Neutral Citation Number: [2022] EWHC 2262 (Admin)

Case No: CO/4336/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/08/2022

Before :

THE HONOURABLE MR JUSTICE MORRIS

- -

Between :

THE QUEEN (on the application of THE SPITALFIELDS HISTORIC BUILDING TRUST)	**Claimant**
- and –	
LONDON BOROUGH OF TOWER HAMLETS	**Defendant**
- and –	
OLD TRUMAN BREWERY LTD	**Interested Party**

- -
- -

Richard Harwood QC (instructed by **Hodge, Jones and Allen**) for the **Claimant**
Isabella Tafur (instructed by **Legal Services, London Borough of Tower Hamlets**) for the **Defendant**
Timothy Corner QC and Yaaser Vanderman (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Interested Party**

Hearing dates: 29 and 30 June 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 31st August 2022.

Mr Justice Morris:

Introduction

1. By this application for judicial review, the Spitalfields Historic Building Trust ("the Claimant") challenges the decision dated 10 November 2021 of the London Borough of Tower Hamlets ("the Defendant") to grant Old Truman Brewery Limited ("the Interested Party") planning permission for the redevelopment of the Old Truman Brewery site at Brick Lane and Woodseer Street, London E1 ("the Decision"). Following a resolution of the Defendant's Development Committee ("the Development Committee") at its meeting on 14 September 2021 ("the September Meeting"), the planning permission was granted on 10 November 2021.

2. The Claimant contends that the Decision was unlawful for three reasons, in summary: exclusion of Committee members from voting; prohibition of public speaking at the September Meeting; and failure to have regard to relevant policies in a draft neighbourhood plan. The grounds are set out in full at paragraph 84 below. The Defendant resists the application, supported by the Interested Party.

The Factual Background

The Development: the application for planning permission

3. In May 2020 the Interested Party applied for planning permission for the redevelopment of land at the junction of Woodseer Street and Brick Lane to deliver a mixed-use scheme comprising office, retail, gym and restaurant uses ("the Application"). The Application was in respect of the following:

> "Redevelopment at 140, 146 Brick Lane and 25 Woodseer Street, London, E1 6RU to include erection of a part five storey office building (Class B1) plus rooftop plant with ground floor and first floor commercial units (Class A1/A3) and two storey basement for provision of plant, servicing, storage and a gym (Class D2) (140 Brick Lane – Plot S1), linked to the reconfigured ground floor of the adjacent building and provision for commercial units (Class A1) (146 Brick Lane - Plot H), refurbishment and two storey extension of the adjacent building (25 Woodseer Street - Plot S2) for office use (Class B1) with ground floor commercial unit (Class A3), plus rooftop plant and external landscaping"

4. There were 7,051 objections to the Application, including from the Claimant, in a letter dated 7 January 2021. The principal objections included concerns about the introduction of large companies to the development, creation of a shopping mall, effect on local businesses, gentrification, community cohesion, proposed land uses on the site, impact to local character and businesses, concerns of design and scale causing harm to heritage assets, obscuring of the views of the Truman's chimney, amenity impact to neighbouring residents including daylight and sunlight impact to Woodseer Street, and the lack of a development brief for the wider estate.

The Development Committee meeting on 27 April 2021

5. The Application was reported to the Development Committee meeting on 27 April 2021 ("the April Meeting") with an officer recommendation for approval.

The April Report

6. The Officer's Report for the April Meeting ("the April Report") ran to over 60 pages and explained that the site was part of a wider estate in the same ownership that had gradually regenerated into a creative and commercial hub, involving many small and independent businesses (paragraph 1.2). It described the area around the Application site to the south, west, north and east – in detail and in terms similar to Local Character Area B in the draft Spitalfields Neighbourhood Plan ("the Draft Plan") (see paragraphs 76 et seq below). It summarised the representations that had been received, including the Claimant's objection (at paragraphs 5.39 to 5.42). An objection from the East End Preservation Society was reported as an "objection on grounds of prematurity given lack of site-wide development brief and draft status of the Spitalfields Neighbourhood Plan" (paragraph 5.26).

7. Section 6 of the April Report identified key development plan policies in the Tower Hamlets Local Plan and the London Plan, and in particular the policies relating to design and heritage, namely the Local Plan policies S.DH1, D.DH2, S.DH3 and London Plan policies D2-9 (see paragraphs 72 to 75 below)

8. As regards the Draft Plan, the April Report stated (at paragraph 6.7) as follows:

> "The Spitalfields Neighbourhood Plan is currently being prepared for the Spitalfields area; and includes the application site. Regulation 14 consultation was carried out from July to September 2020 which is the first stage of consultation. Regulation 16 consultation, the second stage of consultation, was held from January to February 2021. The neighbourhood plan was submitted for independent examination in early March 2021. The Neighbourhood Plan at this stage is considered to have low to moderate material weight in planning decisions."

9. The April Report contained a very detailed appraisal of the design and impact on the character and appearance of the Brick Lane and Fournier Street Conservation Area. From paragraphs 7.26 to 7.58, it addressed the design. At paragraph 7.26 it noted that the development plan policies require high-quality design that reflected local context and character and provide attractive places that safeguard, and where possible, enhance the setting of heritage sites. At paragraph 7.58, the April Report stated its "design conclusion":

> "To conclude, the proposal would respond appropriately to the positive aspects of the local context; re-introducing and setting back the building line on Woodseer Street to repair the urban fabric; and significantly improving the attractiveness of the public realm in this location. The proposal development is well considered design of a high architectural quality, well proportioned and designs out opportunities for crime. As such,

the proposal is compliant with the Development Plan in this regard."

10. Paragraphs 7.59 to 7.84 addressed "Heritage", stating, in particular:

> "7.59 Development Plan policies require proposals affecting heritage assets and their settings to conserve their significance by being sympathetic to their form, scale, materials and architectural detail. Policy S.DH3 requires development to protect and enhance the borough's conservation areas including their setting.
>
> **Heritage context**
>
> 7.60 The site is situated within the Brick Lane and Fournier Street Conservation Area; and there are statutory listed brewery buildings in close proximity to the site….
>
> …
>
> 7.65 In terms of scale, the appraisal states: '*Brick Lane is made up of narrow frontage, 19th century shopfronts in buildings of 2, 3 and 4 storeys. The rest of the area is predominantly low-rise, of 3 to 4 storeys. This low-rise character emphasizes the landmark value of Christ Church Spitalfields… and of the chimney of Truman's Brewery. Both of these features act as focal points for views and important points of reference, making it easier for visitors to find their way around'*.
>
> **Impact of the proposed development**
>
> 7.69 As noted in the design section, the scale of the proposed Building S1 is of a scale in keeping with other brewery buildings to the north and west, namely Building H and Building F. The CA appraisal makes reference to the 'larger scale' of the brewery buildings in relation to the wider context; and as show in Figure 13 above, Building S1 is only visible from the setting of the listed brewery buildings to a minor extent.
>
> …
>
> 7.71 In this regard, the stepping down of the proposal towards Woodseer Street, and in particular the lower scale of the properties on the southern side of Woodseer Street, is considered to provide an appropriate transition which successfully mitigates between the scale of Woodseer Street and the taller brewery buildings to the north.

> 7.72 While it is noted that the proposed built form on the corner of Brick Lane and Woodseer Street, is greater than that historically existing, namely the Black Eagle Tap PH, it is considered that the expression of the building form towards the corner is an appropriate response in townscape terms, matching the height of Building H and Building F to the north and west, and is therefore not unduly dominant for such a location.
>
> 7.73 The two storey extension to Building S2, to create a 5 storey building, is considered appropriate in the context of the set back 'Block J' industrial building, also part of the Truman's Estate, on the opposite side of Woodseer Street, as well as the adjacent 5 storey residential block on the corner of Woodseer Street and Spital Street.
>
> 7.74 Overall, the scheme would regenerate a vacant car-park site and high blank wall; and would introduce a strong corner feature building at the junction of Woodseer Street and Brick Lane. New active frontage, paving and street trees across the site would significantly improve the quality of the public realm in and around the site, which is currently degraded from the presence of the aforementioned wall."
>
> (emphasis added)

11. In relation to the views of the Truman's chimney, paragraph 7.76 stated:

> "In relation to the Truman's chimney, an important local landmark identified in the CA Appraisal, it was noted in objections received that the proposals could impact views of this landmark. However, an analysis submitted by the applicant demonstrates that the proposed development would not obscure views of the chimney from Brick Lane. Given the presence of Building H, the chimney is not visible from locations on Woodseer Street or Spital Street." (emphasis added)

In the Officers' Update Report of 27 April 2021, under "Clarification", paragraph 2.2. stated:

> "Clarification to paragraph 7.66 [sic] to note that the proposals would be partially visible across the base of the Truman's chimney from a view along Brick Lane to the south."

12. Paragraphs 7.83 and 7.84 of the April Report stated its Heritage conclusion as follows:

> "The proposed development would deliver a well-considered design that is appropriate in terms of mass, scale, form and architectural detailing. It would enhance the character and appearance of the Brick Lane and Fournier Street Conservation

> Area; and would preserve the setting of other heritage assets. As such, the NPPF 'public benefits test' (paragraph 196) is not engaged.
>
> The proposals therefore comply with policy HC1 of the London Plan; policy S.DH3 of the Local Plan; the relevant paragraphs of the NPPF (2019); and the statutory duties set out in the Planning (Listed Buildings and Conservation Areas) Act 1990." (emphasis added)

13. In relation to the issue of impact on the local community, paragraph 7.152 stated:

> "… the issue above is capable in some circumstances of being a material consideration in the context of a changing local character. However, in this instance, the issue is assigned very limited weight given the small scale of the changes proposed in relation to the wider Truman Brewery changes over recent decades – those which include activities and land uses that are recognised as being positive aspects of the local character within the Brick Lane and Fournier Street CA Appraisal and the draft Spitalfields Neighbourhood Plan. Furthermore, it is of note that any new development could have either a positive or negative impact on surrounding property values".
>
> (emphasis added)

14. In conclusion, at paragraph 7.157, the April Report explained that officers had assessed the scheme against relevant development planning policies, having regard to consultation responses and other material considerations and had concluded that it was acceptable and that planning permission should be granted, subject to appropriate conditions and a section 106 obligation. The April Report identified the section 106 obligations that should be secured. These included:

    (1) A requirement that 20% of retail units (i.e. 3 units) would be reserved for independent businesses (i.e. those that operate no more than 10 similar retail units in London or employ no more than 250 full-time employees). This was to be secured through a Retail Management Strategy setting out how the owner intended to market and manage letting and occupation of the retail floor space, including a range of methods to promote the availability of the independent retail floor space. This was to be secured for a period of 20 years (paragraph 7.22). This requirement would accord with "the draft Spitalfields Neighbourhood Plan which recognises the contribution of small and micro-businesses to the local economy" (paragraph 7.23).

    (2) A requirement that 10% of the employment workspace would be affordable workspace, providing 30% discounts on market rent (paragraph 7.15).

The April Meeting itself

15. The Application was considered by the Development Committee on 27 April 2021. The meeting was held virtually under Coronavirus legislation. At that point in time, there were six members of the Development Committee. Five committee members were present at the meeting: the Chair, Councillor Abdul Mukit and Councillors Sufia Alam, Kahar Chowdhury, Leema Qureshi and Kevin Brady (who was substituting for Councillor John Pierce). Councillor Dipa Da gave apologies. She was the sixth member of the Development Committee, but no substitute was appointed in her place.

16. The Council's senior planning officer presented the scheme to the Committee and summarised officers' view on the acceptability of the design. The Committee heard oral representations from a number of parties, including Mr Alec Forshaw, on behalf of the Claimant. He raised concerns about the provision of commercial office space which he said would harm the character of Brick Lane; the lack of housing in the scheme; harm to the character and appearance of the Brick Lane Conservation Area; design; and impacts on residential amenity through noise, overlooking and loss of daylight. He referred to the impact on the view of the Truman's chimney from south of Woodseer Street.

17. Committee members asked a number of questions in relation to the impact of the development on local businesses; the amount of affordable workspace; impacts on the BAME community and impacts on small and medium-sized enterprises. At the behest of members, Mr Jason Zeloof, on behalf of the Interested Party, indicated that he would be willing to explore further provision in the section 106 obligation to address some of those concerns. Councillor Brady formally proposed deferring the Application to enable officers to explore the section 106 obligation and ensure that it was more in keeping with the obligations which Mr Zeloof had indicated he was willing to explore. This was accepted.

18. The minutes of the April Meeting record:

> "On a vote of 5 in favour and 0 against the committee RESOLVED:
>
> That the consideration and determination of planning permission is DEFERRED at 140, 146 Brick Lane and 25 Woodseer Street, London, E1 6RU due to the following reason:
>
> - To enable Officers to explore further the Head of Terms for the s106 agreement in relation to the terms & provision of affordable workspace and the provision of independent retail space with a focus on supporting existing local businesses and the community cohesion aspects of these matters."
>
> In accordance with Development Procedural Rules, the application was DEFERRED to enable Officers to prepare a supplementary report to a future meeting of the Committee."
>
> (emphasis added)

The Defendant's constitution

Annual Council Meetings 19 May 2021 and on 24 June 2021

19. The Defendant's annual meeting on 19 May 2021 covered the Council's constitution ("the Constitution"). The report for the meeting stated that it was considered best practice for the Council to confirm adoption of the Constitution each year at its annual meeting. The Constitution was formally adopted at that meeting on 19 May 2021. There were then some subsequent amendments and the Constitution, with those amendments, was formally adopted on 24 June 2021. The provisions of the Constitution relevant to the issues in the present case are set out in paragraphs 22 to 34 below. However those provisions had consistently been in the Defendant's constitution for previous years; they were not new in May or June 2021.

20. At the meeting, the Defendant agreed the proportionality calculation for the allocation of places on non-executive committees to councillors from political groups, in accordance with the requirement of section 15 of the Local Government and Housing Act 1989 (see paragraph 65 below). The relevant officer's report on that issue set out and reiterated the principles set out in section 15. It agreed the allocation of places and committees to the party groups and other councillors. As regards the Development Committee, there were to be a total of 7 seats, of which 6 were allocated to Labour and one was allocated to "Ungrouped".

21. Further, at the May meeting, the Development Committee was freshly constituted. In a supplemental agenda the members of the Development Committee were named. The six Labour group members were Councillors Mukit, Islam, Pierce, Chowdhury, Perry and Qureshi. Of those six, Councillors Islam and Perry were new members. Councillor Pierce had not been present at the April Meeting. Three substitutes were named: Councillors Brady, Akhtar and Edgar. The latter two had not been present at the April meeting. The remaining one place allocated to "Ungrouped" was not taken up. Thus, of the five councillors who had attended the April Meeting, Councillor Alam was not re-appointed to the Development Committee and Councillor Brady remained a substitute. The other three were re-appointed.

The Constitution

22. The Constitution governs the membership, conduct and proceedings of the Council's various committees.

23. Part A provides a Summary and Explanation. It explains that the Constitution sets out how the Council operates, how decisions are made and the procedures which are followed to ensure that these are efficient, transparent and accountable to local people. Section 10 deals with Regulatory and Non-Executive Committees including the Development Committee. Paragraph 1 provides that the Council will appoint the Committees set out in Part B to discharge the functions described in Part B. Paragraph 4 explains that:

> "Except where prevented in law, or this Constitution, any Committee may establish one or more sub-committees to undertake specific areas of decision making that would normally be the responsibility of the parent Committee."

