylight is likely to be adversely affected significantly in 23 habitable rooms, and sunlight in 11 habitable rooms, measured by the normal guidelines in "Site Layout Planning for Daylight and Sunlight: a guide to Good Practice" published by the Building Research Establishment ("*the BRE Guide*").

5. The Claimant seeks to impugn the grant of planning permission on three grounds. In summary these are (i) that the Council failed to make the S&D Report available on their website during the prescribed period when representations on the application may be made, thereby depriving the Claimant and others of the opportunity of making representations about, and in the light of, it; (ii) that the Council's Development Committee, which resolved to grant the planning permission impugned on January 12<sup>th</sup> 2017, acted unlawfully and unfairly in giving no weight to materials that residents had provided to members of that Committee before their meeting; and (iii) that members of the Development Committee were misled materially about the likely impact of the proposed development on the sunlight and daylight enjoyed by houses in the terrace.

## **WHETHER THE CLAIMANT AND OTHERS WERE UNFAIRLY DEPRIVED OF THE OPPORTUNITY TO MAKE REPRESENTATIONS ON THE S&D REPORT**

### *i. submissions*

6. On behalf of the Claimant Mr Richard Buxton contended that local residents, including the Claimant, had been unable to make representations on the S&D Report during the period in which the relevant legislation provides that representations may be made. A number, who had every interest in considering the S&D Report, have filed witness statements confirming that they did not see any reference to it in the list of documents associated with the application for planning permission when they visited the Council's website during that period, in some cases on many occasions. Others who objected to the effect of the development on sunlight and daylight, with one exception, made no reference to it, as no doubt they would have done had it been available. The exception, a representation by Mr Stephen Lyman and Ms Janet Davies, which appears to have referred to information in the S&D Report, may be explained by the fact that Mr Lyman worked for the architects for the scheme and may have had access to it in that way.
7. Mr Buxton accepted that the Council's evidence was that, if its system worked according to plan, then all the documents associated with the application, including the S&D Report, should have appeared on the website. There is no suggestion that there was any malfeasance and, all other things being equal, the S&D Report should have been available. But, as an expert, Mr George Edwards, had said, things go wrong with computer systems. There is no positive evidence that the S&D Report (or any other document) was actually listed on, or downloaded from, the website in the relevant period. Mr Buxton submitted that the evidence is such that, on the balance of probabilities, the S&D Report was not available for viewing in the relevant period.
8. Mr Buxton submitted that the failure to make the S&D Report available was procedurally unfair, seriously prejudicing the ability of the Claimant and others to provide representations about its shortcomings and inaccuracies. They would, for example, have been able to show that the main habitable room affected on the ground floor of each of the properties on Tomlins Grove was not a bedroom (as the S&D Report suggested) but a living room, lounge, or kitchen (for which daylight and sunlight are more important than bedrooms). The misclassification was also

significant in relation to any appraisal in terms of Average Daylight Factors and sunlight. There were also other serious shortcomings in the report. There was no requirement for individuals to visit the Council's offices or to make other enquiries about the availability of documents: they were told by letter that the information would also be available on the Council's website.

9. On behalf of the Council Mr Matthew Reed QC submitted that the evidence established that the S&D Report was listed on their website during the consultation period. It was uploaded onto the website on September 23<sup>rd</sup> 2016 and made publically available with others at the beginning of the consultation period on October 3<sup>rd</sup> 2016. The evidence is that, apart from deliberate intervention, there was nothing that would cause only one document not to appear on the list. Absent a failure in the system, there would have to have been deliberate interference which is extremely unlikely. The report was seen by Mr and Mrs Lyman between October 29<sup>th</sup> and 30<sup>th</sup> 2016 and their assumption has been that they saw it on the Council's website. Mr Edwards has provided no example of a document that has been uploaded failing to appear on the online list and no explanation of how such an omission could occur. There is a simple explanation why other residents may have failed to see the report on the list. The list contained 99 documents; the S&D Report was on it towards the end, and it did not have an entry in the description section.
10. Mr Reed further contended that, even if the document was not available, there was no unfairness. That involves the Claimant being materially prejudiced: see *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49] and [62]-[63]; *George v Secretary of State for the Environment* (1979) 77 LGR 689 per Lord Denning MR at p695. In her case the Claimant had the opportunity to obtain the document, the existence of which she should have been aware. But, even had she obtained the S&D Report, it would not have led her to make any different comments that would have affected the decision. She had no detailed knowledge of the BRE Guide but, even if she had and had made the criticisms now advanced of it, it would have made no difference. Accordingly, if the third ground of her claim, that the report to members was misleading, fails so equally must this ground for her claim.

## *ii. discussion*

*a. whether there was any requirement for the S&D Report to be available for inspection on the authority's website*

11. The publicity that applications for planning permission must be given is prescribed by article 15 of the Town and Country Planning (Development Management Procedure)(England) Order 2015 ("*the DMPO*"). In all cases, article 15(7) provides *inter alia* that:

"The following information must be published on a website maintained by the local planning authority—

- (a) the address or location of the proposed development;
- (b) a description of the proposed development;

- (ba) in the case of EIA application accompanied by an environmental statement, that statement;
- (c) the date by which any representations about the application must be made, which must not be before the last day of the period of 14 days, or in the case of an EIA application accompanied by an environmental statement 30 days, 10 beginning with the date on which the information is published;
- (d) where and when the application may be inspected;
- (e) how representations may be made about the application;..”

12. A “requisite notice” of the application also has to be given by a site notice or in some cases by serving it on any adjoining owner or occupier<sup>1</sup>. This notice must state<sup>2</sup> *inter alia* that:

“Members of the public may inspect copies of

- the application
- the plans
- and other documents submitted with the application

at.....during at reasonable hours until.....”.

13. The local planning authority are required, when determining the application, to take into account any representations made within time limits that must be specified: see section 71(2)(a) of the Town and Country Planning Act 1990 (“*the 1990 Act*”) and article 33(1) of the DMPO.

14. The local planning authority must also keep a register. Where this register “is kept using electronic storage, the authority may make the register available for inspection by the public on a website maintained by the authority for that purpose”: see article 40 of the DMPO. Part 1 of the Register must contain “a copy (which may be photographic or in electronic form) of the application [for planning permission] with any accompanying plans and drawings”, but not necessarily any documents submitted with (but not forming part of) the application: see article 40(3)(a) of the DMPO. Part 2 must also include those documents required to be included under Part 1 “and any accompanying design and access statement provided in accordance with article 9” of the DMPO: see article 40(4)(a). Entries in the register need only be made within 14 days of the receipt of the application: see article 40(10) of the DMPO. Although the Secretary of State had the power to provide for the register “to contain copies of applications...and of any other documents or material submitted with them” (by virtue of section 69(5)(a) of the 1990 Act), perhaps surprisingly, therefore, he has not

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<sup>1</sup> See article 15(1)-(5) of the DMPO and (10).

<sup>2</sup> See Schedule 3 of the DMPO.

provided that the register available for inspection must contain all the documents submitted with an application for planning permission.

15. The DMPO accordingly contains no requirement that every document submitted in support of an application for planning permission must be available for inspection on the local planning authority's website, although they must be available for inspection at an address specified in the "requisite notice". The S&D Report is not one of the few types of documents accompanying an application that must be made available in a physical register or on the authority's website under the DMPO.
16. In this case, however, that is not all that falls to be considered. Local planning authorities are required to prepare a statement of community involvement setting out their policy as to the involvement of persons, who appear to have an interest in matters relating to development in their area, in the exercise of the authority's functions under *inter alia* Part 3 of the 1990 Act<sup>3</sup>. Appendix 3 of the Council's Statement of Community Involvement, that sets out "the minimum standards for consultation on planning proposals", states that "application details" can be viewed at a specific address "and are also available via our website". Although this policy statement is no doubt one that creates a legitimate expectation that "application details" can be viewed on the Council's website, what that term encompasses is open to argument.
17. The application in this case was also advertised by a site notice and a press advert, neither of which is in evidence. The Claimant and others also received a letter, however, stating that "the application and supporting drawings" could be viewed electronically at the Planning Office at certain times and that "the information will also be available on the Council's website".
18. Mr Reed did not seek to contend that, even if the S&D Report had not been available to be inspected on the Council's website and if the Claimant could show that she had been substantially prejudiced thereby, the decision could not be impugned on the ground of procedural unfairness. He was minded to accept that it could be, based on the letter sent to the Claimant and others. I am content to proceed on that basis when determining this claim for judicial review. It is also the case, however, that anyone visiting the Council's website would have seen a page associated with the application in this case entitled "Planning Application Documents" on which a list of them appeared including supporting reports. Had the S&D Report not appeared on that list, the person visiting it would justifiably have felt misled.
19. I would simply note more generally that, if those potentially interested in an application for planning permission are to be given a fair opportunity to make representations on it, they must be able to address what has been submitted in support of it by the applicant in any representations that they may choose to make. That requires that any such documents must be available for inspection by them (as reflected in the "requisite notice" of the application that has to be given under the DMPO). It would no doubt be simpler (and, for many members of the public, more convenient) if all such documents were required to be available for inspection on the authority's website. But, where an authority indicates that relevant documents are

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<sup>3</sup> See section 18(1) and (2) of the Planning and Compulsory Purchase Act 2004.

available for inspection on their website (as the Council did in their Statement of Community Involvement and letters to local residents), it would be desirable for such an indication to make clear if there are some that will not be available on the website, so that those interested may not be misled into a belief that they may have inspected all such documents having visited the website when in fact they have not.

*b. whether the S&D Report was available for inspection*

20. The question whether the S&D Report was available for inspection on the Council's website in the relevant period depends on whether it was listed as one of the "Planning Application Documents" on it. If it was listed on that page, there would be a link enabling it to be downloaded and viewed. The Council contends that one of the 99 documents listed on that page was identified under "document type" as "Daylight & Sunlight", although (like some others) there was no entry next to it under the column "description".
21. The application for planning permission was submitted via the Planning Portal on September 21<sup>st</sup> 2016 by the Council's agent. The application and the associated documents and plans that had been submitted with it were downloaded into the Council's iDox Document Management System ("*iDox DMS*") on September 22<sup>nd</sup> 2016. A Council Officer then opened each document downloaded to confirm the file contents, to rename it accurately and to determine whether or not to classify it as public or confidential. The S&D Report was not downloaded from the planning portal but inserted into the system manually on September 23<sup>rd</sup> at 12:59 and classified as public (as an Event Log records).
22. The application used for displaying data drawn from the iDox DMS and another system (Acolaid) which the Council uses in handling the application is a web application, Public Access 2.1. This application does not store any data. When an application is viewed on the website, the iDox DMS system is queried to populate the document count, the number that appears on the tab marked "documents". When the "Planning Application Documents" page is viewed under that tab, a list of all the documents, classified in that system as public and where the document type is set to be visible, is displayed populated from the iDox DMS system.
23. Once the Council has determined that an application is valid, the application and associated information about documents that have been classified as public appears on the Council's website. In this case there is no dispute that the application and a list of documents was available on the Council's website on and after October 3<sup>rd</sup> 2016. The question is thus whether one document, the S&D Report that had been classified as public, did not appear on the list displayed thereafter during the consultation period.
24. The company responsible for the iDox system has stated that, without deliberate intervention, there is nothing that would make one specific document not appear in the list of documents displayed. There is no evidence of any such intervention and, although Mr Edwards has said things do go wrong with such systems, he has provided no example of a document on such a system failing to appear on the list and no explanation of how it could occur.