Part B: The Defendant's Committees, including the Development Committee

24. Part B addresses the responsibility for functions and decision-making procedures. Section 19 paragraph 1 states:

> "The Council has established a number of Committees, Sub-Committees, Boards and Panels with delegation powers and/or responsibility for various functions of Council. Summary terms of reference are included below setting out the powers of each body. Where useful, more detailed procedures and processes are set out in Part D of the Constitution"
> (emphasis added)

25. The list of bodies then identified in section 19 of Part B includes the Development Committee (and various specified sub-committees are also included in section 19). Section 19 further explains that:

> "In the absence of any express statutory prohibition to the contrary, all Council bodies listed from 4 onwards [*which includes the Development Committee*] may establish Sub-Committees pursuant to section 101 of the Local Government Act 1972 and/or may make specific delegations to officers.
>
> Where a Council Committee appoints a Sub- Committee under the above provision, the Committee shall appoint a Member to serve as Chair of the Sub- Committee. If the Committee does not do so, the Sub-Committee may appoint its own chair from amongst the Members appointed by the Committee to the Sub-Committee. Each Committee, Sub-Committee may appoint a Vice-Chair from amongst its membership."

The summary terms of reference for the Development Committee are set out in section 19, sub-section 7 of Part B which provides that membership shall comprise 7 Councillors; that each political group may appoint up to 3 substitutes and that the Committee will be quorate with 3 members. It explains that additional information relating to the Development Committee is included in Parts C and D. The functions of the Development Committee are set out at page 58 of Part B and include determination of applications such as the Application, the subject of the present proceedings. (The list of committees in section 19 does not include a committee or sub-committee formed specifically to deal with the Application nor with deferred applications more generally). The May 2021 Council meeting appointed councillors to those committees. There was no mention of, or appointment to, a "Truman's Brewery" planning application sub-committee.

Part C: The Planning Code of Conduct

26. Part C of the Constitution sets out certain Codes and Protocols. Section 35 contains the Planning Code of Conduct. Paragraph 1.2 provides as follows:

> "1.1 The Planning Code of Conduct has been adopted by Tower Hamlets Council to regulate the performance of its

> planning functions. Its major objectives are to guide Councillors and officers of the Council in dealing with planning-related matters and to inform potential developers and the public generally of the standards adopted by the Council in the exercise of its planning powers.
>
> 1.2 The Planning Code of Conduct is in addition to the Code of Conduct for Members adopted under the provisions of the Localism Act 2011. Councillors should follow the requirements of the Code of Conduct for Members and apply this Code in the light of that Code. The purpose of this Code is to provide more detailed guidance on the standards to be applied specifically in relation to planning matters.
>
> …
>
> 1.4 This Code applies to Councillors at all times that they are involved in the planning process. This would include, where applicable, when part of decision-making meetings of the Council in exercising the functions of the Planning Authority…
>
> …"

27. Section 12 provides for "Conduct at the Committee" and states, inter alia, as follows:

> "12.1 Councillors must not only act fairly but must also be seen to act fairly. Councillors must follow agreed procedures (at all times and should only ask questions at the appropriate points in the procedure. At no time should a Councillor express a view which could be seen as pre-judging the outcome. During the course of the meeting Councillors should not discuss (or appear to discuss) aspects of the case with the applicant, a developer, an objector, their respective advisers or any member of the public nor should they accept letters or documents from anyone other than an officer from Democratic Services or the Legal Adviser to the Committee.
>
> …
>
> 12.5 If a Councillor arrives late for a meeting, they will not be able to participate in any item or application already under discussion. Similarly, if a Councillor has to leave the meeting for any length of time, they will not be able to participate in the deliberation or vote on the item or application under discussion at the time of their absence. If a Councillor needs to leave the room, they should ask the Chair for a short adjournment."

28. Then, and significantly for present purposes, section 13 of the Code is entitled "Decision making" and provides, inter alia, as follows:

> "13.4 Councillors must not take part in the meeting's discussion on a proposal unless they have been present to hear the entire debate, including the officers' introduction to the matter. If an application has previously been deferred then the same Councillors will be asked to reconsider the application when it is returned to Committee"
>
> (emphasis added)

29. The Code of Conduct then concludes in section 17, entitled "Guidance/Procedure notes", inter alia, as follows:

> "17.2 Appendix B to this Code of Conduct sets out the Development Procedure Rules that apply to all meetings of the Development Committee, Strategic Development Committee and Council in relation to the determination of planning applications. This is set out in Part D Section 53 of the Constitution."

Part D: The Development Procedure Rules

30. Part D of the Constitution contains Supplementary Documents including at section 53, the Executive, Committee and Partnership Procedure Rules. Part D is to be read in conjunction with Parts A to C. Those section 53 rules include "Strategic Development Committee/Development Committee - Development Procedure Rules" ("the Rules"). The Rules provide, inter alia, as follows:

> "1. SCOPE
>
> 1.1 These rules apply to all meetings of the Development Committee, Strategic Development Committee and Council in relation to the determination of planning applications.
>
> 1.2 As the determination of planning applications is a quasi-judicial function these rules provide processes and procedures which fulfil legal requirements of impartiality and natural justice." (emphasis added)

31. Section 5 is headed "Order of Proceedings". Paragraph 5.3 sets out the "procedure for considering each application" in seven distinct stages, culminating in "The Committee will consider the item and reach a decision". Paragraph 5.4 of the Rules then provides:

> "The Chair shall have discretion to vary the procedure for hearing an application, following consultation with officers, should that be necessary in specific circumstances.
>
> In order to be able to vote upon an item, a councillor must be present throughout the whole of the Committee's consideration

> including the officer introduction to the matter"
>
> (emphasis added)

Paragraph 6 of the Rules refers to "public speaking". It states:

> "6.2 When a planning application is reported to Committee for determination the provision for the applicant/supporters of the application and objectors to address the Committee on any planning issues raised by the application, will be in accordance with the public speaking procedure adopted by the relevant Committee from time to time."

Paragraph 10.2 under the heading "Decisions contrary to Development Plan" states:

> "10.2 If a Committee is minded to make a decision contrary to the officer recommendation (whether for approval or refusal) and that decision would be contrary to the provisions of the Development Plan, such motion may only contain the Committee's initial view and must be subject to a further report detailing the planning issues raised by such a decision. Further consideration of the matter must be adjourned to a future meeting of the Committee when officers will present a supplemental report setting out the proposed new position and explaining the implications of the decision."
>
> (emphasis added)

32. Significantly, for present purposes, paragraph 11 of the Rules is headed "Deferrals" and provides as follows:

> "11.1 Where it is necessary to defer the determination of an application, the matter will be placed on the list of "Deferred, Adjourned an Outstanding Items" in the agenda to enable further consideration as soon as possible. Generally where the reason for deferral does not involve any substantive new information being brought before the Committee (for example, following deferral for a site meeting or clarification of an issue) the Committee will be updated by means of the addendum update report and can usually proceed to determine the application at the next meeting. In such circumstances at the re-convened consideration there will be no further public speaking pursuant to Rule 6.
>
> 11.2 Where deferral is for a more substantive reason (such as renegotiating part of the proposal) then it would generally be appropriate for a fresh report to be presented to the Committee in the "Planning Applications for Decision" part of the agenda in order to ensure that the Committee is apprised of all material considerations. Where a new full

> report is presented to Committee, public speaking pursuant to Rule 6 is permitted.
>
> 11.3 Such applications will be placed on the list of Deferred items at the beginning of the agenda so that the Committee has a record of all applications that stand deferred.
>
> 11.4 Where an application is deferred and its consideration recommences at a subsequent meeting only Members who were present at the previous meeting will be able to vote. If this renders the Committee inquorate then the item will have to be reconsidered afresh. This would include public speaking rights being triggered again."
> (emphasis added)

33. Section 3 of the Rules explains what is meant by "Addendum Update Reports"; namely a report published shortly before a committee meeting to update members on developments since the agenda was published (five clear working days before the meeting). Section 13 of the Rules deals with formal site visits by the Committee. Paragraph 13.2(f) provides that failure to attend such a visit does not bar a member from voting, provided that the member is satisfied that he/she is familiar with the site.

34. I refer to the above provisions in the Constitution at paragraph 13.4 of the Planning Code of Conduct and paragraph 11.4 of the Rules compendiously as the "Deferred Meeting voting rule". These provisions are relevant to Ground 1 below. Paragraphs 11.1 to 11.3 of the Rules are of particular relevance to Ground 2 below.

The Development Committee Meeting on 14 September 2021 (i.e. the September Meeting)

35. The Application was considered again at the Development Committee meeting on 14 September 2021. Events leading up to the September Meeting were as follows.

Advance notice of the Meeting

36. By letter dated 3 September 2021 the Defendant notified those that had previously made representations that "the Development Committee will consider this application at their meeting to be held on 14 September 2021". The covering email stated that the committee notification letter "explains how to register to speak at this meeting". In fact the letter did not do this, nor mention the fact that there would be no public speaking allowed. The Claimant received this notification.

Formal Notice of the meeting

37. On or about 6 September 2021, formal Notice of the Meeting (including the agenda and accompanying papers) were sent out and published. The Notice for the meeting was headed "Development Committee". It identified the Chair as Councillor Mukit and the "Members" as Councillors Chowdhury, Perry and Qureshi with "3 Vacancies". It further identified "substitute Members" as Councillors Brady, Akhtar and Edgar. The Notice further stated:

> "The deadline for registering to speak is 4 PM Friday 10 September 2021.
>
> The deadline for submitting information for the update report is Noon Monday, 13 September 2021"

In fact (and certainly by the next day), the position of Councillor Brady stated in the Notice was not accurate. At the hearing before me, the Defendant revealed for the first time that on 6 September itself, Councillor Brady had been appointed a full Member of the Development Committee. It thus followed that by the time of the September Meeting, the membership of the Development Committee had been reduced from 6 to 5 (rather than 4). Councillors Islam and Pierce were no longer members of the Committee.

The Agenda

38. The Agenda for the meeting is headed "Development Committee". Item 2 was to confirm the minutes of the meeting of "the Development Committee" held in August. It included at Item 3, "Recommendations and Procedure for Hearing Objections and Meeting Guidance" and, at Item 4, "Deferred Items" being a reference to the Application. Each agenda item then cross-referred to supporting papers and reports. The supporting paper for Item 3 included the statement "Speaking is not normally allowed on deferred items or applications which are not for decision by the Committee"; and further that, at meetings where public speaking is allowed, only two objectors might do so on a "first come first served basis" and for three minutes each.

39. In relation to Item 4, there were two reports. The first report, advising the Committee of planning applications that had been considered at previous meetings and currently stood deferred, identified the Application as the only relevant deferred application and stated, inter alia:

> "As public speaking has already occurred when the Committee first considered these deferred items, the Council's Constitution does not allow a further opportunity for public speaking. The only exception to this is where a fresh report has been prepared and presented in the "Planning Applications for Decision" part of the agenda. This is generally where substantial new material is being reported to Committee and the recommendation is significantly altered." (emphasis added)

(Apart from the concluding words, this accurately reflects the terms of paragraph 11.2 of the Rules).

40. The second report was the planning officers' substantive report on the Application ("the September Report").

The September Report

41. Following the resolution at the April Meeting, Council officers engaged in a period of negotiation with the Interested Party. Further terms were agreed for inclusion in the

section 106 obligation and a report was prepared to inform the meeting of 14 September 2021 ("the September Report"). It recommended approval.

42. The September Report was a seven-page report with the April Report appended at Appendix 1 and with a new three-page Appendix 2 setting out definitions for the purposes of the section 106 Agreement. It noted a further 425 objections.

43. The September Report did not provide a full reappraisal of the proposed development, but rather focused on the reasons for the deferral. It stated, inter alia, as follows:

> "1.2 As set out in the minutes of the meeting, the Committee expressed concern that further exploration was needed on the planning obligations in relation to the terms and provision of affordable workspace; the provision of independent retail with a focus on supporting existing local businesses; and the community cohesion aspects of these matters.
>
> 1.3 … Several changes had been made to the proposed affordable workspace and independent retail commitments in order to address the reasons for deferral. These are set out in this report and also appended (Appendix 2). The officer recommendation remains to grant planning permission and has been updated to reflect the outcome of the negotiations"

44. In section 3, the September Report continued as follows:

> **"CONSIDERATION OF THE COMMITTEE'S REASONS FOR DEFERRAL**
>
> **Affordable Workspace**
>
> Proposed amount and duration
>
> 3.1. The Council's Local Plan Policy D.EMP2 requires a minimum of 10% of employment floorspace on major schemes to be provided at a minimum 10% below market rates for at least 10 years. The London Plan requires affordable workspace to be provided for 15 years.
>
> 3.2. At Development Committee, the proposals included the allocation of not less than 10% of the workspace within the development to be not less than 30% below the indicative market rate for a period of 10 years.
>
> 3.3. Following deferral, the applicant has increased their offer to provide affordable workspace that is not less than 45% below the indicative market rent for a period of 15 years.
>
> 3.4. The proposed 45% 'discount' on workspace would exceed the Council's Local Plan policy requirement but would be

in line with Policy SPITAL7 of the draft Spitalfields neighbourhood plan. Although still in draft, the Neighbourhood Plan policies now carry significant weight, having been subject to examination and recommended for referendum. The proposed 15-year duration of the affordable workspace would exceed the minimum durations required in the Local Plan (10 years) and draft Neighbourhood Plan (12 years); and would meet the requirements of London Plan policy.

Size of business

3.5. At Development Committee, the application did not include restrictions on the size of business that the affordable workspace would be secured for. This has now been negotiated to comprise the definition of "small" businesses under the Companies Act 2006. Using the current definition, this would mean satisfying two or more of the following criteria in a financial year:

- Turnover not more than £10.2m
- Balance sheet total not more than £5.1m
- Employees not more than 50

Proposed 'Affordable Workspace Strategy'

3.6. An Affordable Workspace Strategy, to be submitted and secured as part of the section 106 agreement, was originally proposed. Since the deferral of the application, the details of the Strategy have been negotiated and developed, with the aim of ensuring that the affordable workspace is focused on and prioritised for local businesses in keeping with the nature and character of the wider Brick Lane and Spitalfields area. The strategy would comprise the following:

- Fit out and specification of the affordable workspace which shall be a 'Category A' specification, referring to the basic finishing of an interior space.
- A marketing strategy which consists of:
  - an initial marketing period of three months to be focussed on local marketing only as per the range of methodologies below;

  …

  - giving priority with first applications and nominations for lettings to be offered to

prospective occupiers who are based 'locally', that is, existing Tower Hamlets business rates payees; existing Tower Hamlets council tax payees; or businesses based within a three miles radius of the Development; and

- a strategy for seeking occupiers that are in keeping with the nature and character of existing workspace occupiers within the Truman Brewery estate and the wider Brick Lane and Spitalfields area, with a strong focus on attracting independents.

Independent Retail

…

Size of business

3.9. At Development Committee, the agreed definition of 'independent retail' referred to small to medium-sized businesses that operate no more than ten similar retail outlets in London; or employ no more than 250 persons (full time equivalent).