25. What is undoubtedly surprising, however, is that at least seven residents accessed the system and have said that they did not see any reference in the list to a daylight and sunlight report. Mr Reed pointed out that the report appeared (on the Council's case) at very nearly the end of that list and submitted that it may simply have been missed. That is, of course, possible but still surprising given the number of separate occasions on which some of these residents accessed the website during the consultation period but saw no such document. For example, one says that he accessed it ten times; another on six occasions. Mr Buxton also points out that objectors nowhere generally referred to the S&D Report.
26. It is true that the Council cannot provide evidence showing that the S&D Report was in fact listed on the relevant page of its website. But there is some evidence, however, that it may have been listed. (i) One representation, from Ms Janet Davies and Mr Steve Lyman, referred to information that appeared in the S&D Report. Mr Lyman subsequently stated that "we can only assume it was [seen] from the Planning website". He has later said that they used information from the website in formulating their representations; that they had access to the S&D Report at that time; that their assumption had always been that it was seen on the Council's website, but that he cannot now make a statement whether he saw it there or had access to it by virtue of his position as Associate Director of the firm of architects responsible for the project. In my judgment this material provides some, albeit limited, support for the Council's case, notwithstanding Mr Lyman's current inability to make a statement one way or another, given that he says that he "purposely avoided all contact with the project" in his work at the firm in the light of his potential conflict of interest and that he and Mrs Davies' assumption had hitherto been that they had seen the Report on the Council's website. (ii) The second piece of evidence that again provides some support, albeit limited, for the Council's case is a witness statement filed by the Claimant made by Professor Michael Keith, a local resident, in which he says that he wrote a letter shortly after the meeting of the Development Committee on January 11th 2017 to his next door neighbour recording that he had tried to access the report immediately following the Committee meeting but was unable to do so "because the hyperlinks were not connecting online to any substantive reports in spite of indicating that they might do so." To try to obtain the document using such a link, however, it must appear on the list of documents.
27. In this case the onus lies on the Claimant to show at least on the balance of probabilities that the S&D Report was not listed on the Council's website in the relevant period. In my judgment the evidence that the Council have adduced and which has not been seriously challenged, that its systems will secure that a document, such as the S&D Report, on the iDox DMS classified as public will be listed, is compelling and no credible mechanism has been identified that could explain its omission alone from the list. Although I am troubled by the number of residents who have said that they did not see it listed, in some cases even though they accessed the relevant page on a number of occasions, the Claimant has not persuaded me that it is more likely that the Council's systems inexplicably failed than that the document was not inadvertently overlooked among the long list of over 90 documents by those visiting the website. Indeed, as I have mentioned, there is some, albeit limited evidence, that the report did appear on the list which also supports the Council's case.

28. Accordingly this ground on which this claim for judicial review has been brought must be dismissed.

**WHETHER THE DEVELOPMENT COMMITTEE ACTED UNLAWFULLY AND UNFAIRLY IN GIVING NO WEIGHT TO MATERIALS THAT RESIDENTS HAD PROVIDED TO MEMBERS OF THAT COMMITTEE BEFORE THEIR MEETING**

29. On the afternoon on January 9<sup>th</sup> 2017, Ms Sara Dunn sent all the members of the Development Committee an e-mail on behalf of residents of Tomlins Grove attaching a document identifying a number of concerns with the Officer's Report to the committee that members might develop with officers and which also contained drawings, photographs and montages and comments on them. It appears that, at the meeting of the Committee, she and Professor Keith spoke in opposition to the application. But they were prevented from circulating the document at the meeting and officers advised the Committee that they should place no weight on it as Officers had not seen it before the meeting and could not, therefore, verify the accuracy of what it contained.

*i. submissions*

30. Mr Buxton submitted that the advice by officers, to give the materials that members had been sent no weight, was procedurally unfair and unlawful. Members were entitled to consider, and should have considered, them and placed appropriate weight on them. They were sent well in advance of the meeting, before the "cut off" time for inclusion in an Officer's Update Report. There was no prohibition on members, who are the decision-makers, being sent representations directly or any prohibition on them being taken into account if they are. The relevant procedural rules of the Council do not require materials to be sent to a planning officer. If officers needed more time to consider the materials before they could offer advice to members, consideration should have been given to adjourning the meeting.
31. On behalf of the Council, Mr Reed submitted that there was no procedural irregularity. The Council had Development Procedure Rules in their Constitution that secure proper consideration of applications. These note that it is common for late representations to be received. They provide for them to be presented in a written form in an Update Report to be presented to members no later 30 minutes before the meeting of the Committee. They provide:

“3.3 The practicality of producing such a report means there has to be a cut-off point for receipt of late material which is no later than noon on the working day before the day of the meeting. Generally material received after this time will not be reported to the Committee though the Corporate Director, Development and Renewal, has an absolute discretion in this regard.

3.4 Material must not be distributed to Committee members by members of the public (including public

speakers) or other Members of the Council during the course of the meeting.”

32. The Agenda for the Committee meeting also stated that:

“Should you wish to submit a representation or petition, please contact the planning officer [named on the front of the relevant report]. Any representations or petitions should be submitted no later than noon the working day before the committee meeting for summary in the update report that is tabled at the committee meeting. No written material (including photos) may be circulated at the Committee meeting itself by members of the public including public speakers.”

33. The obvious effect of the relevant rules and the statement on the agenda, so Mr Reed submitted, is to require material to be provided in advance to the planning department to ensure that officers can consider and advise members on them. There was no procedural irregularity in this case on the Council’s part. The irregularity was the failure by objectors to follow the rules. Given that they had not been followed the advice officers had given was neither unfair nor unlawful.

34. Mr Reed further submitted that there was no unfairness in not adjourning the meeting. No resident had suggested that, in the circumstances, it should be and there was no duty on the Council to accommodate the failure to comply with the rules. Mr Reed further submitted that no prejudice was in any event suffered: local residents had, and took, the opportunity to address the meeting; the issues raised in the document had been addressed in the Officer’s Report and members were well aware of the nature of the development and are to be taken to know their local area.

## *ii. discussion*

35. In my judgment there is generally nothing to prohibit members of the public making representations directly to the members of a planning committee and for those representations to be taken into account by them. Those members are elected and accountable to the inhabitants of their area. Seeking to isolate elected members from any communication with them would in any event probably be impractical. The Council’s Development Procedure Rules do not purport to do so.

36. Two points should nonetheless be noted. The first is that members need to be careful about their response to any communication or representation that they may receive directly from members of the public about an application for planning permission which is not made at a committee meeting. They naturally need to be careful that any response which they may give does not appear to prejudge or prejudice consideration of the application on its merits by them at their meeting. But they also need to help secure that the application is dealt with transparently. It would be wrong when taking decisions for members to take into account matters that are not disclosed to others, for example to the applicant. It would be prudent, therefore, for them to keep a note of any communication and to forward that note and any written representations that they may receive directly from members of the public to officers of the authority for them to be dealt with and disclosed in the normal way. These are matters that may well be

dealt with in more detail in any Planning Code of Conduct for Members that an authority may adopt. The second point is that, if members of the public make representations directly to elected members of a local planning authority without also informing their officers of them, there is a risk that those officers may be then unable at the meeting of the committee to advise members about their contents and that their advice may be that in the circumstances weight should not be given to their contents.

37. In this case the Council's Development Procedure Rules and the statement on the agenda papers are designed to enable members of the public to know the time by which representations have to be submitted if officers are to advise members on them and to ensure that new material that has not been considered by officers is produced at the meeting itself. These rules are obviously sensible to help secure that applications are dealt with by members on their merits and in the light of advice from those retained to advise them. The Agenda Paper makes plain, as one would expect, that the representations have to be sent to an officer for them to be dealt with in time.
38. In my judgment there can be no complaint that local residents were not permitted, in accordance with the Development Procedure Rules and the statement on the agenda papers, to circulate the document in question at the meeting of the Development Committee. Officers did not advise that the contents of that document were immaterial as a matter of law or on the facts of this application. But, given that the document had not been previously seen by them, in my judgment it was not unreasonable or unfair for officers to advise members not to give any weight to its contents as they had been unable to verify its accuracy. The document contained, for example, a number of images of the development proposed. Whether these were accurate would plainly require checking.
39. Nor in the circumstances in my judgment was it unreasonable or unfair for members to follow that advice if they did so. No doubt, as Mr Buxton submitted, members might have forwarded the document in question when they had received it to officers for them to consider in the Update report prepared for the meeting. But members might have assumed that those responsible for sending all of them the document would also have sent it to officers, as the Development Procedure Rules and the Agenda paper contemplated. By not doing so, those responsible ran the risk that officers would be unable to advise substantively on its contents and that, in those circumstances, officers might advise members (as they did) not to place weight on its contents. It was of course open to members to adjourn the meeting to get their officers' advice. But in my judgment it was not unfair not to do so in these circumstances. Although the general desirability of determining applications for planning permission expeditiously cannot override the requirements of fairness, the failure by those who complain of unfairness to comply with the authority's published guidance, that is designed to secure that applications are properly determined fairly and on their merits without the need for deferral, is not irrelevant. Nor was it impossible for any major substantive point the document contained to be made orally at the meeting of the Development Committee by Ms Dunn and Professor Keith. They had the opportunity to do so. The minutes recall that officers responded to some of the points they made, concerning displacement of businesses and road closures, without any suggestion that what they had said orally should be given no weight merely because the points were being made at the meeting.

40. Accordingly in my judgment this ground on which the decision to grant planning permission is impugned must also be dismissed.

**THE BASIS ON WHICH THE DEVELOPMENT COMMITTEE CONSIDERED THE IMPACT OF THE PROPOSED DEVELOPMENT ON SUNLIGHT AND DAYLIGHT REACHING NEARBY PROPERTIES**

*i. background*

41. The most directly relevant policy that addresses amenity in the Council's Development Plan is Policy DM25 in its "Managing Development Document". DM25 provides, so far as relevant, that:

"1. Development should seek to protect, and where possible improve, the amenity of surrounding existing and future residents and building occupants...by:

d. not resulting in an unacceptable material deterioration of the sunlighting and daylighting conditions of surrounding development including habitable rooms of residential dwelling..."

42. Paragraph 25.5 in the explanatory text of the Managing Development Document states *inter alia* that:

"In applying parts (1c and d) of the policy, the Council will aim to minimise the impact of the loss of daylight and sunlight...caused by new development...The Council will expect the impact of the development to be assessed following the methodology set out in the most recent version of Building Research Establishment's (BRE) "Site layout planning for daylight and sunlight: A guide to good practice". Depending, on the scale of the development a Daylight and Sunlight Report may be required to fully assess the impacts."

*ii. the BRE Guide*

43. The BRE Guide is intended to provide advice on site layout planning to achieve good sunlight and daylight within both new and existing buildings and in open spaces between them. Although the Guide recognises that it may be used by planning authorities, its aim is to help, rather than to constrain, the designer<sup>4</sup>.

*a. daylight*

44. Section 2 of the BRE Guide contains numerical target values which indicate when the daylight enjoyed by an existing building is likely to be significantly adversely affected by a development. They are intended for application to rooms in dwellings where

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<sup>4</sup> See paragraph [1.6] of the BRE Guide (quoted in paragraph [52] below).

daylight is required, including living rooms, kitchens and bedrooms, although they may also be applied to any non-residential building where the occupants have a reasonable expectation of daylight<sup>5</sup>. The values are contained in two guidelines. One relates to what is referred to as the vertical sky component (“VSC”) and the other to daylight distribution within a room.

45. The VSC guideline measures the amount of light reaching a window on a completely overcast day and it thus provides a measure of the daylight environment in the room as a whole. It is the ratio of the direct sky illuminance falling on the centre of each main window to the simultaneous horizontal illuminance under an unobstructed, overcast sky<sup>6</sup>. In a completely unobstructed vertical wall, the maximum value for the VSC is almost 40%. That will be reduced by any obstruction. The BRE Guide states (at [2.2.7]) that

“If this VSC is greater than 27% then enough skylight should still be reaching the window of the existing building. Any reduction below this level should be kept to a minimum. If the VSC, with the new development in place, is both less than 27% and less than 0.8 times its former value, occupants of the existing building will notice the reduction in the amount of skylight. The area lit by the window is likely to appear more gloomy, and electric lighting will be needed more of the time.”

46. Daylight distribution within a room is measured by the area of the working plane, that is the plane in which a visual task lies, which receives daylight directly. The BRE Guide states that:

“2.2.8 Where room layouts are known, the impact on the daylighting distribution in the existing building can be found by plotting the ‘no sky line’ in each of the main rooms....The no sky line divides points on the working plane which can and cannot see the sky....(In houses the working plane is assumed to be horizontal and 0.85 m high...) Areas beyond the no sky line, since they receive no direct daylight, usually look dark and gloomy compared with the rest of the room, however bright it is outside. According to BS 8206-2, supplementary electric lighting will be needed if a significant part of the working plane lies beyond the no sky line...

2.2.9 If, following construction of a new development, the no sky line moves so that the area of the existing room, which does receive direct skylight, is reduced to less

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<sup>5</sup> See paragraph [2.2.2] of the Guide.

<sup>6</sup> The VSC is defined as the “Ratio of that part of illuminance, at a point on a given vertical plane, that is received directly from a CIE standard overcast sky, to illuminance on a horizontal plane due to an unobstructed hemisphere of this sky. Usually the ‘given vertical plane’ is the outside of a window wall. The VSC does not include reflected light, either from the ground or from other buildings.”

than 0.8 times its former value this will be noticeable to the occupants, and more of the room will appear poorly lit. This is also true if the no sky line encroaches on key areas like kitchen sinks and worktops.”

47. Both the total amount of daylight and its distribution in a room are important (as the BRE Guide states<sup>7</sup>). Thus paragraph [2.2.1] of the BRE Guide identifies cases in which

“the diffuse daylighting of the existing building may be adversely affected. This will be the case if either:

- the VSC measured at the centre of an existing main window is less than 27% and less than 0.8 times its former value
- the area of the working plane in a room which can receive direct skylight is reduced to less than 0.8 times its former value.”

A flow chart, to which this summary relates, indicates that in either case “daylighting [is] likely to be significantly affected”.

*b. sunlight*

48. The effect of a development on sunlight enjoyed in a dwelling is considered in the BRE Guide by reference to the number of annual probable sunlight hours (“*APSH*”). Paragraph [3.2.11] of the BRE Guide identifies cases in which:

“the sunlighting of the existing dwelling may be adversely affected. This will be the case if the centre of the window:

- receives less than 25% of annual probable sunlight hours, or less than 5% of annual probable sunlight hours between 21 September and 21 March and
- receives less than 0.8 times its former sunlight hours during either period and
- has a reduction in sunlight received over the whole year greater than 4% of annual probable sunlight hours.”

49. The BRE Guide recognises that sunlight to kitchens and bedrooms is less important than sunlight to the main living rooms in the dwelling and conservatories<sup>8</sup>.

*c. the guidelines generally*

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<sup>7</sup> See paragraph [2.2.5].

<sup>8</sup> See paragraph [3.2.3].

50. Paragraphs [2.2.1] and [3.2.11] of the BRE Guide provide guidelines for identifying normally whether or not a development will adversely affect significantly the daylight and sunlight that a relevant room in a dwelling may enjoy. For convenience, when it is predicted that a development will have such an effect, I shall say that the development does not meet, or fails to meet, the relevant guideline.
51. These guidelines identify when normally a relevant room may suffer a material deterioration in the sunlight or daylight it enjoys. When considering how the guidelines may be used for environmental impact assessment, the BRE Guide states (at paragraph [I6]) that “where the loss of skylight or sunlight does not meet the guidelines in this book, the impact is assessed as minor, moderate or major adverse” on a particular building depending on a number of factors. These include the number of windows affected (ranging from a small to a large number or all the windows in the property); the extent of the loss of light (ranging from a loss which is “only marginally outside” to one “substantially outside” the guidelines); and whether the affected indoor spaces have a particularly strong requirement for skylight or sunlight (such as a living room in a dwelling).

*d. flexibility*

52. The BRE Guide emphasises, however, that these and the other target values it contains are “advisory” and may be “varied to meet the needs of the development and its location”<sup>9</sup>. Thus, in the Introduction to the Guide (at paragraph [1.6]), it is stated that:

“the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design (see Section 5). In special circumstances the developer or planning authority may wish to use different target values. For example, in a historic city centre, or in an area with modern high rise buildings, a higher degree of obstruction may be unavoidable if new developments are to match the height and proportions of existing buildings. Alternatively, where natural light is of special importance in a building, less obstruction and hence more sunlight and daylight may be deemed necessary.... Appendix F gives advice on how to develop a consistent set of target values for skylight under such circumstances, and Appendix C shows how to relate these to interior daylighting requirements.”

This approach is echoed in Section 2 of the BRE Guide dealing with the effect of a new building on the daylight reaching existing buildings. It states that:

“2.2.3 Note that numerical values given here are purely advisory. Different criteria may be used based on the requirements for daylighting in an area viewed against other

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<sup>9</sup> See the Summary.

site layout constraints. Another important issue is whether the existing building is itself a good neighbour, standing a reasonable distance from the boundary and taking no more than its fair share of light. Appendix F gives further guidance.”

In Appendix F it is stated that:

“F4 For example, in a mews in a historic city centre, a typical obstruction angle from ground floor window level might... correspond to a VSC of 18%, which could be used as a target value for development in that street if new development is to match the existing layout.

F5 A similar approach may be adopted in cases where an existing building has windows that are unusually close to the site boundary and taking more than their fair share of light....To ensure that new development matches the height and proportions of existing buildings, the VSC and APSH targets for these windows could be set to those for a ‘mirror-image’ building of the same height and size, an equal distance away on the other side of the boundary.”

53. In addition other aspects of design of the new and existing building may warrant non-compliance with the normal target values for daylight (as the reference in paragraph [1.6] in the Introduction to Section 5, which deals with such matters, indicates). Thus the BRE Guide States that

“2.2.10 The guidelines above need to be applied sensibly and flexibly. There is little point in designing tiny gaps in the roof lines of new development in order to safeguard no sky lines in existing buildings. If an existing building contains rooms lit from one side only and greater than 5m deep, then a greater movement of the no sky line may be unavoidable.”

54. Similarly, in relation to sunlight, paragraph [3.2.8] states that

“The guidelines are purely advisory. Planning authorities may wish to use different criteria based on the requirements for sunlight in particular types of developments in particular areas. Sometimes a larger reduction in sunlight may be necessary if new development is to match the height and proportion of existing buildings nearby.”

*e. balconies, overhangs and projecting walls*

55. Balconies and overhangs significantly reduce the light entering windows below them. When dealing with daylight the BRE Guide states that:

“2.2.11 Existing windows with balconies above them typically receive less daylight. Because the balcony cuts out

light from the top part of the sky, even a modest obstruction opposite may result in a large relative impact on the VSC, and on the area receiving direct skylight. One way to demonstrate this would be to carry out an additional calculation of the VSC and area receiving direct skylight, for both the existing and proposed situations, without the balcony in place. For example, if the proposed VSC with the balcony was under 0.8 times the existing value with the balcony, but the same ratio for the values without the balcony was well over 0.8, this would show that the presence of the balcony, rather than the size of the new obstruction, was the main factor in the relative loss of light.

2.2.12 A larger relative reduction in VSC may also be unavoidable if the existing window has projecting wings on one or both sides of it, or is recessed into the building so that it is obstructed on both sides as well as above.

2.2.13 However, as a general rule the aim should be to minimise the impact to the existing property.”

56. In relation to sunlight, the BRE Guide states that:

“3.2.8 In certain situations care needs to be taken in applying these guidelines. For example.....if the existing building stands unusually close to the common boundary with the new development, or has a large balcony or overhang above the window, then a greater reduction in sunlight access may be unavoidable....

3.2.9 Balconies and overhangs above an existing window tend to block sunlight, especially in summer. Even a modest obstruction opposite may result in a large relative impact on the sunlight received. One way to demonstrate this would be to carry out an additional calculation of the APSH, for both the existing and proposed situations, without the balcony in place. For example, if the proposed APSH with the balcony was under 0.8 times the existing value with the balcony, but the same ratio for the values without the balcony was well over 0.8, this would show that the presence of the balcony, rather than the size of the new obstruction, was the main factor in the relative loss of sunlight.”

*iii. the Officer's Report to the Development Committee*

57. The Officer's Report to the Council's Development Committee stated *inter alia* that:

“8.101 Policy DM25 of MDD requires development to protect, and where possible improve, the amenity of surrounding existing and future residents as well as the amenity of the surrounding public realm. The policy states that this should be by way of protecting privacy, avoiding an unacceptable increase in sense of enclosure, avoiding a loss of unacceptable outlook, not resulting in an unacceptable material deterioration of sunlighting and daylighting conditions or overshadowing to surrounding open space and not creating unacceptable levels of noise, vibration, light pollution or reductions in air quality during construction or operational phase of the development.

#### Daylight and sunlight

- 8.102 Guidance relating to daylight and sunlight is contained in the Building Research Establishment (BRE) handbook ‘Site Layout Planning for Daylight and Sunlight’. The primary method of assessment is through calculating the vertical sky component (VSC). BRE guidance specifies that reductions in daylighting materially affect the living standard of adjoining occupiers when, as a result of development, the VSC figure falls below 27 and is less than 80% times its former value.
- 8.103 The applicant has submitted a daylight assessment by Waldrams daylight & sunlight. The report has analysed 40 properties surrounding the development to assess the impact this development will have on their daylight and sunlight due to their proximity to the development site. The properties tested are: 8 – 11 Mornington Grove, 28 & 29 Mornington and 7 – 25 Tomlins Grove.
- 8.104 Properties 8 – 11 Mornington Grove, 4 – 7, 9 & 20 – 25 Tomlins Grove are fully compliant with the BRE Guidelines on daylight and sunlight in terms of VSC daylight distribution and APSH. Nos. 28 & 29 Mornington Grove, there are four windows (W8 and W10) on the first and second floors which would experience reductions in VSC beyond 20% recommended in the BRE Guidelines, although W8 and W10 on the first floor and W10 on the second floor are likely to be sufficiently close to the BRE Guidelines to be considered acceptable, experiencing 25%, 26% and 23% reduction respectively. W8 would experience a 38% reduction in VSC but importantly the room it serves, R2, experience no change in its daylight distribution, indicating this room will remain

as well daylit in the proposed situation as it currently is in existing situation, [and<sup>10</sup>] meets the BRE Guideline in terms of VSC.

- 8.105 In terms of sunlight, all windows which look over the proposed development site and face within 90 degree of due south meet the BRE Guidelines for [sic] APSH with the proposed development.
- 8.106 In relation to properties on Tomlins Grove, nos. 4 – 7, 9, 20 – 23 would meet the BRE Guidelines in terms of VSC with the proposed development in place. For each property from and including 8 – 18 Tomlins Grove, the significant majority of the windows meet or come sufficiently close to the BRE guidelines in terms of VSC to be considered acceptable but there is one window likely to serve a habitable room on the ground floor which experience a reduction in VSC beyond 20% recommended in the BRE Guidelines. However, in all but five cases, the rooms served by these windows meet or come close sufficiently to the BRE Guidelines for daylight distribution to be considered acceptable, indicating these rooms will remain appropriately well-lit with the proposed development.
- 8.107 In terms of the four remaining windows and rooms, W1 on the ground floor of 8,15,16,17 and 18 Tomlins Grove, these windows are blinkered by their own massing (side returns and balconies) and not as a result of the proposed development.
- 8.108 In relation to sunlight, all habitable rooms analysed contain at least one window which meets the BRE Guidelines in terms of APSH.
- 8.109 Overall, the proposal makes appropriate efforts to protect neighbouring properties' sunlight in accordance with policy DM25.