3.10. To address the reason for deferral, similar to the affordable workspace obligation above, this definition has been negotiated to comprise the definition of "small" businesses under the Companies Act 2006. Using the current definition, this would mean satisfying two or more of the following criteria in a financial year:

- Turnover not more than £10.2m
- Balance sheet total not more than £5.1m
- Employees not more than 50

Proposed 'Independent Retail Strategy'

3.11. Similar to the Affordable Workspace Strategy above, the obligation to provide an Independent Retail Strategy has been developed further. Principally, the Strategy includes an initial three-month period for local marketing only; giving priority for lettings to potential occupiers who are based locally; and a strategy for seeking retail occupiers that are in keeping with the nature and character of the local area. The details are set out in full in paragraph 3.6 above, which also apply to this obligation.

> 3.12. The strategy would also include details of the fit out and specification of the independent retail units.
>
> 3.13. It is of note that the Section 106 clause would 're-start' if and when an independent retail unit vacates during the 20-year period.
>
> …
>
> **Summary**
>
> 3.16. In summary, the proposed amendments to the proposed planning obligations - the increased provision and duration of affordable workspace; the addition details provided in relation to local marketing; prioritisation of local businesses; selection of occupiers that reinforce the unique character of the area; and the quality of commercial spaces - would respond to the Committee's reasons for deferral.
>
> …
>
> 3.18. Overall, these obligations would provide additional benefits to local businesses and the local community; and address the reasons for deferral. The obligations are provided in the context of a scheme that otherwise complies with the adopted development plan."
>
> (emphasis added)

Further Representations

45. On 3 and 9 September 2021, requests to speak at the meeting were made by two objectors who had spoken at the April Meeting: Saif Osmani, Chair of the Development Committee at Spitalfields Housing Association and Marian Goodrich, a local resident. Those requests were rejected by officers because public speaking had already taken place at the April Meeting. Each was informed that, instead, written representations could and should be made by 13 September 2021. In her evidence Ms Palin, the Claimant's senior administrator, stated that the Claimant would have taken the opportunity to speak at the September Meeting had it been given the opportunity to do so. On instructions, Mr Harwood QC indicated that, by that time, the Claimant knew that public speaking was not going to be allowed at the September Meeting.

46. The Claimant submitted a further written objection by letter dated 10 September 2021, stating:

> "The Spitalfields Trust, along with very many local businesses and residents, has strong objections to the proposed development. It believes that the proposed corporation offices will threaten and destabilise the existing make-up of small independent businesses and the low rents they pay, which are crucial to the unique character of Brick Lane. In addition the scheme harms the amenity of long-established residents in

> Woodseer Street, and harms the character and appearance of the Brick Lane/Fournier Street Conservation Area."

This objection was then expanded under six headings, many of which were not directed specifically to the issues which gave rise to the deferral but re-iterated matters previously raised. The headings were: Harm to Brick Lane Town Centre; Lack of Provision of Affordable Rental Space; Harm to the Character and Appearance of the Brick Lane Conservation Area (including views of Truman's chimney); Harm to Residential Amenity because of Noise; Overlooking and loss of daylight; Sustainability and Prematurity in advance of adopted planning brief for the Old Truman Brewery. There is reference to the Local Plan, but no reference to the Draft Plan.

47. By the time of the September Meeting, officers also provided a short 2-page update report, addressing the further representations received since 9 September, including a summary of the further representations received from the Claimant.

The September Meeting itself

48. By the September Meeting, the coronavirus legislation had expired and so committee members had to be physically present at the meeting to take part formally. Councillor Qureshi appeared remotely but she did not vote. (It appears she was self-isolating). The members in the meeting room were Councillors Mukit, Chowdhury and Brady. Councillor Perry gave her apologies. The substitutes, Councillors Akhtar and Edgar were not present. The meeting was also broadcast and the recording is published.

49. Introducing the guidance under Item 3, Mr Buckenham, a council officer, emphasised "there's only one item this evening which is the deferred item with no public speaking". Then, turning to Item 4, the Chair announced at the start of the Application as follows:

> "Only the councillors present on the 27 April committee meeting and are here in the Council Chamber may vote on this item. They are myself, Cllrs Kevin Brady and Kahar Chowdhury. Cllr Leema Qureshi is also present but as she is attending online she cannot vote today on this item."

This statement was in line with paragraph 13.4 of the Planning Code of Conduct.

50. The requirement that members had to have been present at the April Meeting meant that Councillor Perry was not allowed to take part. Councillor Qureshi was not able to attend in person. Neither of the two substitutes (Councillors Akhtar and Edgar) were allowed to take part, so it was not possible to substitute for Councillors Perry and Qureshi. As a result, those that took part were Councillors Mukit, Brady and Chowdhury.

The Minutes of the September Meeting

51. The Minutes of the September Meeting record, under Item 4, that "Update report was tabled". It is not clear whether this is a reference to the September Report or the 2-page update report. The Minutes record positive decisions made in respect of Items 2 and 3. In relation to Item 4, the Minutes record, inter alia, as follows:

> "In response to the presentation, the Committee asked a number of questions around the following issues:
>
> …
>
> • The status of the draft Spitalfields Neighbourhood Plan and the extent the proposals complied with this. Officers confirmed that at this stage in the process, the Council can give and had given this full weight in relation to assessing this application. It has been properly applied and the proposals accorded with the plan and has helped secure some of the additional concessions. …"

The minutes then go on to record that the Committee resolved to grant planning permission by 2 votes in favour to 1 against. Councillor Mukit, the chair, voted against. (Had the votes been equal, Councillor Mukit would have had a second or casting vote.)

The Transcript of the September Meeting

52. The meeting was recorded. The Claimant has prepared an unofficial transcript. Agenda Item 3 was considered and discussed briefly.

53. Under Item 4, Councillor Mukit expressly asked Mr Buckenham, the Development Manager, Planning Services, about the Draft Plan:

> ": ….I just wanted to ask you one question about local neighbourhood plan. I want you to make a comment on that because we are working very closely with the Spitalfields Trust on local neighbourhood plans and they are going to approve this on 11th November. How does it affect of our …this application. Thank you."

Mr Buckenham responded:

> "In terms of the neighbourhood plan …very important to mention it has been alluded to in the report the Spitalfields's neighbourhood plan has now been on its journey through its draft and through its consultation, through examination and the examiner's report was published on 16th July. Neighbourhood plans form part of the development plan so they sit alongside the council's local plan and the London plan when you're making your decisions and Section 70 of the Duncan (?) Planning Act says that actually you do not have to wait for the referendum to take place. If there is a draft plan and it's been through examination <u>then any policies within that plan that are material to your decision making should be applied and our view is that the proposals are consistent with the Spitalfields neighbourhood plan and indeed there was a slide a bit earlier that just talked about how the affordable workspace is really adhering to the level of discount that's being asked for in that plan rather than in the council local plan</u> so it's a bigger level of discount than the

> Spitalfields neighbourhood plan and that's what's been negotiated with the applicant. I think Mrs Hartman (?) has just moved it on to the screen so it's Policy Spittle 7 (?) of the draft neighbourhood plan is the one that's being applied in this case."
>
> (emphasis added)

A little later in the Meeting, Councillor Mukit asked Mr Buckenham whether the decision on the Application should be deferred until the Draft Plan itself was approved on 11 November. Mr Buckenham responded that the Draft Plan was now at the stage where they could give it practically full weight in terms of decision making and it would not change between now and November. Mr Buckenham continued:

> "The natural follow-on question is if members of the committee in some way feel that there are policies in that plan that haven't been properly applied to this application. We're not aware of any and indeed we've used the plan to our advantage in terms of the negotiations to get a greater reduction in terms of the level of affordable workspace which we wouldn't have been able to do just under the council's own local plan for example."
>
> (emphasis added)

Grant of planning permission and subsequent events

54. The planning permission was issued on 10 November 2021.

55. A pre-action protocol letter was sent on behalf of the Claimant on 2 December 2021, enclosing a draft Statement of Facts and Grounds which dealt with the present Ground 1. The Defendant responded with a detailed pre-action response dated 16 December 2021 and the Interested Party provided draft Summary Grounds of Resistance. In their Summary Grounds of Resistance, both the Defendant and the Interested Party contended that permission should be refused because the true nature of the claim is a challenge to the Constitution which was adopted on 24 June 2021 and thus the challenge was well out of time. Lang J granted permission on 26 January 2022. In her decision, she did not expressly address that issue of promptness.

The Legislative Background

The Local Government Act 1972

56. Section 101 of the Local Government Act 1972 ("LGA 1972") provides, inter alia, as follows:

> **"Arrangements for discharge of functions by local authorities.**
>
> (1) Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions—
>
> (a) by a committee, a sub-committee or an officer of the authority; or

(b) by any other local authority.

…

…

(2) Where by virtue of this section any functions of a local authority may be discharged by a committee of theirs, then, unless the local authority otherwise direct, the committee may arrange for the discharge of any of those functions by a sub-committee or …"

57. Section 102 provides, so far as material, as follows:

"Appointment of committees.

(1) For the purpose of discharging any functions in pursuance of arrangements made under section 101 above … -

(a) a local authority may appoint a committee of the authority; or

(b) two or more local authorities may appoint a joint committee of those authorities; or

(c) any such committee may appoint one or more sub-committees.

…

(2) Subject to the provisions of this section, the number of members of a committee appointed under subsection (1) or (1A) above, their term of office, and the area (if restricted) within which the committee are to exercise their authority shall be fixed by the appointing authority or authorities or, in the case of a sub-committee, by the appointing committee."

58. Section 106 provides, inter alia, as follows:

"Standing orders.

Standing orders may be made as respects any committee of a local authority by that authority or as respects a joint committee of two or more local authorities, whether appointed or established under this Part of this Act or any other enactment, by those authorities with respect to the quorum, proceedings and place of meeting of the committee or joint committee (including any sub-committee) but, subject to any such standing orders, the quorum, proceedings and place of meeting shall be such as the

committee, joint committee or sub-committee may determine."

(emphasis added)

59. Schedule 12 to LGA 1972 provides, inter alia, as follows:

> "39(1) Subject to the provisions of any enactment (including any enactment in this Act) all questions coming or arising before a local authority shall be decided by a majority of the members of the authority present and voting thereon at a meeting of the authority.
>
> (2) Subject to those provisions in the case of an equality of votes, the person presiding at the meeting shall have a second or casting vote.
>
> …
>
> 42 Subject to the provisions of this Act, a local authority may make standing orders for the regulation of their proceedings and business and may vary or revoke any such orders.
>
> 44 (1) Paragraphs 39 to 43 above (except paragraph 41(3)) shall apply in relation to a committee of a local authority (including a joint committee) or a sub-committee of any such committee as they apply in relation to a local authority."
>
> (emphasis added)

The Local Government Act 2000

60. Under Chapter 5 of the Local Government Act 2000 ("LGA 2000") section 9P provides as follows:

> "**Local authority constitution**
>
> (1) A local authority must prepare and keep up to date a document (referred to in this section as its constitution) which contains—
>
> (a) a copy of the authority's standing orders for the time being,
>
> (b) a copy of the authority's code of conduct (if any) for the time being under section 28 of the Localism Act 2011,
>
> (c) such information as the Secretary of State may direct, and

> (d) such other information (if any) as the authority considers appropriate.…"

61. Section 9Q LGA 2000 provides as follows:

> **"Guidance**
>
> (1) A local authority must have regard to any guidance for the time being issued by the Secretary of State for the purposes of this Part.
>
> (2) Guidance under this section may make different provision for different cases or descriptions of local authority."

62. Section 21(10) LGA 2000 provides:

> *"Provisions with respect to executive arrangements*
>
> **Overview and scrutiny committees.**
>
> …
>
> (10) An overview and scrutiny committee of a local authority, or any sub-committee of such a committee, may include persons who are not members of the authority, but (subject to any provision made by or under paragraph 8 or 9 of Schedule 1) any such persons are not entitled to vote at any meeting of such a committee or sub-committee on any question which falls to be decided at that meeting ...."
>
> (emphasis added)

Further provision in this regard is made at paragraphs 7, 11 and 12 of Schedule A1, allowing voting rights in specific cases and circumstances.

The Local Government Act 2000 (Constitutions) (England) Direction 2000

63. The Local Government Act 2000 (Constitutions) (England) Direction 2000 ("the Constitutions Direction") contains relevant guidance from the Secretary of State. By paragraph 3 n, the information that must be contained in the Constitution includes a description of the roles of any committee or sub-committees appointed in accordance with s.101 LGA 1972, including the membership, terms of reference and functions of the authority's committees or sub-committees and "any rules governing the conduct and proceedings of meetings of those committees and sub-committees, whether specified in the authority's standing orders or otherwise" (emphasis added).

Local Government and Housing Act 1989

64. Section 13 of the Local Government and Housing Act 1989 ("LGHA 1989") addresses voting rights and provides as follows:

> **"Voting rights of members of certain committees: England and Wales.**
>
> (1) Subject to the following provisions of this section, a person who—
>
> (a) is a member of a committee appointed under a power to which this section applies by a relevant authority and is not a member of that authority;
>
> (b) is a member of a joint committee appointed under such a power by two or more relevant authorities and is not a member of any of those authorities; or
>
> (c) is a member of a sub-committee appointed under such a power by such a committee as is mentioned in paragraph (a) or (b) above and is not a member of the relevant authority, or one of the relevant authorities, which appointed that committee,
>
> shall for all purposes be treated as a non-voting member of that committee, joint committee or, as the case may be, sub-committee.
>
> (2) The powers to which this section applies are—
>
> (a) the powers conferred on any relevant authority by subsection (1) of section 102 of the Local Government Act 1972 (ordinary committees, joint committees and sub-committees)
>
> …" (emphasis added)

65. Section 15 LGHA 1989, under the heading "Political balance on committees etc", provides, inter alia, as follows:

> **"Duty to allocate seats to political groups.**
>
> (1) It shall be the duty of a relevant authority having power from time to time to make appointments to a body to which this section applies to review the representation of different political groups on that body—
>
> (a) where the members of the authority are divided into different political groups at the time when this section comes into force, as soon as practicable after that time;
>
> (b) where the authority hold annual meetings in pursuance of paragraph 1 of Part I of Schedule 12 to the Local Government Act 1972 (annual meeting of principal councils) and the members of the authority

are divided into different political groups at the time of any such meeting, at or as soon as practicable after the meeting;

(c) where, at the time of the meeting required by paragraph 1 of Schedule 7 to the Local Government (Scotland) Act 1973 to be held in an election year within twenty-one days of the election, the members of the authority are divided into different political groups, at or as soon as practicable after the meeting;

(d) as soon as practicable after any such division as is mentioned in paragraphs (a) to (c) above occurs; and

(e) at such other times as may be prescribed by regulations made by the Secretary of State.

….

(4) Subject to subsection (6) below, it shall be the duty of a relevant authority or committee of a relevant authority—

(a) in performing their duty under subsection (3) above; and

(b) in exercising their power, at times not mentioned in subsection (3) above, to determine the allocation to different political groups of seats on a body to which this section applies,

to make only such determinations as give effect, so far as reasonably practicable, to the principles specified in subsection (5) below.

(5) The principles mentioned in subsection (4) above, in relation to the seats on any body which fall to be filled by appointments made by any relevant authority or committee of a relevant authority, are—

(a) that not all the seats on the body are allocated to the same political group;

(b) that the majority of the seats on the body is allocated to a particular political group if the number of persons belonging to that group is a majority of the authority's membership;

(c) subject to paragraphs (a) and (b) above, that the number of seats on the ordinary committees of a relevant authority which are allocated to each political group bears the same proportion to the total of all the seats on the ordinary committees of that

authority as is borne by the number of members of that group to the membership of the authority; and

(d) subject to paragraphs (a) to (c) above, that the number of the seats on the body which are allocated to each political group bears the same proportion to the number of all the seats on that body as is borne by the number of members of that group to the membership of the authority." (emphasis added)

66. Schedule 1 to LGHA 1989 provides, inter alia, as follows:

"Bodies to which section 15 applies

1. Subject to such exceptions as may be prescribed by regulations made by the Secretary of State, section 15 of this Act applies, in relation to any relevant authority or committee of a relevant authority—

(a) to any ordinary committee or ordinary sub-committee of the authority;

…

Construction of sections 15 to 17

…

4 (1) In sections 15 to 17 of this Act and this Schedule—

…

"seat", in relation to a body to which section 15 of this Act applies, means such a position as a member of that body as—

(a) entitles the person holding the position to vote at meetings of the body on any question which falls to be decided at such a meeting; and

…

…

(3) References in this paragraph to voting include references to making use of a casting vote."

(emphasis added)

Localism Act 2011

67. Section 31 of the Localism Act 2011 ("LA 2011") makes further provision in relation to voting rights, as follows:

> **"Pecuniary interests in matters considered at meetings or by a single member**
>
> (1) Subsections (2) to (4) apply if a member or co-opted member of a relevant authority—
>
> (a) is present at a meeting of the authority or of any committee, sub-committee, joint committee or joint sub-committee of the authority,
>
> (b) has a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting, and
>
> (c) is aware that the condition in paragraph (b) is met.
>
> …
>
> (4) The member or co-opted member may not—
>
> (a) participate, or participate further, in any discussion of the matter at the meeting, or
>
> (b) participate in any vote, or further vote, taken on the matter at the meeting,
>
> but this is subject to section 33.
>
> …" (emphasis added)

Local Government Finance Act 1992

68. Section 106 of the Local Government Finance Act 1992 ("LGFA 1992") also makes provision in relation to voting rights, as follows:

> **"Council tax and community charges: restrictions on voting.**
>
> (1) This section applies at any time to a member of a local authority, or a member of a committee of a local authority or of a joint committee of two or more local authorities (including in either case a sub-committee), or a council manager within the meaning of section 11(4)(b) of the Local Government Act 2000, if at that time—
>
> (a) a sum falling within paragraph 1(1)(a) of Schedule 4 to this Act; or

> (b) a sum falling within paragraph 1(1)(a), (b), (d) or (ee) of Schedule 4 to the 1988 Act (corresponding provisions with respect to community charges),
>
> has become payable by him and has remained unpaid for at least two months.
>
> (2) Subject to subsection (5) below, if a member or a council manager to whom this section applies is present at a meeting of the authority or committee or in the case of an authority which are operating executive arrangements the executive of that authority or any committee of that executive at which any of the following matters is the subject of consideration, namely—
>
> (a) any calculation required by Chapter III, IV or of Part I of this Act;
>
> (b) any recommendation, resolution or other decision which might affect the making of any such calculation; or
>
> (c) the exercise of any functions under Schedules 2 to 4 to this Act or Schedules 2 to 4 to the 1988 Act (corresponding provisions with respect to community charges),
>
> he shall at the meeting and as soon as practicable after its commencement disclose the fact that this section applies to him and shall not vote on any question with respect to the matter.
>
> …" (emphasis added)

Town and Country Planning Act 1990

69. Section 70 of the Town and Country Planning Act 1990 ("TCPA") provides as follows:

> **"Determination of applications: general considerations.**
>
> (1) Where an application is made to a local planning authority for planning permission—
>
> (a) subject to section 62D(5) and sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> (1A) Where an application is made to a local planning authority for permission in principle—

(a) they may grant permission in principle; or

(b) they may refuse permission in principle.

(2) In dealing with an application for planning permission or permission in principle the authority shall have regard to—

(a) the provisions of the development plan, so far as material to the application,

(aza) a post-examination draft neighbourhood development plan, so far as material to the application,

…

(c) any other material considerations.

…

(3B) For the purposes of subsection (2)(aza) (but subject to subsections (3D) and (3E)) a draft neighbourhood development plan is a "post-examination draft neighbourhood development plan" if—

(a) a local planning authority have made a decision under paragraph 12(4) of Schedule 4B with the effect that a referendum or referendums are to be held on the draft plan under that Schedule,

…" (emphasis added)

Senior Courts Act 1981

70. Section 31 of the Senior Courts Act 1981 ("SCA 1981") provides, inter alia, as follows:

"…

(2A) The High Court—

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

(b) may not make an award 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.

…

> (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application,
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

Relevant Planning Policy

71. There are three planning policy documents relevant to these proceedings: the London Plan; the Tower Hamlets Local Plan and the draft Spitalfields Neighbourhood Plan.

The London Plan

72. The London Plan provides a number of policies. Policy D3 "Optimising site capacity through design-led approach" states as follows:

> **"The design-led approach**
>
> A All development must make the best use of land by following a design-led approach that optimises the capacity of sites, including site allocations. Optimising site capacity means ensuring that development is of the most appropriate form and land use for the site. …
>
> …
>
> D Development proposals should:
>
> **Form and layout**
>
> 1) enhance local context by delivering buildings and spaces that positively respond to local distinctiveness through their layout, orientation, scale, appearance and shape, with due regard to existing and emerging street hierarchy, building types, forms and proportions
>
> …
>
> **Quality and character**
>
> 11) respond to the existing character of a place by identifying the special and valued features and characteristics that are unique to the locality and respect, enhance and utilise the heritage assets and

> architectural features that contribute towards the local character
>
> 12) be of high quality, with architecture that pays attention to detail, and gives thorough consideration to the practicality of use, flexibility, safety and building lifespan through appropriate construction methods and the use of attractive, robust materials which weather and mature well" (emphasis added)

73. Policy D4 "Delivering good design" provides, inter alia, as follows:

> "…
>
> **Design scrutiny**
>
> …
>
> D The design of development proposals should be thoroughly scrutinised by borough planning, urban design, and conservation officers, utilising the analytical tools set out in Part B, local evidence, and expert advice where appropriate …"

74. Policy D8 "Public Realm" provides, inter alia, as follows:

> "Development Plans and development proposals should:
>
> ..
>
> B ensure the public realm is well-designed, safe, accessible, inclusive, attractive, well-connected, related to the local and historic context, and easy to understand, service and maintain….
>
> …
>
> D be based on an understanding of how the public realm in an area functions and creates a sense of place during different times of the day and night, days of the week and times of the year….
>
> …
>
> F ensure there is a mutually supportive relationship between the space, surrounding buildings and their uses, so that the public realm enhances the amenity and function of buildings and the design of buildings contributes to a vibrant public realm
>
> G ensure buildings are of a design that activates and defines the public realm, and provides natural surveillance.

> Consideration should also be given to the local microclimate created by buildings, and the impact of service entrances and facades on the public realm."

The Tower Hamlets Local Plan

75. The Tower Hamlets Local Plan 2031 provides, inter alia, as follows:

> **"Policy S.DH1**
>
> **Delivering high quality design**
>
> 1. Development is required to meet the highest standards of design, layout and construction which respects and positively responds to its context, townscape, landscape and public realm at different spatial scales, including the character and distinctiveness of the borough's 24 places (as shown on Figure 4) and their features. To achieve this, development must:
>
> a. be of an appropriate scale, height, mass, bulk and form in its site and context
>
> …
>
> c. ensure the architectural language: scale, composition and articulation of building form, design of detailing, elements and materials applied on elevations, complements and enhances their immediate and wider surroundings
>
> d. protect important views of and from landmark buildings and vistas
>
> …
>
> f. create well-connected, inclusive and integrated spaces and buildings which can be easily adaptable to different uses and the changing needs of users
>
> …
>
> **Explanation**
>
> …
>
> 8.7 Parts 1(d) refers to views which are mostly distinctive and which residents, workers and visitors of the borough recognise and value. In particular, development proposals will need to take account of the views identified in Policy D.DH 4 and shown in Figure 6"

…

Policy D.DH2

Attractive streets, spaces and public realm

…

1. Development is required to contribute to improving and enhancing connectivity, permeability and legibility across the borough, ensuring a well-connected, joined-up and easily accessible street network and wider network of public spaces through:…

2. Development is also required to positively contribute to the public realm through:

…

   b. providing clear definitions and enclosure through building frontage and massing, and connection and continuity of pedestrian desire lines and street activities, at a human scale

…

Policy S.DH3

Heritage and the historic environment

"1. Proposals must preserve or, where appropriate, enhance the borough's designated and non-designated heritage assets in a manner appropriate to their significance as key and distinctive elements of the borough's 24 places.

…

3. Applications affecting the significance of a heritage asset will be required to provide sufficient information to demonstrate how the proposal would contribute to the asset's conservation. Any harm to the significance of a heritage asset must be justified having regard to the public benefits of the proposal: whether it has been demonstrated that all reasonable efforts have been made to sustain the existing use, find new uses, or mitigate the extent of the harm to the significance of the asset; and whether the works proposed are the minimum required to secure the long term use of the asset.

   Factors that will be considered can include:

…

Policy D.DH4

Shaping and managing views

1. Development is required to positively contribute to views and skylines that are components of the character of the 24 places in Tower Hamlets. Intrusive elements in the foreground, middle ground and backdrop of such views will be resisted. Development will be required to demonstrate how it:

    a. complies with the requirements of the London View Management Framework and World Heritage Site Management Plans (Tower of London and Maritime Greenwich)

    b. positively contributes to the skyline of strategic importance, forming from the silhouettes of tall building clusters around Canary Wharf (as defined on the Policies Map)

    c. preserves or enhances the prominence of borough-designated landmarks and the skyline of strategic importance in the borough-designated views (as defined in Figure 6)" (emphasis added)

Figure 6 as referred to in paragraph 1c) identified 9 key views – the only relevant one, for present purposes, being a view towards Christ Church Spitalfields.

The draft Spitalfields Neighbourhood Plan

76. As at the time of the September Meeting, the Draft Plan had been subject to examination and was ready for referendum. It was therefore "a post-examination draft neighbourhood development plan" within the meaning of s.70(2)(aza) TCPA 1990.

77. Section 3 of the Draft Plan is headed "Vision and Objectives" and provides:

> "Vision for Spitalfields
>
> The Neighbourhood Plan's vision is to conserve and improve all the ingredients that come together to make Spitalfields such a distinctive and attractive neighbourhood. Throughout the period to 2035 we want to maintain the delicate balance between businesses-large or small, corporate or creative-local residents, and local, national and international visitors. They all compete for the 21st century's scarce urban resource-the space to live, work, rest and play. We want to ease the many pressures of inner city living which impact both publicly and privately held indoor and outdoor space. We want to enable the different parts of the peoples of the area to work together harmoniously by conserving

> the cherished sense of place; protecting the distinctive urban grain,; maintaining the vibrant cultural character; and helping local commercial and retail enterprises thrive as they welcome visitors into a safe, clean and entertaining environment with the broadest of offerings."

78. The policies of the Draft Plan which are said to be material to the Application include SPITAL1, 2 and 7.

79. Policy SPITAL1 ("Protecting the physical fabric of Spitalfields") states in particular:

> "A. All development, including new buildings and extensions or alterations to existing buildings, shall be of a high quality of design, which complements and enhances the local character and identity of Spitalfields.
>
> B. All applications for development within conservation areas, identified in Figure 2.1, should demonstrate that they would not have a harmful impact on the character or appearance of the area. Development proposals should not have a negative impact on listed buildings or other designated heritage assets, or their settings.
>
> …
>
> D. All applications for development should take account of their impact on the Local Character Areas identified in Figure 4.1 and Appendix A, within which the application site sits or adjacent to it. New development should interact and interface positively with the street and streetscape described in the Local Character Area in which it is located, including respecting existing or, where possible, historic street facing building lines and frontages.
>
> E. Development should contribute positively to the character of existing and nearby buildings and structures, and should have regard to the form, function and heritage of its Local Character Area.
>
> F. Development should be sensitive to its setting and should respect the scale, height, mass, orientation, plot widths, and grain of surrounding buildings, streets and spaces. This applies within the Local Character Area within which the site is located, and, where relevant, where it directly impacts an adjacent Local Character Area.
>
> G. Development should have regard to any impact on the local views identified in the relevant Conservation Area Appraisal or Character Area Appraisal, and shown on Figure 4.2."

(emphasis added)

Figure 4.2 is a map of the area entitled "significant views within the Spitalfields Area" and identifies a substantial number of views. It states that "the significant views include…views already identified as important in the existing adopted Conservation Area Management Guidelines; and… additional views considered important because they give views of a specific identified landmark e.g. the spire of Christ Church or the Old Truman Brewery chimney, or because they offer good general street and townscape views."

80. Policy SPITAL2 ("Land Use, Activities and Frontages") provides, inter alia, as follows:

> "A. New development should maintain and create a positive relationship between buildings and street level activity, including the provision of appropriate activities at ground floor level facing and fronting the street as set out in the Local Character Area appraisals.
>
> …
>
> C. New or altered shopfronts and signage should demonstrate a high quality of design that preserves and enhances the character and appearance of the Local Character Area within which the application sits.
>
> … "

81. Policy SPITAL7 ("Affordable Workspace") states as follows:

> "As required by Tower Hamlets Local Plan Policy D.EMP 2 (New employment space), major development of commercial and mixed-new schemes must provide at least 10% of new employment floorspace as affordable workspace for a minimum of 10 years. In Spitalfields, this provision should be let at an affordable rate at least 45% below the Neighbourhood Area's indicative market rate for a minimum of 12 years, subject to viability (which must clearly be demonstrated by an open book viability appraisal)."