#### Conclusion

- 8.110 Overall, as would be expected, the proposals would result in some impact on the daylighting conditions of the surrounding development. The results show that there would be noticeable reductions in the level of daylight from some windows. However, the rooms affected would remain well-lit and have adequate amenity reducing the overall impact, therefore would

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<sup>10</sup> I have inserted the “and” to make the sentence grammatical.

be considered acceptable in accordance with Local Plan policy DM25.

8.111 While perceptible reductions to daylighting would still occur, in all cases the properties would continue to receive good levels of daylighting, especially for an urban location, it is therefore considered that the proposal would appropriately protect surrounding residents' level of daylight in accordance with Local Plan policy DM25."

58. Paragraph 8.107 was corrected in an Update Report to the Committee. This stated *inter alia* that:

"2.4 Paragraph 8.107 suggests four remaining windows flats 8,15,16,17 and 18 are blinkered by their own side returns balconies. To clarify, first floor windows at each of 8, 15, 16 and 17 have Vertical Sky Component reductions of greater than 20% however the report notes the failures are partly due to the outlook of these windows being restricted by their own side returns which restrict daylight to these windows.

2.5 Overall, officers are satisfied that daylight/sunlight matters have been fully assessed by officers and are considered acceptable."

59. It may be noted that:

- (1) The number of houses (12), and the number of habitable rooms that failed to meet the guidelines for daylight (23), identifiable from from the S&D Report was not mentioned. Nor was the number of identifiable habitable rooms that did not meet VSC guideline (15), nor the daylight distribution guideline (20), mentioned.
- (2) In relation to paragraph [8.106], number 19 Tomlins Grove was not addressed (although in fact two rooms in it failed to meet the VSC guideline) and, as I shall explain, what was said about number 9 was inconsistent.
- (3) Paragraph [2.4] of the Update Report inaccurately refers to 4 (rather than 5) rooms on the first (rather than the ground) floor.
- (4) In relation to paragraph [8.108], the Officer's Report was in error in stating that all habitable rooms met the BRE Guidelines in terms of APSH. The S&D Report had stated that a window on the ground floor of 9 properties in Tomlins Grove (numbers 8, 10, 12, 13, 15, 16, 17, 18, and 19) would experience reductions beyond the 20% "recommended in terms of total APSH". In fact the Council now accept that the windows to two other rooms were shown in the S&D Report do not meet the sunlight criteria.
- (5) The Officer's Report gave no indication of the particular use to which the specific rooms mentioned in connection with the criteria for sunlight and daylight were put, other than they were considered to be "habitable".

60. Mr Reed informed me that the officers responsible for the report to the Development Committee had not exercised any independent judgment but had relied on the

assessment in the S&D Report. To that extent paragraph [2.5] of the Update Report was thus also inaccurate.

***iv. the minutes of the meeting***

61. The minutes record that, in response to questions about sunlight and daylight impacts, it was noted that there would be “some impact” on properties in Tomlins Grove, but that, “given the separation distances and the design of the properties at Tomlins Grove restricted light exposure, the impacts from this development would be minimal.”

***v. submissions***

62. On behalf of the Claimant, Mr Richard Buxton contended that the decision of the Development Committee was procedurally unfair as there were errors in the S&D Report, and consequently in the Officer’s Report which relied on it, that might have misled members of that Committee significantly: see *R v Selby District Council ex p Oxtou Farms Limited* [2017] PTSR 1103 per Judge LJ at p1111. Alternatively this was a case in which there were objectively verifiable and relevant errors of fact in relation to the S&D Report that warrant a quashing order: see *E v Home Office* [2004] EWCA Civ 49, [2004] QB 1044, per Carnwath LJ at [66].
63. Mr Buxton submitted that the Officer’s Report was manifestly wrong to suggest that all the habitable rooms in the terrace contained at least one window that would meet BRE Guidelines in terms of APSH. At least 11 did not.
64. Mr Buxton pointed out that neither the “analysis” section of the S&D Report nor the Officer’s Report to the Development Committee stated what the number of rooms that failed to meet the VSC or the daylight distribution guidelines or both in fact were. Nor did it indicate what the rooms adversely affected were used for. The Officer’s Report contained very few hard facts for the Committee to consider.
65. Mr Buxton further contended that achieving good daylight requires both the VSC and daylight distribution guidelines to be met. But, in both the S&D Report and the Officer’s Report, it is assumed that rooms will not be adversely affected unless both guidelines are not met. That is clear both from the last sentence in paragraph [8.104] and from paragraph [8.106] of the Officer’s Report.
66. Mr Buxton submitted that the S&D Report was in error in suggesting that the BRE guidelines permitted the effect of the “side returns” to be omitted from the analysis in respect of both daylight and sunlight or to be treated as irrelevant. That error was reflected in the Officer’s Report. In any event, in relation to daylight, projecting walls were only relevant, in accordance with paragraph [2.2.12], when they were there “as well as” balconies. But, in this case, there were no overhanging balconies in the terrace. Moreover no reference at all was made to projecting walls in the BRE Guide when considering sunlight: the omission was not insignificant in such a carefully drafted document.
67. Mr Buxton accepted that the guidelines fell to be applied in a flexible way but he contended that no explanation was provided why loss of light outside the guidelines should be permitted or be treated as acceptable either in the S&D Report or the

Officer's Report, other than the suggestion that the site is within an urban area. Although in some specific locations where there are special circumstances, such as historic city centres or areas with high buildings, there may be flexibility to set different target values, here there were no special circumstances to justify doing so: the proposed development is significantly taller than its surroundings. Merely being in an urban area is not enough. If different target values were to be adopted, that should have been explained to members of the Committee.

68. The S&D Report had also referred to cases in which good daylight could be still be achieved, even if either the VSC or daylight distribution guideline was not met, namely, when a specified Average Daylight Factor (“ADF”) was achieved. But, so Mr Buxton pointed out, it was not indicated that the BRE Guide did not generally recommend the use of ADF when considering loss of light to existing buildings. Moreover the relevant factor depended on the particular use of the room in question which the S&D Report had wrongly identified in a number of significant cases. Rooms failing the guidelines were identified in the detailed Appendix to that Report as bedrooms when they were in fact living rooms or kitchens where the adverse effect would be greater. Reliance on ADFs would have been flawed in this case.
69. Mr Buxton submitted that these errors were all material. As the minutes indicated, members of the Committee had plainly been concerned about the impact of the proposed development on daylight and sunlight. Had members not been misled they might have reached a different decision and it cannot be said that it is highly likely that they would not have done so.
70. On behalf of the Council, Mr Reed submitted that the relevant legal test was whether the overall effect of the Officer's Report significantly misled the Development Committee about material matters that were not corrected at the meeting of the Committee: see *R v Selby District Council ex p Oxton Farms* supra per Judge LJ.
71. Mr Reed contended that the BRE Guide fell to be interpreted by experts on the basis of common practice. An interpretation of the Guide (unlike that of policies in development plans) would only be flawed if it was not within the range of reasonable interpretations that such an expert might adopt. Mr Reed emphasised those parts of the BRE Guide that referred to flexibility. He submitted that a development could be in accordance with the guidelines even if the target values in them were not met. The judgment as to whether a scheme would be acceptable in spite of not meeting the guidelines in the BRE Guide is for the expert advisor. There was no need to identify special circumstances to vary such values and the application of the tests could produce values sufficiently close to the target values to be acceptable. What it was reasonable to expect in the area where a new development was proposed, here an urban location, was relevant. There was no requirement to give more specific reasons and an authority is entitled to rely upon an expert view.
72. Mr Reed accepted that the BRE Guide required compliance with both the VSC and daylight distribution guidelines but, so he submitted, the S&D Report and the Officer's Report had not suggested otherwise. The final words in the last sentence of paragraph [8.104], “in terms of VSC”, were self-evidently wrong and should not have been included. It was clear that the VSC guideline was not met. The fact that the daylight distribution test was met was capable of being an ameliorating factor, even if

the VSC guideline was not met. The suggestion was not that the guidelines were met but that the rooms remained well-lit in those circumstances, which was a question of expert judgment. There was no manifest error in such a judgment in this case. Mr Reed also accepted that the “analysis” section of the S&D Report and the Officer’s Report did not refer in terms to the results of applying the daylight distribution guideline (other than in the case of the rooms referred to in paragraph [8.106]). But, so he submitted, that omission could not be regarded as material.

73. Mr Reed submitted that the BRE Guide allowed for the omission of the effects of balconies and overhangs to existing dwellings in order to identify the potential contribution of a proposed development to the daylight and sunlight available to rooms in them. That reflects what conditions can reasonably be expected in such dwellings with them. There is no logical reason to distinguish the appraisal of the effect of such balconies and overhangs from that of projecting wings. Thus, even though no mention is made of them in the BRE Guide when dealing with sunlight, the flexibility inherent in the BRE Guide would allow for the same approach in that case given the obvious similarity in the effects of balconies and projecting wings.
74. Mr Reed accepted that the statement in paragraph [8.108], that all the habitable rooms analysed in the S&D Report contained at least one window that met the BRE guideline in terms of APSH, was incorrect. The S&D Report had identified 9 rooms that would experience reductions beyond the 20% “recommended in terms of total APSH”. But the S&D Report had gone on to note that

“these windows and rooms are blinkered by the massing of the Tomlins Grove properties themselves and, as shown by the compliant results to non-blinkered windows, it is this massing which partially limits sunlight. Were these side returns notionally omitted from the analysis, as permitted in the BRE Guidelines, these windows would likely meet the BRE Guidelines recommendations.”

The last sentence was a repetition of that used in the S&D Report when considering the five rooms whose daylight was likewise “blinkered”. Both led to the overall conclusion in the S&D Report that “overall..given the flexibility permitted in the BRE Guidelines, these properties are considered [to be] in accordance with BRE Guidelines for daylight and sunlight with the proposal in place and hence in accordance with local planning policy.” If this was a lawful approach to the “blinkering” effect of the side elevation, then, so Mr Reed contended, the error in the Officer’s Report was immaterial: the recommendation would not have changed.

75. Mr Reed submitted that the question was whether, read as a whole, the Officer’s Report failed to convey the overall position with respect to daylight and sunlight adequately. While the number of rooms that did not meet the guidelines was not stated in the S&D Report or the Officer’s Report and while in some cases figures were given or statements made which were not correct, it could not be said that the overall conclusions would have been changed or the impression given of the impact of the development proposed altered, if such numbers had been mentioned and the errors had not been made. For example, it would have made no difference to the conclusion about sunlight had it been recognised that 11 rather than 9 rooms did not

meet the guideline in respect of APSH given the effects of “blinkering”. Nor was the failure to mention that number of rooms failing the daylight distribution guideline significant: it was unlikely to have made any difference.

76. Mr Reed accepted that the S&D Report had referred to the terms of the ADF test and had provided the results in relation to it in an Appendix. But, so he submitted, whether or not it would have been appropriate to rely on them was irrelevant. The “analysis” section of the S&D Report had not relied on them in reaching its conclusions. The Council’s Officers had not exercised any independent judgment or relied on those factors which were not mentioned in the Officer’s Report. The fact that rooms may have been wrongly identified as bedrooms in the Appendix to the S&D Report was likewise irrelevant. All the relevant rooms were treated in that report and the Officer’s Report as “habitable” and less weight was not given to any which may have been wrongly identified as a bedroom.

#### *v. discussion*

##### *a. general approach*

77. The purpose of a planning officer's report is not to decide the issue for a committee but to inform their members of the considerations relevant to their decision and, if the officer chooses to do so, to give advice on what decision they should take. The report is addressed to members who can be expected to be reasonably familiar with local circumstances and with relevant policies at national and local level and to understand what statute requires of them when determining an application for planning permission. Part of a planning officer's expert function in reporting to a committee is to make an assessment of how much information to include in the report to avoid burdening the committee with excessive and unnecessary detail. There is thus no requirement for a report to contain an elaborate citation of underlying background materials: *R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500 per Sullivan J at p509; *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin) per Sales J at [43]; *R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404, [2016] Env LR 30, per Lindblom LJ at [31]; *R (Lensbury Ltd) v Richmond on Thames LBC* [2016] EWCA Civ 814, [2016] JPL 96 per Sales LJ at [8].
78. Members of a planning committee may well benefit from the provision of expert advice on technical matters (whether from officers of the authority or from others). But the decision is theirs, not one that they can abdicate to others even if such persons are experts. Thus “reports obviously have to be clear and full enough to enable [members] to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves”: *Morge v Hampshire County Council* [2011] UKSC 2, [2011] 1 WLR 268 per Baroness Hale of Richmond JSC at [36].
79. As Lindblom LJ put it in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2018] JPL 176, at [42]:

“The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way—for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy—that the court will be able to conclude that their decision was rendered unlawful by the advice they were given.

Where the line is drawn between an officer’s advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact..., or has plainly misdirected the members as to the meaning of a relevant policy... There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law.... But unless there is some distinct and material defect in the officer’s advice, the court will not interfere.”

80. In this case Policy DM25 required the Committee to consider whether or not the proposed development would “result in an unacceptable material deterioration of the sunlighting and daylighting conditions of surrounding development including habitable rooms of residential buildings”<sup>11</sup>. The plan also indicated that the impact of any proposed development should be assessed in accordance with the BRE Guide<sup>12</sup>.
81. I do not accept that, in considering what the impact of a proposed development assessed in accordance with the BRE Guide is, the Council were free to adopt any interpretation of that Guide that might be adopted within the limits of rationality. Written documents normally fall to be construed objectively in their context by the court, including documents promulgated by an authority or other institution. Of course the *application* of any policy, guidance or other statement in such a document may involve questions of judgment, the lawfulness of which may only be reviewed within those limits or on the ground of an error of fact or some other defect recognised in public law as rendering a decision unlawful if it is material. But such statements fall to be interpreted, and their *meaning* determined by the court, objectively in accordance with the language used read as always in their proper context: see *eg Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012]

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<sup>11</sup> See paragraph [41] above.

<sup>12</sup> See paragraph [42] above.

PTSR 983, per Lord Reed at [18]-[19]; *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836, at [107]-[123]. It is irrelevant (as the approach to the interpretation of the National Planning Policy Framework or other Ministerial statements, for example, illustrates in the context of planning) whether or not the statement emanates from the decision-maker or (as in this case) is incorporated by reference into the development plan: see eg *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865, per Lord Carnwath JSC at [23] and [26], *R (Holder) v Gedling Borough Council* [2018] EWCA Civ 214 per Lord Burnett of Maldon LCJ at [20].

82. In considering the interpretation of the BRE Guide, however, it is always necessary to have well in mind that it is not an enactment but rather that it is advice aimed primarily (but not exclusively) at designers<sup>13</sup>. Moreover it contains scientific or technical terms in understanding which a court may itself be assisted by expert evidence: cf eg *Glaverbel SA v British Coal Corp (No.4)* [1995] FSR 254 per Staughton LJ at pp263-264. In this case witness statements filed on behalf of the parties by a chartered surveyor involved in the production of the S&D Report, Mr Michael Harper, and by the author of the BRE Guide, Dr Paul Littlefair, have assisted in understanding the BRE Guide in that respect and in some others.
83. Policy DM25 requires consideration of two questions about the impact of a proposed development on the sunlighting and daylighting conditions of surrounding development: (i) whether or not it would result in a “material deterioration” of those conditions and (ii) whether or not any such deterioration would be “unacceptable”.
84. The guidelines in the BRE Guide identify cases in which normally it is likely that a proposed development will result in a significant, adverse effect on the sunlight and daylight available to relevant rooms in existing dwellings<sup>14</sup>. In my judgment they are thus intended to identify when there will be a material deterioration in the relevant conditions in such rooms: if the change is adverse, it involves a deterioration; if it is significant, it is material. Paragraph [1.6] of the Introduction indicates, however, that there may be cases in buildings in which “natural light is of special importance” when there will be a material deterioration, even if the guidelines do not themselves suggest that there will be. But the BRE Guide does not suggest that the “flexibility” to which it refers is intended to indicate that there will be no such material deterioration if the guidelines indicate that there is likely to be. In such cases the “flexibility” to which it refers are cases in which any such deterioration may be justified from the point of view of the designer of the new building to whom the BRE Guide is primarily addressed<sup>15</sup>. Moreover “different [target values] may be used based on the special

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<sup>13</sup> See paragraph [52] above.

<sup>14</sup> When considering environmental impact assessment the BRE Guide indicates that one reason for treating the adverse impact that arises if the guidelines are not met for sunlight and daylight is minor as that “there are particular reasons why an alternative, less stringent guideline should be applied”: see paragraph [I6]. This recognises that, even when there is justification for adopting a different guideline, the effect is still adverse.

<sup>15</sup> See eg paragraph [1.6] of its Introduction (quoted in paragraph [52] above where it refers to section 5 of the Guide (which deals with matters such as the view from a new development, privacy, security, access, enclosure and microclimate), paragraph [2.2.3] and [2.2.10] (quoted in paragraphs [53] and [54] above).

requirements of the proposed development or its location”<sup>16</sup>, for example, if “a higher degree of obstruction may be unavoidable if new developments are to match the height and proportions of existing buildings”<sup>17</sup>. This is not to suggest that there may not be other reasons relating to the design and layout of a new development that may justify or render acceptable a significant adverse effect on the sunlight and daylight enjoyed by existing dwellings. There may also be other, town planning considerations not related to that such matters that may render a material deterioration in such conditions acceptable when considering the application of Policy DM25. But, unless natural light is of special importance in a building, in my judgment the guidelines in the BRE Guide are those that assess the impact of a proposed development and whether or not there is likely to be a “material deterioration” in the relevant conditions in any relevant room, albeit that the extent to which any dwelling containing such a room is adversely affected as a result may vary depending on a number of factors<sup>18</sup>.

85. Although both parties tended to formulate their submissions by reference to the S&D Report and only then applied them to the Officer’s Report and the Update Report, in my judgment those two reports to members provide the correct starting for consideration of this claim. They are what members of the Committee were provided with. Although they may well have been able to consult the S&D Report had they chosen to do so, there is no evidence that in fact any of them did.

86. The BRE Guide is a technical document. Unlike planning policies, national and local, with which members of planning committees will in practice be familiar, the Guide may well not be.

*b. the assessment of the effect of the proposed development on the daylight enjoyed by properties in Tomlins Grove*

87. The Officer’s Report (like the S&D Report) failed to state the number of properties (12) in which the daylight enjoyed in habitable rooms was likely to be adversely affected significantly by the proposed development, and the number of rooms in them (23) so affected, assessed in accordance with the BRE Guide. In my judgment the extent of the likely “material deterioration” in the daylight enjoyed by surrounding development in Tomlins Grove as a result of the development, assessed in accordance with the BRE Guide, was thus not indicated to members of the Committee in that report. That information indicated the extent of the material deterioration in the sunlight and daylight that the proposed development would cause.

88. There were some further general omissions. The Officer’s Report not merely failed to explain what the daylight distribution guideline in the BRE Guide was and when, in

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<sup>16</sup> See paragraph [F1] of the Guide.

<sup>17</sup> See paragraphs [1.6], [2.23], [3.28], [F4], and [F5] of the Guide (quoted in paragraphs [52], [53], and [57] above.

<sup>18</sup> See paragraphs [50]-[52] above. The BRE Guide recognises that an affected building may only have a low level requirement for skylight or sunlight: see paragraph [I6]. That may apply to non-residential buildings which have a requirement for some skylight or daylight but it scarcely applies to dwellings. There is no suggestion in this case in any event that the dwellings in Tomlins Grove had a “low level requirement” for daylight and sunlight compared with other dwellings.

accordance with it, daylight in rooms would be adversely affected if that distribution changed. The Officer's Report also failed to mention the number of rooms in Tomlins Grove (20) which would fail the daylight distribution test. Nor did it explain why that failure was acceptable, if it was, in most of those cases. An alert reader would have noted that an unspecified number of rooms among the five rooms discussed in paragraph [8.106] of the Officer's Report were said to come "sufficiently close to the BRE Guidelines for Daylight Distribution to be considered acceptable" notwithstanding their failure to meet the VSC guideline. Such a reader might also have inferred that the effect on the five rooms referred to in paragraph [8.107] and paragraph [2.4] of the Update Report was not thought to be even sufficiently close to the daylight distribution guideline to be acceptable, notwithstanding failure to meet the VSC guideline (for, if they had been, they would not have been treated separately from those rooms referred to in paragraph [8.106]). But even such an alert reader would not have known that the rooms being referred to in these two paragraphs represented less than half of the rooms that had failed to meet the daylight distribution guideline. The result is that not only were members not told of the number of rooms whose daylighting would be significantly adversely affected on this measure, they were also given no specific advice on the acceptability as such of the adverse effect in the majority of the rooms that failed the daylight distribution guidelines.

89. I shall return to the significance of these omissions. But in practice, therefore, only those rooms that failed the VSC guidelines were specifically addressed in the Officer's Report. There were in fact 15 such rooms in 11 properties, information that itself was not conveyed to members of the Committee in the Officer's Report.
90. The only properties in which there was a failure to comply with the VSC Guidelines addressed in paragraphs [8.106] and [8.107] of the Officer's Report and paragraph [2.4] of the Update Report were the properties, 8 to 18 Tomlins Grove inclusive. Two flaws should be noted about these paragraphs (apart from the error in the Update Report referring to 5 of them being on the first floor rather than on the ground floor of the properties in question). (i) The Officer's Report did not address the position with respect to 19 Tomlins Grove at all. The S&D Report had in fact identified two habitable rooms in that property that would fail to meet the VSC guideline. (ii) The suggestion that there was a ground floor room in "each" of the properties 8-18 (inclusive), thus including number 9, which did not come sufficiently close to the recommended VSC and where there was a reduction in VSC of more than 20%, was not correct. In fact, as was noted in the opening sentence of paragraph [8.106], the windows in number 9 were shown in the S&D Report to have complied with the VSC guideline.
91. Accordingly, of the 15 habitable rooms that failed to meet the VSC Guidelines, 13 were in the 10 of the properties between 8 and 18 Tomlins Grove considered in the Officer's Report and the Update Report. 10 of these were on the ground floor. The reports allocated them into three groups. (i) The first group comprised the rooms not on the ground floor (the number, location and use of which were not mentioned in the Officer's Report) that were thought to "come sufficiently close to the BSC guidelines in terms of VSC to be considered acceptable". These were in fact three rooms in basement identified in the S&D Report as kitchens, lounges or dining rooms. (ii) The second group contained the five rooms on the ground floor, which did not come sufficiently close to having a VSC of 27% to be acceptable (and thus fall into the first

group) and which also experienced a reduction in VSC of more than 20%. They were nonetheless thought to remain well-lit and were considered acceptable, as they would meet the BRE guideline for daylight distribution or come “sufficiently close” to meeting it. (iii) The third group comprised the remaining five ground floor windows that did not fall into the first two groups but in relation to which the failures were said to be “partly due” to the daylight to the windows concerned being restricted by the properties’ own side returns. No indication was given of what coming “sufficiently close” in terms of VSC involved (to warrant inclusion in the first group) or of what coming “sufficiently close” to meeting daylight distribution guidelines involved (to warrant inclusion in the second) or the basis upon which either was determined. Nor was any indication given as to the extent to which the failure in respect of the rooms in the third group was due to the existing side returns.