82. Appendix A to the Draft Plan is entitled "Local Character Area Appraisals". Within that Appendix, The Old Truman Brewery is in Local Character Area B, the assessment of which states, inter alia, as follows:

> "B5. The area also includes a number of empty sites, such as former car parks or service yards, and utilitarian, 20th century buildings where there are opportunities for redevelopment or imaginative adaptation which will enhance the area and introduce more permeability into and through the brewery complex. Such opportunities for larger buildings need to consider their interface with adjoining Local Character Areas, such as North Brick Lane

> and St Stephen. The most sensitive perimeter interface is facing Woodseer Street, including the new residential block at 15 Spital Street because of the 19th century terrace of housing on the south side of the street."
>
> …
>
> B7. The Brick Lane/Fournier Street Conservation Area Appraisal and Management Guidelines recognise the Truman Brewery chimney as a landmark, and states that views of its from publicly accessible spaces should be protected. This includes certain key views from within Local Character Area B, where it is sometimes seen in close proximity to other Brewery buildings, but also because of the chimney's height there are views from further afield, including Local Character Areas C, E and F.
>
> B8. The following views and vistas within the Local Character Area are considered important and effort should be made to protect them:
>
> - …
>
> - view from Brick Lane under the bridge looking north (View BVE02)
>
> - From west side of Brick Lane north of Hanbury Street looking north toward the brewery (View BVE03)"
>
> (emphasis added)

83. Local Character Area F is South Brick Lane. The northern boundary of that area is Woodseer Street and the south side of Woodseer Street is in Area F. It provides as follows:

> "F1 South of the brewery complex, Brick Lane is the busy and narrow artery of Banglatown.
>
> …
>
> F6 The following views are considered important and effort should be made to protect them:
>
> - …
>
> - from Brick Lane looking eastwards along Woodseer Street (View FVE06)"

The Grounds of Challenge

84. The Claimant puts forward three grounds of challenge, as follows:

(1) Councillors were unlawfully told that they could not vote on the Application at the September 2021 Development Committee meeting if they had not been present at the earlier April 2021 meeting which had deferred the application. All members of the Committee (and substitutes) who were present (or who would have been present without the instruction) were entitled to vote. (Ground 1: entitlement to vote)

(2) Since the Application had been deferred for the renegotiation of part of the proposal and had been returned to the Committee with substantive changes to the planning obligations, substantive new information and a significant change in the weight to be attached to the Draft Plan, public speaking should have been allowed at the September meeting under the Council's Constitution. (Ground 2: public speaking)

(3) The Council failed to have regard to relevant policies of the Draft Plan despite recognising that it was a material consideration which carried significant weight. (Ground 3: failure to have regard to the Draft Spitalfields Neighbourhood Plan)

Ground 1: Entitlement to Vote

The Parties' submissions

The Claimant's case

85. The Claimant submits as follows:

(1) All members of the Development Committee are entitled to vote on applications coming before it.

(2) In the present case, no individual councillor was prohibited by reason of pecuniary interest or any other disqualifying condition in the primary legislation.

(3) The Deferred Meeting voting rule contained within the Constitution (i.e. paragraph 13.4 of the Code of Conduct and paragraph 11.4 of the Rules) was therefore unlawful. It is lawful for committee members or substitutes to vote on a deferred application when they had not attended the first meeting. In the present case, such members could and would have been as well informed as those who had been at the first meeting.

(4) Contrary to the Defendant's assertion, the Council did not establish a sub-committee, or change the membership of the Development Committee, to consider the Application. The provisions in the Constitution do not purport to change the membership of the Committee, but instead seek to impose constraints as to which members of that Committee are able to consider deferred applications. The language of the document is that of consideration and voting, not membership. At no point did the Council or the Development Committee establish, by decision, a sub-committee or change the membership of the Development Committee. The Defendant changed its stance after the Decision, when it argued for the first time that the membership of the Committee had itself changed or that the Committee had created a sub-committee. At no point did the

Defendant apply or seek to apply the proportionality rules in section 15 LGHA 1989. Notice of the September Meeting was given as a meeting of the Development Committee, identifying all members and substitutes of that Committee.

(5) Paragraph 42 of Schedule 12 LGA 1972 does not give the Council or the Development Committee power to deprive a committee member of his or her entitlement to vote. The powers to make standing orders - in section 106 and Schedule 12 - are concerned with the conduct of proceedings and not with the inherent rights of members under primary legislation.

(6) The effect of the Deferred Meeting voting rule meant that only three of the full complement of five members could vote at the September Meeting. But for the rule, five members (or substitutes) could have attended and voted. If two more Councillors had attended and voted the outcome might have been different (i.e if both voted against, or one voted against and one abstained (with Councillor Mukit's casting vote being against)).

86. The Claimant relies upon *R(Ware) v Neath Port Talbot County Borough Council* [2007] EWHC 913 (Admin) at §38, [2007] EWCA Civ 1359; *R(Etherton) v Hastings Borough Council* [2009] EWHC 235 (Admin) and, in particular, *In the matter of Hartlands (NI) Ltd* [2021] NIQB 94.

87. Finally, the Claimant submits that the claim was not out of time. Time runs from the Decision, granting planning permission: see *R(Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593.

The Defendant's and the Interested Party's cases

88. The Defendant's case and that of the Interested Party are broadly aligned. Their submissions can be summarised as follows:

(1) The vote which took place on the determination of the Interested Party's planning application was wholly lawful. The Chair's announcement at the start of the item, that only Councillors present at the April Meeting and present in the Council Chamber at the time of the determination could vote on the item, was lawful and in accordance with the Constitution. In particular it was lawful for the Defendant to make such provision in the Constitution for three reasons:

(a) By paragraph 13.4 of the Code of Conduct and paragraph 11.4 of the Rules in the Constitution, the Defendant has made provision for the composition of membership of the Development Committee when a deferred application is being considered. It has provided, in substance, that, in such a case, the Committee is to comprise only those members who were present at the earlier meeting.

(b) Alternatively, the "effect" of those provisions of the Constitution is that, when consideration of a deferred application recommences, the Development Committee, in exercise of its power to establish a sub-committee under Part B, section 19 and s.101 LGA 1972, delegates the

power to determine to a sub-committee, comprising only those members who were present when the application was first considered.

(c) In any event, the purpose of these provisions is to make rules "for the regulation of their proceedings and business" within the meaning of paragraph 42 of Schedule 12 to LGA 1972; they were thus expressly authorised and/or permitted by LGA 1972.

89. In respect of the first two reasons, reliance is placed upon *R(Bridgerow Ltd) v Cheshire West and Chester Borough Council* [2014] EWHC 1187 (Admin) and *R(Blacker) v Chelmsford City Council* [2021] EWHC 3285 (Admin). In respect of the third reason, reliance is placed upon *R v Flintshire CC ex parte Armstrong-Braun* [2001] EWCA Civ 345. The cases of *Ware* and *Etherton* are distinguishable: neither involved the court assessing the constitution of a local authority. *Hartland* is distinguishable on the facts. It was not contended there that the relevant provision changed the composition of the relevant committee. Moreover the wording of paragraph 42 of Schedule 12 LGA 1972 ("proceedings and business") is wider that that in the relevant Northern Ireland legislative provision ("procedure").

90. Further or alternatively, the real nature of this claim is a challenge to the Constitution, and any judicial review challenge to the Constitution is out of time. Relief should therefore be refused on the ground of undue delay pursuant to section 31(6)(b) SCA 1981. Time started to run from 24 June 2021 (or 19 May 2021), the date that the Constitution was adopted. At that time, the Claimant was pursuing strong objections to the Application, consideration of which had been deferred; and thus was *affected by* the provisions of which it now complains, because it was inevitable that the Application would be considered pursuant to those provisions - that is the time from which the rules could have applied to them: see *R(Badmus) v Secretary of State for the Home Department* [2020] 1 WLR 4609. Granting relief would be detrimental to good administration. The fact that the issue of delay was raised at the permission stage does not mean that it cannot be addressed now, since it was not addressed earlier: *R(Bokrosova) v Lambeth London Borough Council* [2016] PTSR 355.

Discussion and analysis

91. I address first the substantive issue, before turning to the question of delay.

(1) The Deferred Meeting Voting Rule

The case authorities

92. In *R v Flintshire County Council ex parte Armstrong-Braun*, supra, the Court of Appeal held, as a first issue, that a council standing order which prevented any councillor from putting a matter on the agenda for a council meeting unless he had the support of at least one other councillor, was a standing order "for the regulation of [the council's] proceedings and business" within paragraph 42 Schedule 12 LGA 1972. Schiemann LJ (at §§17 and 18) endorsed the view that it was a provision which set out "rules as to how matters were placed on the agenda for subsequent discussion and voting", and rejected an argument that the power to *prohibit* proceedings went beyond a power to *regulate* proceedings.

93. The wider issue in the case was whether that standing order was nevertheless outside the policy and objects of LGA 1972. In particular, the second issue was whether it was possible for a standing order which falls within the wording of paragraph 42 nevertheless to be quashed as falling outside the policy and objects of LGA 1972 or as being otherwise legally objectionable. In answering that question in the affirmative, Sedley LJ said:

> "52. The Local Government Act 1972 is, as Schiemann LJ has said, the modern successor of a series of major statutes giving life and legitimacy to local government in England and Wales. The 1972 Act, with its satellite primary and delegated legislation, continues and develops a historical system of local representative democracy. Each of those three words needs to be given its proper value.
>
> 53. First, a representative democracy exchanges the Athenian ideal of direct participation for elected individuals through whom alone the electors have a voice in the institutions of government. Secondly, the system is local, not only in the sense that a county council is not a national body − but more relevantly − because a councillor is elected as the representative of a territorial unit within the county. Thirdly, every councillor's voice and vote is equal. It follows that the proceedings and business of the Council cannot lawfully be arranged so that (however innocent the intent) particular councillors are unjustifiably silenced or otherwise disadvantaged in doing what they have been elected to do. Effect has to be given to this third principle in the light of the statutory requirement (Local Government Act 1972 Schedule 12 para 4(5)) that no non−urgent business may be discussed at all unless it is contained in the notice summoning the meeting."
>
> 54. None of this, it seems to me, is aptly described in terms of councillors' rights. It has to do with the exercise and possible abuse of power by a local authority acting collectively. If there are rights involved, they are those of the people of the county." (emphasis added)

94. In *R(Ware) v Neath Port Talbot County Borough Council*, supra, the claimant challenged the grant of planning permission. The issue was whether the decision of certain members of the planning committee not to vote on the application could be impugned on the basis of wrong advice given to them by council officers. Those officers had advised that, first, their attendance at a previous meeting with objectors might raise the spectre of a complaint to the ombudsman, and secondly, to be legally secure, the councillor should have attended a site visit if they were to vote. Collins J upheld the claim. As to the first aspect, the officers were wrong to raise the spectre of a complaint. It could only have put pressure on the councillors/members As to the site visit advice, he found (at §38) that, as a matter of principle, it is difficult to see that a committee can bind its members by making a decision that those who have been unable

to make a site visit cannot participate in the ultimate decision. It must be for the individual member to decide whether on the facts the fact that he had not been to the site should disqualify him. The Court of Appeal overturned Collins J's decision on the basis that in fact officers had not told or pressurised members not to vote: see §§35 to 41. At §§40 and 41 Mummery LJ stated:

> "40. The councillors were clearly advised that it was for them to make their own decisions about whether to vote. They were not advised or told by the Council officers that they were disqualified from voting, or to leave the meeting on 19 September. They were not prevented from voting at it, if they so wished. In deciding individually not to vote the councillors were exercising their own judgment in the light of the advice that was given. None of the advice given to them was wrong or amounted to an immaterial consideration giving rise to a procedural irregularity or to unlawfulness in the granting of the consents.
>
> 41. It follows that there was no procedural irregularity vitiating the grant of the consents. Having received correct advice the councillors decided not to vote on the resolution. This was their decision and it has not been demonstrated that it was affected by immaterial considerations, such as wrong advice either about their attendance at February meeting or about the failure to make a site visit. (emphasis added)

The case therefore concerned the ability of members of a planning committee to vote on a particular application. It did not concern a provision in the council's constitution, nor one for the membership of the relevant committee or the establishment of a sub-committee.

95. In *R(Etherton) v Hastings Borough Council*, supra, the claimant challenged the grant of planning permission on the basis of a failure to follow the provisions of the local authority's planning protocol. The protocol - a guidance document which formed part of the council's constitution - made detailed provision for site visits and for the position of members of the committee who did not attend a site visit. Such members were expected not to vote at a subsequent meeting unless they could confirm that they had sufficient relevant knowledge of the site and they should consult with the case officer regarding alternative means of acquiring sufficient knowledge. Four of the six members of the committee who voted on the application had not been on the site visit. The claimant contended that there was no guarantee that those four members had "sufficient relevant knowledge" to assess the application and to be able to participate. Sir Michael Harrison dismissed the claim, finding that the fact that the four stated that they "knew the site well" was sufficient relevant knowledge. There was no failure to comply with the protocol provision. Under those provisions, the council was entitled to leave it to members who had not been on a site visit to decide for themselves whether they had sufficient information to be able to vote.

96. This was a case dealing with a provision in the council's constitution and dealing with the possible restriction of the ability of members of the planning committee to vote. It

did not address issues of membership of the committee or a sub-committee or Schedule 12 paragraph 42 LGA 1972. There was no contention, as in the present case, that the function of determining the application had ceased to lie with all the members of the planning committee.

97. In *R(Bridgerow Ltd) v Cheshire West and Chester Borough Council*, supra, under the local authority's constitution, applications for renewal of sexual entertainment venue licences were to be determined by a panel of three members drawn from the licensing committee on a politically proportionate basis. The claimant's application was refused by a panel consisting of 12 members of the full licensing committee. The claimant's claim that that committee had not been properly constituted and thus that the decision was unlawful was upheld. The provision in the Constitution for a specially constituted committee or panel, limiting the number of members of the committee able to consider an application, was lawful and applied.

98. In the constitution, the terms of reference provided expressly for three different constitutions of the licensing committee, depending on the nature of the application in question. One of those provided for a panel "comprising three members drawn from the full committee on a politically proportionate basis" and another for three members drawn from the full committee on an ad hoc basis. The Defendant and the Interested Party rely upon *Bridgerow* as an example of a provision in a constitution which restricts consideration of a relevant application to certain councillors only and where it is not "reasonably practicable" to make provision for political balance. Thus, they say, the legislation on political balance did not make the constitutional provisions in the present case unlawful. However in my judgment, *Bridgerow* does not assist in the present case. That was a case where the constitution expressly provided for differently constituted panels of the licensing committee, some politically balanced and some not.

99. *In the matter of Hartlands (NI) Ltd*, supra, in the High Court in Northern Ireland, is closest to the present case on the facts and issues. The applicant, a development company, challenged the decision of Derry City and Strabane District Council to refuse planning permission. Scoffield J quashed the decision because it was based on a material error of law. By reason of its Planning Committee Protocol, certain councillors who were members of the committee were not permitted to vote on the outcome of the application. That provision was ultra vires.

100. The Council's Planning Committee Protocol provided that members of the planning committee not present at an earlier "pre-determination hearing" could not vote on the subsequent planning decision. A pre-determination hearing is a procedure specific to Northern Ireland. At the pre-determination hearing, 12 council members attended. The application was then considered at a planning committee meeting on 29 July 2020. A number of councillors followed the Planning Committee Protocol and/or advice based on it and therefore did not vote on the application at that meeting. The remaining councillors voted by 4-3 to refuse the application. The applicant contended that the operation of the Planning Committee Protocol was potentially crucial to the outcome (§12). Its first ground was that it challenged the Planning Committee Protocol - the "voting issue".

101. At §§78 to 87, the judge referred to the relevant Northern Ireland statutory provisions. First, the Local Government Act (Northern Ireland) 2014 ("LGA(NI) 2014" or "the 2014 Act") makes provision in relation to committees and sub-committees similar to

those in LGA 1972, including provision as to party representation. By virtue of section 39 every decision of a committee, such as the Council's Planning Committee, had to be taken by a simple majority (meaning more than half of the votes of the members "present and voting"): §81.

102. Secondly, the Planning Act (Northern Ireland) 2011 ("PA(NI) 2011" or "the 2011 Act") sets out a detailed statutory code for the exercise of planning functions. Section 30 PA(NI) 2011 provides for "pre-determination hearings", under which, in certain circumstances, the applicant is given the opportunity of appearing before, and being heard by, a committee of the council. Section 30(2) PA(NI) 2011 (set out at §86) addresses "the procedures to be used in respect of a pre-determination hearing". It provides:

> "The procedures in accordance with which any such hearing is arranged and conducted (including, without prejudice to the generality of this subsection, procedures for ensuring relevance and avoiding repetition) and any other procedures consequent upon the hearing are to be such as the council considers appropriate." (emphasis added)

103. At §87, the judge commented as follows:

> "Section 30(2) is a key provision in the context of this case, which is relied upon heavily by the respondent. It allows a council to determine the procedures which it considers appropriate both in respect of the pre-determination hearing itself and also "any other procedures *consequent upon* the hearing."

At §§88 to 91 the judge referred to the Planning Committee Protocol. In particular the Protocol provided that "non-attendance by Members at PDH [pre-determination hearing] means that Members cannot vote on the planning decision"; although they could participate and ask questions. The Protocol further provided that at committee meetings proper, Members had to be present in the council chamber for the entire item, including the officer's introduction and update; otherwise they could not take part in the debate or vote on that item. (In the present case, similar provision is made in paragraphs 12.5 and 13.4 of the Planning Code of Conduct and paragraph 5.4 of the Rules, as set out above).

104. At §95 to 99 the judge set out the nature of the "voting issue":

> "[95] The applicant contends that the Planning Committee's decision is vitiated in law because several members who were present and legally entitled to vote were wrongly disenfranchised as a result of the operation of the Council's Planning Committee Protocol. This is essentially a challenge to the *vires* of the Protocol on this point.
>
> [96] It appears that the issue raised in relation to the Protocol was particularly acute in the circumstances of this case. That is because, between the pre-determination hearing on

> 12 March 2020, and the Planning Committee meeting on 29 July 2020, there had been a significant change in the constitution of the Planning Committee in terms of elected members. That meant that several of those who had attended the pre-determination hearing in March as members of the Planning Committee were no longer members of that committee by July; and that, conversely, a number of the members of the Planning Committee in July had not been members of that committee in March and therefore would have had no reason to attend the pre-determination hearing.
>
> [97] The application of the Protocol in those circumstances meant that, of the twelve elected councillors who attended the Planning Committee meeting on 29 July 2020, there were only seven of them who were permitted to vote….. The transcript of the meeting also supports the contention that clear advice was given that members who were present and would otherwise be eligible to vote were precluded from so voting where they had not been present at the pre-determination hearing. The transcript also shows that a number of councillors accepted this advice and expressed themselves to have "no vote", or words to that effect.
>
> [98] The applicant's objection to this is straightforward. Those committee members 'deprived' of a vote because of their non-attendance at the PDH were elected members entitled to vote in the Council's decision making processes. That is a matter of basic fairness and local democracy and, more particularly, a basic entitlement of an elected councillor which can only be removed from him or her for good reason and with a clear legal basis."

105. At §§110 to 128 he addressed the voting issue. In particular he stated:

> "[110] The outcome of the applicant's challenge on the voting issue turns on questions of pure statutory construction: in particular, whether the ability of the Council to adopt such procedures as it considers appropriate "consequent upon" a pre-determination hearing under section 30(2) of the 2011 Act allows it to <u>restrict the right of elected members to vote</u> in a later Planning Committee meeting.
>
> [111] Elected councillors' right to participate and vote in council meetings is not addressed directly in the 2014 Act. Rather, it is assumed. This is an entirely natural assumption, since councillors are elected to make decisions in council (and in any of the committees to which they are appointed through which a council exercises its functions). The 2014 Act refers on a number of occasions to councillors being "present and voting." <u>It seems to me that it is a basic</u>

> premise of that Act that councillors are entitled to vote in council, or in committees to which they have been appointed, and that the question of whether or not they should vote is, at least in general, a matter for their own individual judgment (subject always to sanction for breach of the Code of Conduct and, ultimately, to electoral accountability for their actions).
>
> [112] Although this question is not entirely clear cut, ultimately I accept the applicant's contention that section 30(2) of the 2011 Act does not provide adequate statutory authority for a council to deprive an elected member of his or her vote in circumstances where they wish to exercise it. Any such authority would, in my view, require to be clearly stated, given that it is such a significant departure from the basic democratic principles to which the 2014 Act gives effect. Reading section 30 of the 2011 Act as a whole, it appears to me that the word "procedures" is referring to the practical arrangements for a pre-determination hearing and the conduct of the hearing – to include matters such as attendance, venue, timing, speaking rights, etc. – rather than the substantive decision-making process which the council (or committee) will ultimately have to undertake. Put another way, as the applicant submitted: "… the right to vote is not a matter of procedure. Procedures precede the vote. The vote is the decision, not the procedure before it."
> (emphasis added)

106. At §§113 to 121, the judge went on to consider the cases of *Ware*, *Etherton* and *Armstrong-Braun*, taking the view that his approach was broadly consistent with those cases, which, he considered, emphasise the personal responsibility of councillors as regards their decision whether to vote or not. As regards *Ware*, the judge took the view that it was implicit in Mummery LJ's observations at §§40 and 41 (set out at paragraph 94 above) that, if the councillors *had* been advised that they could not vote or been precluded from so doing, that would have been unlawful. The judge cited Sir Michael Harrison's approval in *Etherton* of Collins J's observations in *Ware* at §38. As to *Armstrong-Braun*, significantly, the judge characterised the provision in that case as one to "limit the right of an individual elected councillor to exercise his local mandate" (at §118), and went on to rely upon the observations of Sedley LJ at §53 (at §120). At §122 he cited the observations of Sir John Donaldson MR in *R v Waltham Forest LBC ex parte Baxter* [1988] QC 419 that each councillor has "a personal and individual duty to consider the issues involved and to reach his own decision whether to vote for or against the resolution or to abstain". The judge continued:

> "[123] These authorities reinforce my view that, in order to empower a council to deprive an elected member appointed to the Planning Committee of his or her vote on an issue at a meeting at which they were present and desirous of voting, section 30(2) of the 2011 Act would

have had to have been in much clearer terms. The Council was and is entitled, either through its officers or collectively adopted procedures, to give strong advice to a member about the wisdom of voting in particular circumstances where doing so may increase the risk of successful legal challenge; but it was not entitled to purport to legally disqualify members from voting in the circumstances of this case. I do not need to decide, nor do I, whether standing orders or the common law might permit such a disqualification in certain other circumstances which have not arisen for consideration in these proceedings. Generally, however, where a councillor is to be disabled from voting on a particular issue, one would expect this to be clearly spelt out in statute, as, for example, in section 28(1)(a) of the Local Government Act (Northern Ireland) 1972 (where the member has a pecuniary interest in the matter being considered).

…

[125] In addition, it seems to me that the term "procedures" in section 30(2) of the 2011 Act has generally been understood to relate to practical or administrative arrangements for the meeting and debate, rather than the substance of the voting process, in previous departmental publications. For instance, in the DoE 'Best Practice Protocol for the Operation of Planning Committees' (January 2015), when discussing pre-determination hearings at paragraph 27, it is noted that the PDH "procedures can be the same as for the normal planning committee meetings." The following examples are then given: "number of individuals to speak on either side, time available to speakers etc." Similarly, the DfI publication, 'Development Management Practice Note: Pre-Determination Hearings' (November 2016) contains the same text (at paragraph 3.4). At paragraph 4.2 of the DfI Practice Note, referring in particular to the power to set procedures under section 30(2) of the 2011 Act, it is noted that: "This may include: the order of proceedings; the maximum number of speakers on either side; time limits for contributions; opportunities for contributors to respond to others' comments; question/cross examination by elected members and other contributors; members seeking technical advice." This is of course not determinate; but supports Mr Hutton's argument that the reference to "procedures" in section 30(2) would not ordinarily be construed as included regulation of the voting process."

(emphasis added)

107. At §§126 and 127, the judge then went on to consider the position, if he was wrong about the "vires" of the Council to disentitle councillors from voting as a matter of principle. On that basis, he would not have upheld the applicant's argument that the Protocol was irrational or disproportionate. He held that the purpose behind the Protocol provisions – to ensure that those participating in the later vote were fully informed and to encourage participation by councillors in the pre-determination hearing - was clear and rational and not unlawful.

108. The judge stated his conclusions at §§128 and 130:

> "[128] In summary on this issue, however, on the basis outlined above I consider that the decision of the Planning Committee on 29 July 2020 was reached on the basis of a material error of law, namely that certain councillors who were members of the committee were not lawfully permitted to vote on the outcome of the application. I do not consider that it was lawful for the Council to disqualify certain members from voting on the basis that they had not attended the pre-determination hearing. The Council would certainly have been entitled to provide advice to councillors that it would be better if they did not vote in these circumstances (although I also accept the applicant's submission that any legal risk in that course was significantly mitigated by the provision of a transcript of the pre-determination hearing to all members of the committee along with the officers' report). However, the evidence satisfied me that a number of councillors considered that it would not be open to them to exercise their vote. I propose to quash the Council's decision on this basis. I have not been persuaded – nor did the respondent seek to persuade me – that councillors who considered themselves to be disqualified from voting would not have voted if they had been presented with the opportunity and had merely been advised against voting in the circumstances; nor that the outcome of the vote would inevitably have been the same in that instance.
>
> …
>
> [130] Finally on this aspect of the case, I can see some considerable force in a number of the submissions made on behalf of the Council to the effect that councillors should not be permitted to vote if they have been absent from a substantial pre-determination hearing in which significant evidence has been presented and oral representations made, particularly in those councils were such meetings are not recorded and/or transcribed. If, however, it is to be within the power of a council to remove an individual elected member's right to vote, it seems to me that this should be clearly spelt out in statute. If this was the intention of the department with responsibility for

> the 2011 Act, or of the department with current responsibility for local government legislation, that is something which it may wish to reconsider." (emphasis added)

109. The following points emerge from the *Hartlands* case. The judge found that under LGA(NI) 2014 a councillor or committee member had an implicit right to vote (§111). The right can be excluded by clear legislative provision. The rule in the council's Code of Conduct excluding the right to vote deprived members of that right. The issue was whether section 30(2) PA(NI) 2011, on its true construction, allowed the council to restrict the right of members to vote at a planning committee meeting. By its terms, and in particular by the use of the word "procedures", section 30(2) did not cover the restriction on the right to vote in the Code of Conduct. The rule in the Code of Conduct was thus ultra vires. However, had it not been ultra vires, such a rule was not irrational. It was within the Council's powers to advise members not to vote if they had not attended the pre-determination meeting. I make two further points. First, unlike in the present case, it was not contended that the rule had the effect of changing the membership of the planning committee. Secondly, section 37(1) LGA(NI) 2014 Act is in terms very similar to those in Schedule 12 paragraph 42 LGA 1972. However this provision appears not to have been relied on in *Hartlands.*

110. Finally, in *R(Blacker) v Chelmsford City Council* [2021] EWHC 3285 (Admin), the council's constitution contained a provision for deferred consideration where the planning committee wanted to make a decision contrary to officer's recommendation and a restriction on voting at that deferred meeting, in terms similar to the Deferred Meeting voting rule in the present case. However there was no challenge to that restriction on voting. (Rather the challenge was to the committee's change of mind at the second, deferred, meeting). Thornton J observed (at §38) that a failure to comply with a constitution renders the resultant decision unlawful and liable to be quashed and further that the council's constitution "is to be interpreted objectively according to the natural and ordinary meaning of the words used in context and according to common sense".

Analysis

Prima facie entitlement to vote

111. In my judgment, the starting point of the analysis is that every member of a local authority council or committee has a prima facie entitlement to vote at a relevant meeting. In this regard I consider that the analysis of Scoffield J in *Hartland* at §111 applies with equal force to the LGA 1972. It is supported by *Armstrong-Braun* at §53 (although at §54 Sedley LJ doubted the characterisation as a "right" to vote). Whilst there is no direct express statutory provision stating this entitlement, it can be inferred both from certain positive provisions (Sch 12, para. 39 LGA 1972; Sch 1 para. 4(b), LGHA 1989) and from the "negative" legislative provisions which expressly exclude the right to vote in certain specified circumstances (see s.13 LGHA 1989; s.106 LGFA 1972; s.21(10) and Sch A1, LGA 2000 and s.31 LA 2011). This entitlement arises from primary legislation. Secondly, I also agree with Scoffield J that any restriction of the entitlement to vote requires statutory authority; as is the case, for example, in the "exclusionary" legislative provisions above.

112. The question then is whether the restriction on voting in this case is sufficiently clearly authorised by statute and/or the Constitution. (It is accepted by the Claimant that the restriction is not *Wednesbury* unreasonable). The Defendant and the Interested Party contend that it is, for two reasons: (1) the Constitution establishes the composition of the committee which considers deferred applications and (2) the Deferred Meeting voting rule is authorised by Schedule 12 paragraph 42 LGA 1972. I will address each in turn.

113. By way of background, membership of councils and committees will change over time. Elections take place and, in any event, committees are altered on an annual basis or for other reasons. Furthermore, provision is made for substitutes, so that if a committee member cannot attend any particular meeting, a nominated substitute can properly attend. It follows that where a first meeting defers consideration of an application to a later meeting (perhaps some months later), it is possible that, by the time of the second meeting, the committee members who attended the first meeting will no longer be members and there will be new committee members who did not attend the first meeting. Regardless of the Deferred Meeting voting rule, the same councillors will not necessarily be able to consider the application at the two meetings. The application of the Deferred Meeting voting rule will necessarily exclude any new members; it may also lead to the second meeting being inquorate.

114. Some of this occurred in the present case. By the time of the September Meeting, two of the six members as at the date of the April Meeting (one of whom attended) were no longer members and Ms Perry was a new member who could not have attended the April Meeting. Further, if Ms Perry (or one of the substitutes) had attended the September Meeting, he or she would have had available to him both Reports, the Officers' presentation, and if need be, could have had available a transcript of the April Meeting. However, unlike the position in *Hartlands*, there is no direct evidence that, but for the Deferred Meeting voting rule, the excluded councillors would have voted.

(1) Committee membership for deferred application

115. I do not accept the Defendant's contentions either that in the present case, by the Constitution, it has changed the composition of the Development Committee for deferred applications only, or that it has established a separate sub-committee under Part B, section 19 of the Constitution and s.101 LGA 1972 to deal only with deferred applications.

116. First, whilst I accept that the Defendant would be entitled, under the Constitution, to establish a separate committee or sub-committee to consider deferred applications, it did not do so in the present case. The relevant provisions establishing the Deferred Meeting voting rule are, by their terms, rules (or provisions) relating to participation and *voting* by Committee members, and not rules as to committee *membership*. The provisions do not, in terms, purport to change the membership of the Development Committee, nor to establish a sub-committee. The Defendant's argument is based on what they say is *the effect* of the Deferred Meeting voting rule i.e a change of membership has been achieved by a different route. In my judgment that is not sufficient to establish a new committee. The Constitution itself sets out the Defendant's committees and sub-committees. There is no reference to a "deferred applications" committee or sub-committee. Whilst I accept that there is strictly no bar to a committee establishing an additional sub-committee on an ad hoc basis, nevertheless where it

intends to do so, there should be some positive act (whether by resolution or otherwise) which itself clearly purports to do so. Further the Constitution contains "no description of the role of" such a deferred applications committee or sub-committee (as required by paragraph 3 n of the Constitutions Direction). Moreover, the reference to "the Committee" in the second sentence of paragraph 11.4 of the Rule (dealing with quoracy) only makes sense if it is a reference to the full Development Committee. No other "committee" has any relevant rule on quoracy.