92. In my judgment there were flaws in the approach in the Officer’s Report and the Update Report to the consideration of rooms that failed the VSC guideline.
93. First the Officer’s Report is flawed by an apparent misconstruction of the BRE Guide. The assumption upon which it is apparently written, and how it would probably have been understood by members of the Committee, is that the daylight enjoyed by a room which did not meet the VSC guideline was likely to be significantly adversely affected by a proposed development only if the daylight distribution guideline was also not met or was not met sufficiently closely. It is plain, however, and indeed it is common ground, that, as stated in the BRE Guide, there is likely to be a significant adverse effect if either the VSC or the daylight distribution guideline is not met<sup>19</sup>. This misconstruction of the BRE Guide appears both in paragraph [8.104] of the Officer’s Report, even ignoring (as Mr Reed invited me to do) the last words “in terms of VSC”, as well as in paragraph [8.106]. In each case the Officer’s Report indicates that the reductions in VSC are likely to have a significant adverse effect but then states that the room will remain well-lit because the guideline for daylight distribution will be met or it will be “sufficiently close” to being met to be considered acceptable. This reads as if meeting the daylight distribution guideline (or even getting close to meeting it) is, as Mr Reed put it, an “ameliorating factor”, one that may nullify or offset the effect of the reduction in VSC, whereas, in accordance with the BRE Guide, it plainly is not. Failing to meet that the daylight distribution guideline is a separate, distinct reason why daylight may be adversely affected significantly, even if the VSC guideline is met. Meeting that daylight distribution guideline does not mean that daylight in a room will not be adversely affected significantly in accordance with the BRE Guide if the VSC guideline is not met. The amount of daylight reaching the room will still be reduced significantly and adversely<sup>20</sup>. Members of the Development Committee could not have detected from

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<sup>19</sup> See paragraph [47] above.

<sup>20</sup> This error reflected the S&D Report itself. As Mr Harper himself pointed in his second witness statement, that report concluded that these rooms “were considered to remain well-lit *because* they met or came sufficiently close to the daylight distribution test.” (Emphasis added). Mr Reed also submitted that the GLA Report (referred to in paragraph [98] below) supported this approach. In my judgment the parts on which he relied do not support that contention. But that would in any event be irrelevant to the construction of the BRE Guide in accordance with which in this case the impact of the development proposed fell to be assessed.

the Officer's Report this apparent misconstruction of the BRE Guide and the misleading suggestion about the function of the daylight distribution guideline, since, as I have noted, that Report did not state what that guideline or its function was.

94. Mr Reed submitted, however, that, in these two paragraphs, all that was being expressed was an expert judgment that, notwithstanding the failure to meet the VSC guideline, the rooms in question would remain well-lit. That submission, however, ignores the only reason provided why it was suggested that the rooms in question would remain well-lit (notwithstanding the failure to meet the VSC Guideline in cases where the VSC itself was not sufficiently close to 27% to be acceptable), namely that the rooms concerned would meet the BRE Guideline on daylight distribution or come sufficiently close to meeting it to be acceptable. Had the intention been to express such an expert view that the rooms would remain "appropriately well-lit", notwithstanding the significant adverse reduction in light to them, based on some other reason, then such other reason ought to have been, and no doubt would have been, provided.
95. Mr Buxton further criticised the statement in paragraph [8.106] of the Officer's Report that, in some of the five rooms referred to, the rooms came "sufficiently close to the BRE Guidelines for daylight distribution to be acceptable". The Chartered Surveyor who checked the S&D Report, Mr Michael Harper, has stated in his first witness statement that this referred to rooms that came "within 9% of the 20% recommended reduction" as, in his opinion, "a 9% reduction beyond the BRE Guideline levels is a relatively small amount".
96. Mr Harper's reference to 20% as a "recommended reduction" is somewhat odd. The BRE Guide does not recommend that new buildings cause any such reduction: it states that daylight will be adversely affected if the area of the working plane in a room that can receive direct skylight is reduced to less than 80% of its former value<sup>21</sup>. Whether a reduction of nearly 30% in a room's existing lit area may be described generally as a "relatively small" reduction may no doubt be a matter of opinion.
97. Dr Paul Littlefair, who is an expert on questions of lighting and the author of the BRE Guide, stated in his witness statement that there is no basis for such an approach in any published guidance or standard. In response, Mr Harper exhibited an appendix (or part of it, it is not clear which) to a report to the Greater London Authority ("GLA") in November 2013 ("*the GLA Report*") that itself referred to an independent review, conducted by a person who was not identified, of the impact that a proposed development in Dalston would have on the daylight and sunlight enjoyed by nearby buildings. In that independent review it had been recommended (so it was stated in the Appendix to the GLA Report) that the percentage reduction should be increased to 30% "given the underdeveloped nature of the site relative to its context". In my judgment there are at least two difficulties with Mr Harper's reliance on this Appendix in response to Dr Littlefair. (i) The principle underlying this recommendation would appear to be that a greater reduction in daylight distribution may be unavoidable if a new development on an underdeveloped site is to match surrounding development. Whether or not the application site in this case is underdeveloped in its context (something that Mr Buxton contended that it was not),

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<sup>21</sup> See paragraph 2.2.21 (quoted in paragraph [47] above).

as Dr Littlefair stated “in this case the proposed development is significantly taller than its surroundings”. (ii) Secondly Mr Harper’s original explanation why a reduction of up to 29% would be acceptable was not based on a specific site assessment in this case. It was expressed to be generally applicable.

98. Given the nature of the daylight distribution guideline which involves the calculation of a percentage reduction in the directly lit area of a room, there will inevitably be cases of rooms that marginally exceed the guideline percentage which a planning authority might not unreasonably be minded to treat as acceptable almost regardless of other circumstances. That may be how a member of the Development Committee in this case may well have understood the statement that the rooms referred to in paragraph [8.106] came “close sufficiently to the BRE Guideline for daylight distribution to be considered acceptable” had the member understood the function of that guideline. Such a member might have been surprised, however, to learn that of the extent of the margin being treated as “acceptable” regardless of the circumstances (which was nowhere stated in, or deducible from, the Officer’s Report<sup>22</sup>, and which, as Dr Littlefair stated, is not supported by any published guidance or standard<sup>23</sup>). However Mr Buxton has not contended that it is a judgment that no reasonable person could have reached about such a margin. Nor has he contended that members had to be informed of what it was if they were to have the information required to make any reasonable judgment about whether the material impact of the development on the daylight distribution of the small number of rooms in question was nonetheless acceptable. In those circumstances, in my judgment the use of this undisclosed 9% margin does not in itself add a further reason why the reasons given in paragraph [8.106] of the Officer’s Report, for treating the rooms in the second group as remaining appropriately well-lit, were flawed.
99. In my judgment the second flaw in the Report’s consideration of the rooms that failed to meet the VSC guideline concerns the five other windows in the third group. The adverse effect on the daylight which they enjoyed was apparently discounted in the Update Report on the basis that the reductions were “partly due” to the outlook of these windows being restricted by their own side returns which restricted daylight to these windows. As I have already noted, the extent to which the reduction may have been due to such side returns was not identified in the Officer’s Report.
100. When giving permission in this case, Gilbert J stated that in his view “the argument about blinkering is one which does not help the authority. It makes the importance of sunlight and daylight being received greater, not lesser, in terms of a habitable room”: see *Rainbird v London Borough of Tower Hamlets* [2017] EWHC 2453 (Admin) at [11]. That, it might be thought, is merely common sense.
101. In the S&D Report, however, it had been stated, by way of explanation, that, “were these side returns notionally omitted from the analysis, *as permitted in the BRE Guidelines*, these windows would likely meet the BRE Guideline recommendations” (emphasis added). In fact information provided by Mr Harper in his second witness

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<sup>22</sup> Mr Reed sought to suggest that Dr Littlefair had adopted the same approach in a report on another development that he had produced. But in that report Dr Littlefair had identified the “small margin” as being 3%. 9% is considerably more.

<sup>23</sup> It was also not identified as such in the S&D Report.

statement shows that at least four of the ground floor rooms in those properties (as well as that in number 19) would not meet those recommendations even with the notional omission of the side returns. The S&D Report was thus in error.

102. But in my judgment this statement in any event involved a misconstruction of the BRE Guide. The Guide does not permit the effects of projecting walls to be omitted from the analysis used to establish whether or not the proposed development would have an adverse impact on the daylighting of existing dwellings. The notional calculation in the BRE Guide referred to is an “additional calculation”<sup>24</sup>. Mr Harper claimed in his witness statement that “nowhere does our report suggest that these projections can be omitted from the analysis.” In my judgment the statement in the S&D Report I have quoted (and a similar statement later with respect to sunlight) plainly does do so.
103. In this context the BRE Guide is not dealing with cases in which different target values may be justifiable if a new development is to match the height of surrounding development. What the BRE Guide recognises is that in some other cases, although the aim should be to minimise the impact on existing properties, even a modest obstruction opposite may result in a large relative impact on the daylight of rooms underneath balconies<sup>25</sup>. Similarly “a larger relative reduction in VSC may *also* be *unavoidable* if the existing window has projecting wings on one or both sides of it or is recessed into the building, so that it is obstructed on both sides as well as above”<sup>26</sup>. The same point with respect to large balconies or overhangs is made when considering sunlight: in those circumstances a greater reduction in sunlight access also “may be *unavoidable*”<sup>27</sup>. The BRE Guide indicates that one way to demonstrate in such cases whether or not the main factor in the relative loss of light is a balcony on the existing building is to carry out an “additional calculation” without the balcony in place<sup>28</sup>. What the BRE Guide is concerned with in these passages, therefore, is whether a larger relative reduction in VSC, on the area receiving direct skylight and on the sunlight available to a room may be unavoidable even with a relatively modest obstruction.
104. This analysis also explains why the point made by Gilbert J may have less force in such cases. If an existing building has been so designed (whether by the inclusion of balconies, overhangs or projecting wings) so that it makes relatively larger reductions in daylight unavoidable even if there is a modest new obstruction opposite, that design could be seen as taking for the existing buildings “more than their fair share of light” in the same way as (the BRE Guide regards) a building that has windows that “are unusually close to the site boundary” as doing<sup>29</sup>: in each case a greater reduction in daylight and sunlight may be unavoidable if one site is not to be unfairly prejudiced by how another has been developed.

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<sup>24</sup> See paragraphs [2.2.11] and [3.2.9] of the BRE Guide (quoted in paragraphs [56] and [57] above).

<sup>25</sup> See paragraph [2.2.13] and [2.2.11] of the BRE Guide (quoted in paragraph [56] above).

<sup>26</sup> See paragraph [2.2.12] of the BRE Guide (quoted in paragraph [56] above).

<sup>27</sup> See paragraph [3.2.8] of the BRE Guide (quoted in paragraph [57] above).

<sup>28</sup> See paragraphs [2.2.11] and [3.2.9] (quoted in paragraphs [54] and [57] above).

<sup>29</sup> See paragraph F5 of the BRE Guide (quoted in paragraph [53] above).