117. That no change of membership, or creation of a sub-committee, took place or indeed was intended, is borne out by the facts. The September Meeting was in terms a meeting of *the* Development Committee and its members were stated to be all the members of the Committee at that time (and not just those who attended the April Meeting). There is no suggestion that the September Meeting was a meeting of a Development Committee with a changed membership or of a sub-committee of the Development Committee. The Defendant's position at the time was that only members present at the previous meeting would be able to vote. When the Chair gave his explanation at the time (see paragraph 49 above), he was not referring to a different sub-committee or different membership of the Committee. He was clearly referring to a restriction on the ability of certain members of one and the same Committee to vote.

118. Secondly, the suggested change of membership of the Development Committee or creation of a sub-committee did not take account of the duty (upon the Defendant and/or the Development Committee) to comply with requirements of proportionate party representation in s.15 LGHA 1989. Section 15(4)(b) provides for a duty to give effect to proportionality principles in section 15(5) only "so far as reasonably practicable". However, first, no consideration was in fact given to whether this was practicable or not. Secondly, section 15(1) in any event imposes a duty to *review* the representation of different political groups, whether or not the section 15(5) principles can be practicably given effect to. This did not happen in the present case.

119. Thirdly, the Defendant and the Interested Party put forward their arguments here in the alternative - changed composition of *the* Development Committee *or* creation of a separate sub-committee – and with varying emphasis over the course of the argument. However it has to be one or the other: either the Constitution changed the membership of the Development Committee or it created a separate sub-committee. The fact that they did not clearly identify what it was that the Constitution provided for is indicative of the artificiality of their overall contention.

(2) Schedule 12 paragraph 42 LGA 1972

120. It is common ground that, at least, paragraph 11.4 of the Rules is a "standing order" within the meaning of Schedule 12 paragraph 42[1].

121. The question then is whether paragraph 11.4 is a standing order "for the regulation of [the] proceedings and business" of the Development Committee.

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[1] In the course of the hearing, I was informed that the Defendant no longer has any "standing orders" as such and that the provisions of the Constitution are to be regarded as "standing orders". It may be (and Mr Harwood did not dispute) that for present purposes, the Planning Code of Conduct (and in particular paragraph 13.4) also amounts to a "standing order".

122. In *Hartlands*, Scoffield J concluded at §112 (although not without some hesitation) that a similar rule depriving a person of a right to vote was not a matter of "procedure" within the meaning of that term in section 30 PA(NI) 2011. In his view "procedure" related to the practical or administrative arrangements for, and conduct of, (in that case) *a hearing*. These included attendance, venue, timing and speaking rights. At §125, he expanded by reference to examples in the relevant departmental publications. Voting, in contrast, was a matter of substantive decision making.

123. In my judgment, as a matter of construction, "regulation of [the] proceedings and business" (of the committee) is wider than [arranging] "procedure" (as in *Hartlands)*. "Business" is the substantive matters considered by the committee; and "proceedings" refers to the whole of the conduct of that business by the committee. Together, "regulation of the proceedings and business" addresses not just the practical or administrative arrangements for the conduct of a meeting or hearing, but "what" business the committee does as a whole and the manner in which it does it. Schedule 12 paragraph 42 can cover matters of substance, as well as matters of procedure: see *Armstrong-Braun* at §§16 to 17 above and, further, Scoffield J's characterisation of the rule in that case (see paragraph 106 above). The reference in paragraph 3 n of the Constitutions Direct to "rules governing *conduct* and *proceedings* of meetings" suggests that "proceedings" is wider than pure procedure, as interpreted by Scoffield J.

124. Paragraph 11.4 is found in the Rules which themselves regulate, and are intended to regulate, the Development Committee's proceedings. Other provisions in the Rules clearly "regulate the proceedings". Paragraph 1.1 describes them compendiously as "rules applying to all meetings of the Development Committee" i.e. they "regulate the Committee's proceedings". Paragraph 1.2 states that the Rules (as a whole) "provide processes and procedures". The 14 sections which follow can all be said to carry out this function.

125. Section 5, headed "Order of Proceedings", clearly does this as a whole. The stages in paragraph 5.3 are "procedure" in the narrowest sense (as Scoffield J had in mind). Paragraph 5.4 in particular (set out in paragraph 31 above) is pertinent. It is in two parts. The discretion to vary the procedure in the first part falls within "regulation of the proceedings". The second part places a restriction on voting, if the member is not present throughout the whole of the Committee's consideration (i.e. at a particular meeting). In my judgment, this is a rule regulating the proceedings of the meeting in question (and not just because it falls within section 5 under that heading). Thus, the exclusion of the entitlement to vote in paragraph 5.4 is covered by paragraph 42 of Schedule 12. (There was no suggestion in *Hartlands* that a similar provision in Northern Ireland was ultra vires: see *Hartlands* §91). In my judgment, the exclusion of the right to vote at a deferred meeting in *paragraph 11.4* serves the same purpose and is no different in kind. It equally regulates the proceedings at such a meeting.

126. A rule on quoracy is a rule which regulates "the proceedings and business" of a committee. As specifically envisaged, the effect of the Deferred Meeting voting rule in the first part of paragraph 11.4 might be to render the Committee considering a deferred application inquorate. The second sentence of paragraph 11.4 guards against that possibility by providing that, in that event, the application will be reconsidered afresh by the full Committee. In this way, this aspect of paragraph 11.4 - a rule relating to quoracy consequential upon a voting rule - is part of the regulation of the proceedings

and business of the Development Committee; and supports the conclusion that paragraph 11.4 in its entirety regulates the proceedings and business.

127. The judge's decision in *Hartlands* was finely balanced (see §112) and, at §123, he recognised that, in other circumstances, a standing order might permit disqualification. In my view, the wider and different wording in Schedule 12 paragraph 42 tips the balance the other way, in favour of the lawfulness of the Deferred Meeting voting rule.

128. In effect, where consideration of a planning application is deferred, the two meetings form part of a single decision-making process. The local authority is entitled, by provision in its Constitution, to say that, as far as possible, members should be present for all of that process in order to vote. In such case, that provision falls within the power in paragraph 42 of Schedule 12, as constituting the regulation of "proceedings and business" of the committee.

129. For these reasons, I conclude that the Deferred Meeting voting rule and, in particular, paragraph 11.4 of the Rules "regulates the proceedings and business of the Committee" and thus falls within the Defendant's powers in paragraph 42 of Schedule 12 to the LGA 1972. It is therefore not unlawful and Ground 1 fails.

(2) Delay

130. Had I concluded that the Deferred Meeting voting rule was unlawful, I would have concluded that the Claimant's challenge had been brought in time and that relief did not fall to be denied under s.31(6) SCA 1981. I can state my reasons briefly.

131. First, the fact that delay was raised, but not ruled upon, at the permission stage, does not prevent the Court from considering the issue under s.31(6) SCA 1981 at the substantive hearing: *R(Bokrosova) v Lambeth London Borough Council*, supra, at §§92 to 96.

132. Secondly, "undue delay" is to be assessed by reference to failure to act promptly in CPR 54.5: see *Badmus* supra, at §59. In order to decide when grounds first arose (within CPR 54.5(5)), it is necessary to identify what it is that is sought to be judicially reviewed: see *Badmus* at §§60 (and 77). In the present case, the statement of facts and grounds identifies the measure being challenged as the grant of planning permission, and not the Deferred Meeting voting rule in the Constitution. Time therefore ran from the date of the Decision: see *Burkett*, supra. Even if the rule in the Constitution is also being challenged, it can fairly be said that both the rule and the grant of planning permission are being challenged, and the Claimant was entitled to wait until the later decision for time to commence running: see *Burkett* at §§38 and 42. Further and alternatively, even if time should run from the date that the Claimant was "affected by" the rule in the Constitution (*Badmus* §§77 and 78), on the facts of the present case that gives rise to too many uncertainties in seeking to identify the relevant date i.e. 19 May 2021, 24 June 2021, or even earlier, say in April 2021 (given the fact that the previous operative constitution contained the same rule): see *Burkett* supra, per Lord Steyn at §§49-50.

Ground 2: Prohibition on public speaking

The Parties' submissions

The Claimant's case

133. The Claimant submits that the case fell within paragraph 11.2 of the Rules (rather than paragraph 11.1) and thus public speaking should have been allowed. Applying those two rules: there was substantive new information being brought before the Committee; the application was not deferred for a site meeting or clarification of an issue; the Committee was not updated by means of an addendum update report; the application did not proceed to the next meeting; the deferral was for a "more substantive reason"; it involved renegotiating part of the proposal; a substantial fresh report was prepared; the public wanted to comment on the new material. It was *Wednesbury* unreasonable to place the application in the "Deferred Items" part of the agenda. The Defendant's correspondence with other objectors on 9/10 September 2021 refusing public speaking did not set out any consideration of whether speaking should be allowed and did not apply paragraph 11.2. Further the provision in the first report for Item 4 referring to public speaking being allowed "where … the recommendation is significantly altered" is inconsistent with, and not required by, paragraph 11.2. Therefore the Defendant acted unlawfully (in the sense of *Wednesbury* unreasonableness) in preventing the public from speaking at the September Meeting.

134. The Claimant does not need to establish prejudice. But in any event the Claimant and others would have spoken at the meeting if it had been allowed. As regards section 31(2A) SCA 1981, the outcome might well have been different: see *R(Kelly) v London Borough of Hounslow* [2010] EWHC 1256 (Admin) at §§26 and 27.

The Defendant's case

135. The Defendant submits as follows:

(1) The procedure adopted by the Council, including the decision not to allow public speaking at the September Meeting, was entirely fair, lawful and in accordance with the Constitution. The Claimant made written and oral representations to the Development Committee. Following the deferral, there was no obligation to afford the Claimant the opportunity to make further oral representations. Paragraphs 11.1 and, in particular, 11.2 of the Rules did not require the Defendant to allow public speaking. Those Rules are broadly drawn, and in particular the repeated use of the word "generally", allow for an exercise of judgment in each particular case. The September Report was not a "full new report".

(2) In any event, the Claimant did not request to speak at the September Meeting; has not identified any additional representations that it would have made; and adduces no evidence to suggest that further representations would have affected the Council's decision. It has suffered no prejudice. Absent prejudice, the procedure was lawful.

(3) Further or alternatively, relief should be refused pursuant to section 31(2A) SCA 1981. Even if the Defendant erred in failing to allow public speaking, it is highly likely that the outcome would not have been substantially different; planning permission would have been granted.

The Interested Party's case

136. In addition to the points made by the Defendant, the Interested Party submits that the Defendant was entitled, in its wide discretion, not to allow public speaking at the September Meeting. There is no statutory right for members of the public to speak at Development Committee meetings - only a discretion, subject to rules adopted. Here, the relevant rules are broadly worded and grant the Committee a substantial discretion. There is no hard line between the situations in paragraphs 11.1 and 11.2 respectively.

137. In submissions which appeared to cover both prejudice and section 31(2A), the Claimant did not complain nor raise this issue in pre-action protocol correspondence. In any event, even if it had been allowed to speak at the meeting, there is no evidence to suggest that its oral representations would have materially added to the representations it had already made in its written objections of 7 January 2021 and 10 September 2021 and in its oral representations at the April Meeting. In any event, the Claimant might not have been able to speak, since only two objectors could do so, and two had already asked to speak.

Discussion and analysis

Relevant case law

138. I have been referred in particular to *R(Adlard) v Secretary of State for the Environment* [2002] EWCA Civ 735 at §§13 to 32; *R(Kelly) v London Borough of Hounslow* [2010] EWHC 1256 (Admin) at §§26 and 27; *R(Embleton Parish Council & Ainsley) v Northumberland County Council* [2013] EWHC 3631 at §150; *R(Matthews & Urmston) v City of York Council* [2018] EWHC 2102 at §§27 to 28 and *Blacker*, supra, at §§52 to 54. From these authorities I derive the following propositions:

(1) There is no requirement (either in statute or as a matter of procedural fairness) to afford members of the public the right to make oral representations on a planning application: *Adlard.*

(2) What fairness requires is acutely fact sensitive and depends on all the circumstances of the case: *Blacker.*

(3) It is a question of fact whether inability to attend a planning committee meeting results in any prejudice to the person excluded: *Matthews*.

(4) Relevant factors might include whether the person excluded has already made representations, whether orally at a previous meeting or in writing; whether he has expressed a wish to speak; whether he has been provided with an update following an earlier meeting; and whether the person excluded could have added to points already made or made by others: *Embleton* and *Blacker*.

(5) However in a particular case, the person excluded might have lost the opportunity to respond to the oral presentation by officers and to persuade members to a view which differed from that of the officers: *Kelly*.

Analysis

139. The Claimant's case is put squarely on the basis of breach of paragraph 11.2 of the Rules; rather than breach of the requirement of procedural fairness under the general

law. However I am not satisfied that, in refusing to allow public speaking at the September Meeting, the Defendant was in breach of the Rules, and in particular of paragraph 11.2.

140. Paragraphs 11.1 and 11.2 (set out at paragraph 32 above), when considered together, do not provide for a clear delineation between when public speaking will, and will not, be permitted. They are not drafted precisely and do not fall to be interpreted as if in a statute. First, both paragraphs refer to the position "generally", thus indicating an element of discretion in the Defendant's approach. That reference does not particularly assist either party's position. In paragraph 11.1, its inclusion suggests that, in an exceptional case, even where there is no substantive new information, there might be public speaking. On the other hand, paragraph 11.2 suggests that, in an exceptional case, even where there is a more substantive reason, it would not be appropriate for the matter to be considered in the "Planning Applications for Decision" part of the agenda and for there to be public speaking. In any event, this only emphasises the conclusion that there are no hard and fast rules.

141. Secondly, there is an ambiguity in paragraph 11.2 where it refers both to "a fresh report" and a "new full report". I assume that the two are intended to be synonymous; and that the former in fact refers to the latter i.e. public speaking will be permitted when there is a new full report. If the two terms are intended to refer to different types of report, then strictly under the terms of paragraph 11.2, it is only in the case of a "new full report" that public speaking is permitted. But this type of analysis only goes to demonstrate the difficulties in seeking to construe the words of paragraphs 11.1 and 11.2 in a legalistic manner.

142. The facts of the present case do not fall clearly into either paragraph 11.1 or paragraph 11.2. Rather they fall somewhere between the two cases there described. On the one hand, the deferral was to enable the affordable workspace strategy and independent retail strategy to be developed in the context of the section 106 agreement. This did involve "substantive new information" and was more than "clarification of an issue" (and so outside paragraph 11.1); it amounted to "a more substantive reason", and so within paragraph 11.2. The Application was not determined "at the next meeting" (albeit that is only a "usual" approach under paragraph 11.1). On the other hand, the matter was placed in the "Deferred, Adjourned and Outstanding Items" part of the agenda (paragraph 11.1), and not in the "Planning Applications for Decisions" part (paragraph 11.2).

143. Moreover, as described in paragraphs 42 and 43 above, the September Report does not fit neatly within the type of report envisaged either in paragraph 11.1 or in paragraph 11.2. It was not "a new full report" as described in paragraph 11.2. It was an additional report addressing only the matters relating to the deferral. On the other hand, it was not strictly an "addendum update report" (referred to in paragraph 11.1) as that term is used in the rules. The minutes of the April Meeting provided for a "supplementary report". If the "update report" referred to in the minutes of the September Meeting is a reference to the September Report, then that is somewhat closer to the type of report envisaged by paragraph 11.1. It was not *Wednesbury* unreasonable to place the Application in the "Deferred items" part of the agenda for that Meeting.

144. I therefore conclude that the April deferral of the Application does not fall clearly within paragraph 11.2 of the Rules, and, even if it equally does not fall within paragraph 11.1,

the Defendant was not in breach of *its Rules* by not permitting public speaking at the September Meeting. Since it fell within neither paragraph, it was a matter for the Defendant's general discretion whether to permit public speaking.

145. In the present case, I do not consider that the Defendant's exercise of that general discretion not to permit public speaking was unreasonable or otherwise unlawful. The Claimant had already made written and oral representations in advance of the decision at the April Meeting. It had further been given, and taken, the opportunity to make detailed written representations in response to the September Report and in advance of the September Meeting (and in particular the proposed amendments to the planning obligations). Much of those representations was directed to matters other than those proposed amendments. Rather the Claimant repeated and expanded upon the case it put before the Committee in April.

146. As regards prejudice, the Claimant's case is put on the basis that, given the breach of paragraph 11.2, prejudice is not relevant. Since I have found no such breach, I do not need to consider the issue of prejudice to the Claimant. Even if prejudice had been relevant, I would have found that in this case it is not established, for much the same reasons as set out in paragraph 145 above. Even if public speaking had been permitted, I am not satisfied that the Claimant would have made oral representations or if they had done so, its position would have improved. Unlike the other two objectors, the Claimant did not express a wish to speak at the September Meeting and did not complain when the agenda was published on 6 September. Moreover, whilst in her witness statement, Ms Palin said that the Claimant would have spoken at the September Meeting, there is no evidence that it would have made points additional to those it had already made in April and in its September written representations. Further, given the limited number of speakers allowed, it is far from clear that it would have been able to speak. As regards losing "the opportunity to persuade" (identified in *Kelly*), that case involved the loss of any opportunity to address the planning committee orally on the application; it was not a "deferred" application. In the present case, the Claimant had already spoken publicly on the Application (as well as making its written objections).

147. As regards section 31(2A), there is a good deal of overlap between this and the issue of prejudice. In view of my conclusions above, it does not arise as a separate consideration. If, contrary to the foregoing, I had found that the Defendant had acted unlawfully, I would not have refused relief on this ground. Public speaking by the other two objectors (at least) might have led to a different outcome.

148. For the foregoing reasons, Ground 2 fails.

Ground 3: Draft Spitalfields Neighbourhood Plan

The Parties' submissions

The Claimant's case

149. The Claimant submits that the Defendant failed to have regard to relevant policies in the Draft Plan, despite recognising that it was a material consideration which carried significant weight. By the time of the September Meeting significant weight was, correctly, attached to the Draft Plan. Statute provided that it was a material consideration. However, the Committee were not informed of its relevant policies. The

September Report solely referred to SPITAL7. The April Report (unlike its treatment of the Local Plan and the London Plan) made only limited reference to the Draft Plan. It did not refer to SPITAL1 or SPITAL2 nor to the Local Character Areas which they seek to protect. Those policies and Local Character Areas were material and so the Defendant failed to have regard to material considerations. These added to the Local Plan and London Plan policies, in particular to protect local character areas including views identified in them.

150. As regards views, the Local Plan does not go to the level of detail of the Draft Plan in identifying specific local views. It does not seek to protect the Local Character Areas in the Draft Plan. Decisions affecting the area are to be taken with regard to Local Character Area assessments. What they are doing is not merely descriptive. Views are to be protected. The Report should have addressed the views which were potentially affected, namely views BVE 01, 02, and 03 and FVE 06 referred to at B8 and F6, and shown in Figure 4.2, as set out in the Draft Plan.

The Defendant's and the Interested Party's cases

151. The Defendant's case and that of the Interested Party are broadly aligned. They submit, first, that the Defendant did not fail to have regard to the substance of the policies in SPITAL1 and SPITAL2. Officers are not required to address each and every policy relevant to the application. It is sufficient that matters relevant to the proper application of the policies are identified and assessed as a matter of substance: see *R(Lensbury Ltd) v Richmond upon Thames* [2016] EWCA Civ 814 and *West Oxfordshire DC v Secretary of State for Housing Communities and Local Government* [2018] EWHC 3065. Both Officer's Reports referred to the Draft Plan. The Draft Plan policies raised by the Claimant, which are said not to have been considered, were considered in substance and raised similar issues to those covered in other policies that were expressly considered. SPITAL1 and SPITAL2 are generically worded policies relating to design and heritage. They are not materially different from the equivalent provisions in the Local Plan, the London Plan or the NPPF such that they required separate consideration. In any event the character of the areas concerned and the views within them were extensively covered in the design and heritage sections of the April Report. The April Report had close regard to these issues in paragraphs 7.26 to 7.58 and 7.59 to 7.84. In the light of this detailed consideration, the mere fact that the Defendant did not in terms refer to SPITAL1 or SPITAL2 cannot be said to be unlawful. Referring to the new draft policies would have made no difference to the tenor of the April Report: see *R v Mendip District Council ex parte Fabre* [2017] PTSR 1113. It is up to the planning officer's expertise to assess how much information should be included in his or her report. In any event the committee members at the September Meeting were aware of, and closely involved in, the Draft Plan. The minutes and the transcript record that the members asked about its status and the extent to which the proposals complied with it; they were advised that they could give it full weight and that the proposals accorded with the Draft Plan.

152. Secondly, even if the Defendant failed to have regard to the draft policies (which is denied), reference to the policies in the Draft Plan would have made no difference to the outcome and relief should be refused pursuant to section 31(2A) SCA 1981. Even if the Officer's Reports had specifically mentioned further particular provisions of SPITAL1 or SPITAL2, it is highly likely that the outcome would not have been substantially different.

Discussion and analysis

Relevant case law

153. In *R(Lensbury Ltd) v Richmond upon Thames*, supra, the claimant challenged the grant of planning permissions, submitting that the council failed to comply with its duty under s.38(6) Planning and Compulsory Purchase Act 2004 ("PCPA 2004") by failing to have proper regard to the provisions in the development plan. The judge at first instance dismissed the application. The Court of Appeal upheld the first ground of appeal. At §6 of his judgment, Sales LJ endorsed the following statements made by Patterson J in *Tiviot Way Investments v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at §§27 and 30:

> "It is axiomatic that the decision maker does not have to deal with each and every policy that has been raised by the parties during an appeal.
>
> …
>
> That does not mean a mechanistic approach of judging the proposals against each and every policy that may be prayed in aid of a development or against it, but an evaluation of main policy areas within the development plan that are relevant to the proposal to be determined and an assessment of how the proposal [fares] against them."

At paragraph 8, Sales LJ stated:

> "An officer's report containing a planning authority's reasons for granting planning permission is to be read fairly as a whole, focusing on the substance of the matter rather than the form. It is not incumbent on an officer compiling a report for the planning committee of a local planning authority to set out and discuss each policy in turn, like a sort of examination paper. If it appears as a matter of substance on a fair reading of the report that matters relevant to the proper application of policies in the development plan have been appropriately identified and assessed, that will be sufficient. Such reports are to be read against the background that they are written for an informed audience (the planning committee) who may be taken to have a reasonable understanding of, or the means of checking on, the local context and the legislative and policy framework in which the decision is to be taken…" (emphasis added)

Then, after identifying the three grounds of appeal at §27, Sales LJ stated

> "Mr Lockhart-Mummery made a very broad submission, that the April report did not refer in a meaningful way to the policies set out above because it did not set them out or refer to them in the

> body of the discussion of the application in the report. I do not accept this argument. The relevant principles governing the approach to interpretation of an officer's report on a planning application have been referred to above. If, as a matter of substance on a fair reading of the report, a particular policy has been brought into account, that will be sufficient and lawful, even if it is not referred to in terms. But clearly, if relevant policies have been listed in the report for the benefit of members of the planning committee, that will make it easier for the local planning authority to show that such policies have been properly taken into account." (emphasis added)

154. Ground (iii) of the appeal was that the Council had failed properly to take a range of other policies into account, specifically policies 7.4, CP10, CP11, DM OS 11 and DM DC1. Sales LJ stated at §39:

> "Similarly, I do not consider that Mr Lockhart-Mummery's portmanteau make-weight ground (iii) is made out. The discussion at paras. 42-48 of the April report, read in the context of identification earlier in the report of a range of representations regarding the visual and heritage impacts of the development, shows that, as a matter of substance, the Council considered in the exercise of its planning judgment that the proposed development complied with the policies listed by Mr Lockhart-Mummery. That is so even in relation to policy CP11 (River Thames Corridor), which was not expressly referred to in the April report, because the substance of the discussion dealt with the impact of the development on the natural and built environment of the River Thames corridor at this point and there was express reference at para. 47 to the Thames Landscape Strategy, to which policy CP11 refers as defining the special character of different reaches of the River Thames. There was full consideration of the development from the point of view of its effect on the character of the local area (policy 7.4), of protecting and enhancing the open environment (policy CP10), of protecting and enhancing the special character of the Thames Policy Area including by ensuring that development establishes a relationship with the river and takes full advantage of its location (policy DM OS 11), and of ensuring good design quality (policy DM DC1). The Council acted lawfully and rationally in making its assessment in relation to these policies."
> (emphasis added)

155. *R v Mendip District Council ex parte Fabre*, supra, concerned a policy in an emerging Structure Plan which had been subject to examination. Although the policy was mentioned in an objector's letter, officers wrongly advised the Committee that the policy "cannot be given weight" (at 1123C). Sullivan J held that the report should have said that the policy could be given limited weight. However, in rejecting this ground, Sullivan J held (see 1123F) that the policy did not raise any issue not covered in other policies which were referred to, and that referring to the new draft policy would have

made no material difference to the tenor of the report (even though the emerging Plan seemed to introduce a somewhat more restrictive policy).

156. In *West Oxfordshire DC v Secretary of State for Housing Communities and Local Government*, supra, one of the grounds of challenge was that the Inspector's decision letter failed to have regard to a material consideration, namely the Emerging Local Plan in breach of the requirements of s.38(6) PCPA 2004. The applicant contended that the Emerging Local Plan was more restrictive than the adopted local plan and that, by not specifically applying the provision in the Emerging Local Plan or in failing to give significant weight to it, the Inspector failed to accord sufficient significance. David Elvin QC rejected the argument as being based on a legalistic approach to the language used without properly considering whether any difference of language had any material effect. "It is necessary to bear in mind the Court of Appeal's strictures against excessive legalism which applies to the construction of policy as well as to any other planning issue". He concluded that the Adopted Local Plan policies fairly read were in effect the same as the Emerging Local Plan.

Analysis

Failure to have regard

157. The Draft Plan itself was referred to both in the April Report and in the September Report, and at the September Meeting.

158. First, as regards the April Report, whilst it does not refer in terms to SPITAL1 and SPITAL2, it does make a detailed assessment of the relevant design and heritage matters (both in the executive summary, and in paragraphs 7.26 to 7.84): see paragraphs 9 to 12 above. Significantly, within this assessment the Report takes full account of the Brick Lane and Fournier Street Conservation Area and its existing Appraisal ("the CA Appraisal") (paragraphs 7.60, 7.65, 7.76, 7.83 and 7.84 and 7.152). It concluded that the proposed development was in accordance with the relevant policies in the London Plan and the Local Plan. These policies effectively cover the similar, and generically worded, provisions of SPITAL1 and SPITAL2 relating to design and heritage. Thus, the April Report contained a detailed assessment of the substance of those provisions.

159. Secondly, by the time of the September Report, there was a statutory duty to have regard to the Draft Plan (as expressly recognised by that Report itself and in the September Meeting). That Report expressly took into account the Draft Plan in the context of affordable workspace. Moreover the September Report also attached the April Report itself, which addressed in detail the issue of design and heritage (as explained above).

160. Thirdly, by the time of the September Meeting, officers, councillors and objectors were all fully aware of the Draft Plan.

161. Fourthly, and importantly, at the September Meeting itself, the Draft Plan was given specific and express consideration: see Item 4 of the Minutes and extracts from the transcript (at paragraphs 51 and 53 above). At the meeting, and in response to a suggestion that the decision might be deferred until the Draft Plan was approved, the councillors were advised by Mr Buckenham that the proposals were consistent with the Draft Plan (which would not change).

162. Finally, as regards Mr Harwood's specific point in relation to views, and in particular, views of the Truman's chimney, this was raised in the Claimant's written and oral objections. It was addressed in paragraphs 7.65 and 7.76 of the April Report and in the subsequent update. In this regard, the relevant policy in the Draft Plan is SPITAL1 paragraph G, where the requirement is to "*have regard* to any impact on the local views identified in the relevant Conservation Area Appraisal and Character Area Appraisal and shown on Figure 4.2". As regards the relevant Conservation Area Appraisal (i.e. CA Appraisal for Brick Lane/Fournier Street), the Truman's chimney is specifically identified. Further, B7 and B8 of Local Character Area Appraisal B and F6 of Local Character Area Appraisal C identify views of the Truman's chimney and other views relevant to the Development, which are shown on Figure 4.2: see paragraphs 82 and 83 above. Notably, B7 of Area B addresses the Truman's chimney specifically and cross-refers to, and relies upon, what is said about the chimney in the CA Appraisal. Paragraph 7.76 of the April Report expressly refers to the consideration given to the Truman's chimney in the CA Appraisal: see paragraph 11 above.

163. In my judgment, the Defendant was not under a duty to preserve existing views of the Truman's chimney and other relevant views at all costs. First, the duty in the Draft Plan is a duty "to have regard to the impact upon" (and not "to preserve at all costs") the relevant views. Secondly, B8 and F6 above refer to "efforts" to protect views. Thirdly, B8 refers to the fact that the Truman's chimney is expressly addressed in the CA Appraisal. In turn, the CA Appraisal, and the Truman's chimney's consideration within it, were itself expressly addressed in the April Report (at paragraphs 7.60 and 7.65). The chimney was also addressed in other parts of the April Report. In these circumstances, in substance, the Defendant had regard to the impact of the development upon views of the Truman's chimney and upon other relevant views.

164. For these reasons, I am satisfied that, applying the approach set out by Sales LJ in *Lensbury*, supra, on a fair reading of the Reports and what transpired at the September Meeting, matters relevant to the proper application of the policies in the Draft Plan were appropriately identified and assessed. Ground 3 fails.

Section 31(2A) SCA 1981

165. In view of my conclusion in paragraph 164 above, this does not arise. If I had found that the Defendant had erred in law, by failing to refer expressly to SPITAL1 and SPITAL2 or specific provisions within those policies, I would have found that it was highly likely that the outcome for the Claimant would not have been substantially different (i.e. planning permission would still have been granted) and thus refused relief in any event. On the other hand, had I found that the Defendant failed to have regard to *the substance* of the relevant policies in SPITAL1 and SPITAL2, then I would have concluded that section 31(2A) would not have been a bar to relief.

Conclusions

166. In the light of the conclusions at paragraphs 129, 148 and 164 above, each of the three Grounds fails and the Claimant's claim for judicial review is dismissed. I will hear the parties on the appropriate form of order and any consequential matters.

167. Finally I am grateful to all counsel for their assistance and for the quality of the argument placed before the Court.