105. In this case the application site does not adjoin the terrace in Tomlins Grove. It is separated from it not merely by Arnold Road but also by a substantial railway viaduct accommodating business uses in the arches within it. It is difficult to see how an eight storey and a six storey new building beyond them, which are significantly higher than their surroundings, could be described as a “modest obstruction” or why a relatively modest development on the application site would unavoidably result in a relatively larger reduction than would be in accordance with the daylight and sunlight guidelines in the BRE Guide because of the side returns in the terrace in Tomlins Grove (which do not appear to be an unusual feature of such a terrace). More to the point the S&D Report failed to address the question whether a larger reduction than normal in daylighting for those windows affected by side returns was unavoidable even with a modest development on the application site.
106. Mr Buxton contended that paragraph [2.2.12] was in any event inapplicable in this case as there was nothing above the window “as well as” there being a projecting wing. That might be a possible reading had there been a comma after “building” and no reference to obstruction “on both sides”. But in my judgment such a close textual analysis is misconceived. What is important is to understand what the paragraphs [2.2.10] to [2.2.13] of the BRE Guide seek to do, namely to identify when larger reductions in daylight may be unavoidable from a designer’s point of view in certain circumstances, even though the general aim is to minimise the impact to existing property.
107. In my judgment, therefore, the S&D Report was based on a misconstruction of the BRE Guide, that, in accordance with it, the effect of the side returns could be omitted from the analysis of the impact of the proposed development, or otherwise discounted without more, in accordance with it.
108. This error and that relating to the daylight distribution guideline also help to explain how the conclusion was reached in the analysis section of the S&D Report. It was that “given the flexibility permitted in the BRE Guidelines, these properties are considered to be in accordance with the BRE Guidelines for daylight...,with the proposal in place”. The results given in the S&D Report were not “in accordance with” those guidelines: they failed to meet them in respect of a number of rooms (whether or not acceptably). In that Report’s conclusion, however, this was somewhat modified to state that the development would provide levels of daylight “broadly compliant with the BRE Guidelines or sufficiently close to be considered acceptable in urban locations.” Subject to the reference to urban locations to which I shall return, that conclusion only followed from the preceding analysis if (i) daylight enjoyed by a room would not be broadly compliant with the BRE Guidelines or acceptable only if the room failed to meet the guidelines (or come sufficiently close to meeting the guidelines) for both VSC and daylight distribution and (ii) the failure to meet the guidelines for any other rooms could be ignored in accordance with the BRE Guide if those guidelines would be met if the effect of the side returns of the properties was left out of account<sup>30</sup>.

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<sup>30</sup> The second of these points is reflected in Mr Harper’s witness statement in connection with sunlight when he said that a calculation, showing the sunlight criteria would be met if the side returns were omitted, meant that they, rather the proposed development, would be “the main

109. These were not, however, the conclusions in the Officer's Report or repeated in it. The conclusions on daylight in paragraphs [8.110] and [8.111] of the Officer's Report were that "the rooms affected would remain well-lit" and that "in all cases, the properties would continue to receive good levels of daylighting, especially for an urban location." The conclusion in the "analysis section" of the S&D Report did not refer to whether any rooms would remain well-lit and would continue to receive good levels of daylight, perhaps understandably. In it the VSCs for nine of the ten rooms referred to in [8.106] and [8.107] (as well as one on the ground floor on 19 Tomlins Grove) were calculated to fall below 15% with the proposed development. The BRE Guide indicates that, in a new building, in rooms with a VSC below 15%, it is "very difficult to provide adequate daylight unless very large windows are used": see paragraph [2.1.6].
110. It is not easy to understand, however, how these conclusions in the Officer's Report were supported by the preceding analysis in it in relation to those rooms that failed to meet the VSC guideline. Ignoring the 2 rooms adversely affected in 19 Tomlins Grove (that had not been addressed), it was not claimed that the 5 affected by side returns (those in the third group) would remain well-lit or enjoy good daylight<sup>31</sup>. But in any event, as I have explained, the reason given for considering the 5 in the second group that were actually claimed to remain well-lit involved a misdirection. The conclusion that all the rooms would remain well-lit was thus flawed in so far as it rested on the preceding analysis of rooms that did not meet the VSC guideline.
111. The S&D Report had indicated that, in some cases where the reduction in VSC or daylight distribution was more than 20%, "so long as the Average Daylight Factor meets the criteria suggested by the BRE Guidelines...then good internal daylight can still be achieved". As Mr Reed pointed out, the analysis section of that report did not rely on that approach in reaching its conclusions and average daylight factors were not mentioned in the Officer's Report. Mr Reed asserted that officers had not relied on them. There is no evidence that they did or that their use underpinned the conclusions on daylight in that Report. Had they done so, I would have had to consider Mr Buxton's criticisms of reliance on them in this case.
112. The reference to what may be acceptable in "urban locations" may suggest that the target values or guidelines in BRE Guide should be different in practice in "urban locations" generally and that lesser standards of daylight should be expected or treated as acceptable in all such locations. Mr Buxton submitted that the BRE Guide contemplated that the target values in the guidelines may indeed be adjusted, but only if there are special circumstances or special requirements arising from the proposed development or its location: see paragraphs [1.6] and [F1] of the BRE Guide (quoted in paragraphs [52] and [85] above). Mr Reed denied that was so in terms of the BRE

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cause of the loss of sunlight and *therefore* all windows meet the BRE Guidelines' criteria for APSH." (Emphasis added).

<sup>31</sup> Some of the rooms in the second group were said to come sufficiently close to meeting that daylight distribution guideline to be acceptable. But that was not claimed in respect of the third group. Nor was the reason given for discounting part of the adverse effect relevant to whether they would in fact remain well-lit or enjoy good daylight.

Guide, unconvincingly in my judgment<sup>32</sup>. But he also relied on the appendix to the GLA Report (to which I have already referred in paragraph [98] above) in which it was stated that the independent review of the particular development under consideration had recommended that, in “inner city urban environments”, VSC values in excess of 20% should be considered as “reasonably good” and those in the mid-teens should be considered to be “acceptable”, apparently on the basis that “the 27% VSC target value is derived from a low density suburban housing model”. There is in fact nothing in the BRE Guide that states that this value in the VSC guideline is derived from a suburban development or that indicates that its guidelines are only applicable to developments outside an “inner city urban environment”, much less only to those in non-urban locations. Mr Buxton also submitted that there was no evidence that the authors of the S&D Report had relied on the GLA Report, which is true. Indeed, of the 10 ground floor rooms whose VSCs would be reduced to below 15% (to which I referred in paragraph [110] above), 8 would have VSCs below 13%, that is to say, not apparently in the “mid-teens” which the independent review had suggested might be acceptable. Moreover these rooms were all in those groups where the VSC was not sufficiently close to 27% to be considered acceptable in the Officer’s Report.

113. It is unnecessary, however, to reach any final view on the merits or otherwise of any these contentions about urban locations. (i) The development plan in this case does not propose that the impact of developments in Tower Hamlets should be assessed generally by reference to any target values or guidelines other than those given in the BRE Guide. (ii) The S&D Report stated that “good daylighting to the neighbouring properties is still achieved if the [VSC] is in excess of 27% or is reduced by less than 20% from its existing level” or if the ADF met the criteria suggested by the BRE Guide. It did not suggest that “good daylight” would be maintained in other cases or by reference to other criteria. (iii) If any target values or guidelines were to be adopted in this case different from those in the BRE Guide, that, and the reasons why they should be adopted, should have been made clear to members of the Development Committee. (iv) In fact, far from adopting any different set of target values, the Officer’s Report is plainly written by reference to those standards. Paragraph [8.102] (quoted in paragraph [58] above) refers to the “living standard” of adjoining occupiers being “materially affected” if the VSC guideline is not met. There was no suggestion that compliance with the VSC guideline was not required if, at least *prima facie*, rooms were to remain well lit and good daylight was to be maintained.
114. Mr Reed also submitted that, when the Officer’s Report referred what might be a good level of daylighting, especially for “an urban location” and the S&D Report referred to “urban areas”, these should be read as if they referred merely to “this urban location”. In my judgment that is not what they say nor how they would have been understood<sup>33</sup>. Moreover there is nothing in either report to suggest that standards of

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<sup>32</sup> In addition, when considering environmental impact assessment the BRE Guide indicates that one reason for treating the adverse impact that arises if the guidelines are not met for sunlight and daylight as minor is that “there are particular reasons why an alternative, less stringent guideline should be applied”: see paragraph [I6].

<sup>33</sup> Nor for that matter is it what Mr Harper apparently himself thought. He has referred to the flexibility he considers permitted in the application of the guidelines “in urban locations such

good daylighting were being determined, or should be determined, by reference to any target values other than those contained in the guideline in the BRE Guide which had been arrived at by an analysis of the application site and its surroundings.

115. In my judgment, therefore, the conclusions in the Officer's Report on daylight did not follow from the preceding analysis which was in any event flawed. That is material given that they have not been shown nonetheless to be (or to have been) supported by any alternative analysis in it (or, if relevant, in the S&D Report).

*c. the assessment of the effect of the proposed development on sunlight*

116. In relation to sunlight the Officer's Report stated that "all habitable rooms analysed contain at least one window that meets the BRE Guidelines in terms of APSH". That was untrue. In the S&D Report 11 did not do so.
117. Mr Reed sought to contend that the error was immaterial (i) because the S&D Report had stated that the 9 which did not do so would be "likely" to do so if the side returns that partially limited sunlight were "notionally omitted from the analysis, as permitted in the BRE Guidelines" and that "given the flexibility permitted in the BRE Guidelines, these properties are considered to be in accordance with the BRE Guidelines for...sunlight" and (ii) because, in the case of the other two rooms, the reduction was 21%, extremely close to the 20% criterion. Had such information been conveyed to the Committee, he submitted that it would have made no difference to the outcome.
118. Mr Buxton submitted that, whatever the position was with respect to daylight, the BRE Guide made no mention of making any allowance in any circumstance for the effect of projecting walls in the case of sunlight. In considering the significance of that omission, it is necessary to recall that the guide is not an enactment but is advice addressed to designers. There is no logic in distinguishing projecting walls from balconies in the case of sunlight but not in the case of daylight.
119. But, as I have explained, however, in my judgment the reason given in the S&D Report why the 9 rooms could be omitted from the analysis of the impact of the proposed development or otherwise discounted without more in accordance with the BRE Guide was flawed. I am not prepared on the material available to conclude that, had the members of the Committee, been informed of the misdirection or misapplication of the BRE Guide, it would not have made any difference with respect to their conclusion as to whether there was any material deterioration in the sunlight enjoyed by those 9 rooms and would not have made any difference, had they known there would be, to their conclusion on whether or not the deterioration was acceptable merely in terms of the amenity of the dwellings concerned without regard to other, wider considerations. That may well have required consideration of the use to which the 9 rooms affected were put and the extent of the material deterioration, and what sunlight might still be enjoyed, in each, matters about which they were given no information and about which I received no detailed submissions.

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as Tower Hamlets" and "in an urban context": see his first witness statement at [28], [38] and [41]; see also his letter dated December 8<sup>th</sup> 2017.

*d. conclusions on the adequacy of the Officer's report on the issue of sunlight and daylight enjoyed by dwellings in Tomlins Grove*

120. For the reasons given, in my judgment the reports to members about the effect on sunlight and daylight of properties in Tomlins Grove contained a number of flaws. In summary:
- (1) The Committee was misled that there were no habitable rooms that would suffer a material deterioration in their sunlight if permission was granted. In fact there were 11.
  - (2) The Committee were also not told what the extent of the likely “material deterioration” in the daylight enjoyed by dwellings in Tomlins Grove would be, assessed in accordance with the BRE Guide, if permission was granted. They were not told that 23 rooms in 12 properties failed to meet the relevant guidelines.
  - (3) The Committee were likewise not told that, if permission was granted, there were 15 rooms in 11 properties that would suffer a significant adverse effect on the daylight which they enjoyed assessed in accordance with the VSC guideline. The reports to members did not specifically address the two rooms that would suffer such an effect in 19 Tomlins Grove. Of the 13 rooms in 8 and 10 to 18 Tomlins Road (inclusive) that would suffer such an effect which the reports did address, (i) 3 were said to be sufficiently close to the BRE Guideline in terms of VSC to be considered acceptable; (ii) 5 were said to remain appropriately well-lit in consequence of a misdirection about the effect of compliance (or of being sufficiently close to compliance) with the daylight distribution guideline; and (iii) the adverse effect on remaining 5 was discounted on the basis that it was “partially” due to the side returns to the properties (to an extent which was not identified), the justification for discounting them apparently involving a misconstruction of the BRE Guide.
  - (4) The overall conclusion on daylight in the Officer's Report, apparently drawn from consideration only of the failure to meet the VSC guideline in the cases to which reference had been made, that “the rooms affected would remain well-lit” was not supported by that analysis: it was not claimed that the 5 affected by side returns would remain well-lit and the claim that the 5 rooms mentioned in paragraph [8.106] would remain well-lit was flawed by the misdirection about the significance of meeting the daylight distribution guideline or coming sufficiently close to meeting it. The conclusion that all the rooms would remain well-lit was thus flawed in respect of VSC. In fact, the VSC in 10 of the rooms (those in the second and third groups) were not sufficiently close to be thought acceptable in the Officer's Report. As I have noted, there were 10 rooms where the VSC would be reduced by the development proposed to below 15% and 8 rooms to below 13%. The conclusions in the Officer's Report on daylight did not follow from the preceding analysis which was in any event flawed. They have not been shown nonetheless to be (or to have been) supported by any alternative analysis in it.
  - (5) The Committee were also not told what the daylight distribution guideline, or its function was, nor how many rooms (20) would suffer a material deterioration in the daylight in that respect which they enjoyed assessed in accordance with the BRE Guide. An alert and careful reader of the Officer's Report might have recognised that some of the five rooms referred to in

paragraph [8.107] were thought to be sufficiently close to daylight distribution guideline to be acceptable (although that reader might have been surprised to learn that this meant that this might involve a loss of up to 29% of the directly lit area of the room). That reader might also have inferred that the effect on the five rooms referred to in paragraph [8.107] and paragraph [2.4] of the Update Report was that they did not come sufficiently close to be acceptable on the same basis. But in each case the failures may not have worried the reader, as meeting the daylight distribution guideline was erroneously treated in the report as something which compensated for the loss of daylight as a result of the reduction in the VSC at the windows to the rooms in question. It was not apparent that failing to meet the daylight distribution guideline was something which itself indicated a material deterioration in the daylight which the room would enjoy. Such an alert reader would not have known in any event that these rooms only represented less than half of the rooms that would suffer a material deterioration in daylight by the reduction in their directly lit area.

121. The fact that there may be minor mistakes or omissions in an officer's report to a committee does not render any decision based on it unlawful. The question is whether the mistakes or omissions to which I have referred are sufficiently significant or serious as to be material when the report is read as a whole.
- (1) Given that the impact of the proposed development was to be assessed in accordance with the BRE Guide, in my judgment the erroneous statement that the guideline on sunlight was met in the case of properties in Tomlins Grove was material in that a different conclusion on the acceptability of the material deterioration in sunlight to some at least of the 11 rooms might have been reached had the correct position been stated (without regard to other, wider considerations than the amenity of their occupiers)<sup>34</sup>.
  - (2) In relation to daylight, the failure to identify the number of rooms, and the number of properties in which they were located, that failed to meet the daylight guidelines in my judgment was significant: that was the extent of adverse impact on daylight whose acceptability had to be considered. The consideration of those rooms that failed to meet the VSC guideline was flawed *inter alia* by misdirections about the significance of meeting the daylight distribution guideline (or coming sufficiently close to doing so) and about the treatment of the effect of projecting wings, both of which in my judgment were material to the conclusions on those rooms. The overall conclusion that all the rooms would remain well lit and enjoy good daylight was materially flawed by that omission and these errors and it did not follow in any event from the analysis that preceded it. In my judgment it cannot be said that the same conclusions on daylight would have been reached regardless of that omission and those errors (without regard to other, wider considerations than the amenity of their occupiers).
122. In my judgment, therefore, the Officer's Report and the Update Report were materially misleading with respect to the impact of the proposed development on the sunlight and daylight enjoyed by dwellings in Tomlins Grove.

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<sup>34</sup> See paragraph [120] above.

123. Did that fact that the reports were materially misleading as I have described nonetheless make the reports materially misleading as a whole? In my judgment the result of these defects would have been immaterial if either (a) it would have made no difference to the assessment of the effects on the properties in Tomlins Grove and on whether the proposed development complied with Policy DM25 or (b) if the conclusion on compliance with that policy or on the effect on the amenity of those properties would have been immaterial to the decision on whether or not to grant planning permission.
124. In my judgment the conclusions reached about the impact on the sunlight and daylight that properties in Tomlins Grove would enjoy if planning permission was granted might have been different had the report not been materially misleading and might have resulted in a different view on whether the proposed development complied with Policy DM25.1(d). Nor in my judgment would the assessment of the impact on their amenity have been immaterial (had it been different) when the application for planning permission fell to be determined. That is a matter to which I will return when considering, in relation to relief, the question whether the outcome for the Claimant would not have been substantially different had such defects not occurred.
125. In reaching these conclusions I have not taken into account the fact that the acceptability of the adverse impact on those rooms that did not meet the daylight distribution guideline was generally not considered in the reports to members of the Committee. Whether this omission was material I have had more difficulty in determining. It would appear that, apart from those rooms referred to in paragraphs [8.107] and [8.108] of the Officer's Report, only one other room (a living, kitchen or dining room in the basement of 17 Tomlins Grove) would not have come "sufficiently close" to meeting the guideline to be "acceptable" had a 9% margin been applied in relation to that guideline. It is possible that, had members of the Committee been told that the results were sufficiently close to the guideline to be acceptable other than in one case and had they also been told what the guideline was and its function, those omissions of themselves might have made no difference to whatever view (if any) that they might have had about the effect of the proposed development on daylight distribution. But I am not satisfied that it would have made no difference. That is in part because members of the Committee were misled about the function of the guideline. But the fact that much larger numbers of rooms would have been claimed to come sufficiently close to meeting the guidelines to be acceptable (than the very few referred to in the Officer's Report) might also have focussed attention on the extent of the margin being permitted, the reasons for its choice and the use of the rooms affected. But, in considering whether or not the reports were materially misleading and the significance if they were and what relief (if any) may be granted, however, I have assumed that members would have regarded the material deterioration in the distribution of daylight in those rooms that were not specifically considered in the Officer's Report as being acceptable.
126. Nonetheless, for the reasons given, the decision to grant planning permission was unlawful on this ground.

**THE MATERIALITY OF THE MISLEADING ASPECTS OF THE OFFICER'S REPORTS AND SECTION 31(2A) and (2B) OF THE SENIOR COURTS ACT 1981**

127. As I have explained, in my judgment the conclusions reached about the impact on the sunlight and daylight that properties in Tomlins Grove would enjoy if planning permission was granted might have been different had the report not been materially misleading and might have resulted in a different view on whether the proposed development complied with Policy DM25.1(d). The question nonetheless remains whether or not such a different assessment of the impact on their amenity would have made no difference when the application for planning permission fell to be determined. It is sufficient for the Claimant to show merely that it might have done.
128. Distinct from this question is that which arises under section 31 of the Senior Courts Act 1981. That now provides that:
- “(2A) The High Court-
- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award [of damages, restitution or recovery of a sum due] under subsection (4) on such an application,
- if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
- (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.”
129. The court is thus obliged to consider whether it is required to refuse relief under these provisions, whether or not the issue is raised by the parties. But it must be satisfied that it is highly likely that the outcome would not have been substantially different for the claimant.
130. Mr Buxton submitted on behalf of the Claimant that it is evident from the minutes that members of the Development Committee were concerned about the impact of the development proposed on the sunlight and daylight available to properties in Tomlins Grove and that they may well have reached a different decision on the merits had the Officer’s Reports not been misleading. There is no possible basis for contending that members would have been bound to reach the same conclusion. Nor was it highly likely that they would have done so.
131. Mr Reed submitted on behalf of the Council that the decision would have been the same regardless and that in any event it is highly likely the outcome would not have been substantially different. Members must be taken to be familiar with the area and were fully aware of local residents’ concerns. The basic judgment that the effects were acceptable would not have altered. There were a large number of matters which members had to address when considering the application for planning permission of

which the effect of the proposed development on the amenity of dwellings in Tomlins Grove was but one. They had to consider sustainability, housing need, housing density, the mix of units, design quality, open space provision and landscaping as well as impacts on heritage assets and other matters. No challenge is made in this claim to the analysis of such matters. The development was found not merely to be acceptable in some of these respects but positively beneficial in others. Such factors would plainly have outweighed any adverse effects on the amenity of residents of Tomlins Grove.

132. For example, it was stated in the Officer's Report that:

“2.3 The report explains that the proposals would be acceptable in terms of height, scale, design and appearance; preserving the character and appearance of the nearby Tomlins Grove and Tower Hamlets Cemetery Conservation Areas. The scheme would deliver good quality homes in a sustainable location. The proposed flats would all be served by private balconies and communal space that meet or exceed minimum London Plan SPG space requirements.

2.4 The development would result in the provision of 100% affordable rented housing. This is much needed housing and is strongly supported in the consideration of this application. Whilst both London Plan and local policies seek a mix of housing tenures, all 20 units within this scheme will be for affordable rent in direct response to the very high local need in Tower Hamlets. With the extremely high priority for affordable housing in mind the significant additional provision is welcomed and the fact that a mix of tenures is not provided is considered acceptable in this instance.

2.5 The residential quality of the scheme would be high, 32 of the units would be of a size suitable for families (51%). All of the proposed affordable units would meet or exceed the floorspace and layout standards with family sized units being more spacious. All of the dwellings would meet Part M Building Control regulations and 10% (6 units) would be provided as wheelchair accessible.”

133. I recognise that the Officer's Report identified a number of significant planning advantages to which members would be highly likely to give considerable weight. But I am not satisfied that the decision would necessarily have been the same.

134. The number of dwellings in Tomlins Grove and rooms within them which would suffer a material detriment in terms of sunlight and daylight as a result of the proposed development was not insignificant. The Committee was misled into believing there would be no material deterioration in sunlight. The reductions in VSC in 10 of them, for example, were not thought to be acceptable in the Officer's Report

and were only discounted *inter alia* on the basis of misconstruction of the BRE Guide and the conclusions, that the dwellings in question would remain well lit and enjoy good daylight, were not supported by the analysis it contained and were flawed in any event. In considering the acceptability of the height of the proposed development the Officer's Report was written on the basis that the impact of each new building "would not significantly impact on the amenity of nearby neighbours"<sup>35</sup>. Further consideration might well have been given not unreasonably to a number of matters not considered in the Officer's Reports had the conclusion been (as it should have been in accordance with the BRE Guide) that the development proposed would have such an impact on 23 rooms in 12 dwellings. These matters included what the use of the rooms affected was and what the resulting conditions that would be experienced were (given that the existing conclusions on that matter were flawed). It is self evident that the impact will be more significant if the rooms affected have a particularly strong requirement for daylight or sunlight, such as living rooms and kitchens in the case of daylight, and main living rooms and conservatories in the case of sunlight, rather than bedrooms, as the BRE Guide itself indicates<sup>36</sup>. Such further consideration could also have included consideration of what changes in the proposed development might be required to avoid or ameliorate such effects and what would be lost thereby if the proposed development was modified. Had such matters been considered, the Committee might have come to the same conclusion. But they also might not. It cannot be said that they would necessarily have come to the same conclusion.

135. For the same reasons it does not appear to me to be highly likely that the outcome would not have been substantially different. Without knowing what such further consideration might have produced, that is a mere matter of speculation.
136. For these reasons in my judgment the misleading nature of the report was material and there is no duty to refuse relief in this case.

## CONCLUSION

137. For the reasons given, in my judgment the decision to grant planning permission was unlawful and the planning permission granted by the Council will be quashed.

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<sup>35</sup> See paragraphs [8.49]-[8.50] of the Officer's Report.

<sup>36</sup> See paragraphs [2.2.2], [2.2.8], [3.2.3] and [I7] of the BRE Guide.