R. (ON THE APPLICATION OF LANGLEY PARK SCHOOL FOR GIRLS GOVERNING BODY) v BROMLEY LBC

COURT OF APPEAL

The Chancellor of the High Court, Moore-Bick and Sullivan L.JJ.: July 31, 2009[1]

[2009] EWCA Civ 734; [2010] 1 P. & C.R. 10

Alternative sites; Amenity impact; Development plans; Green wedge; Material considerations; Planning control; Planning permission; Schools; Visual impact

H1 *Application for planning permission—alternative options within the development site—material considerations*

H2 Langley Park School for Boys (''the Boys' School'') was situated on land designated as Metropolitan Open Land (''MOL'') in the Bromley Unitary Development Plan (''UDP''). To the east, also on land designated MOL was Langley Park School for Girls (''the Girls' School''). Following approval from the DfES for a capital project to rebuild the Boys' School, the Frankham Consultancy Group was appointed to carry out a feasibility study (''the Study''). The Study dealt with ''Appraisal of Location Options'', and stated that there were three obvious and viable options (''the Options''). It looked at the advantages and disadvantages of each option, and made a recommendation as to the most suitable location. Despite the differences between the Options, and the stated desire in the Study to ''have least impact on the MOL'', the Study did not assess the relative impacts of the Options on the openness and visual amenity of the MOL. Having considered the Study, the Boys' School chose Option 3. An application for planning permission was made to the respondent in April 2008. The Study was not presented to the members at the meeting in June 2008, but three documents were available, in addition to the application, a Design and Access Statement, an Identity and Context Statement and a Supporting Planning Application Statement (''the Supporting Statement''). The Design and Access Statement stated that the site was designated as an important piece of MOL and described the three siting options. The various factors ''for'' and ''against'' each option were set out in much the same terms as in the Study. The impact of the Options on the MOL was not mentioned. Although the visual impact upon the MOL was mentioned in the Supporting Statement, the references to it were

[1] Paragraph numbers in this judgment are as assigned by the court.

brief. The Supporting Statement gave the impression that Option 3 was the chosen option and did not draw attention to the fact that there had been a change from Option 3 to the application proposal whereby a greater proportion of the open part of the site would be occupied by new buildings. It did not discuss the implications of this change for the openness and visual amenity of the MOL.

H3 The report to the members (''the Report'') accurately summarised the objections of the Girls' School on MOL grounds. It was clear that the Girls' School was objecting to the proposed siting and design on the basis that the new school would be sited on the open part of the site and that the Report did not take into account Option 1, which, with significant modifications, would have a less harmful effect on the openness of the MOL. The Report stated that each planning application had to be treated on its own merits and that the main issues to be considered in this case were whether very special circumstances had been demonstrated to justify inappropriate development in MOL, the impact of the proposal on the openness of MOL and the character of the area, and the impact on the amenities of nearby residential properties and Langley Park School for Girls. Planning permission was granted.

H4 The appellant challenged the planning permission on the ground that the respondent failed to consider the possibility of an alternative scheme on the site, Option 1.

H5 **Held,** allowing the appeal and quashing the planning permission,

H6 (1) Although the Report correctly summarised Policy G2 of the UDP, including the requirement that the openness and visual amenity of the MOL should not be injured by any proposal for development within it, advised members that the impact of the proposal on the openness of the MOL was one of the main issues to be considered, and said that the impact of the amount of built form on the site and the effect of the reconfigured layout should be carefully considered in terms of its impact on the openness of MOL, it did not contain any analysis of that impact. Nor did the Report express any conclusions as to the extent (if any) to which the openness and visual amenity of the MOL would be injured by the proposed development. Recitation of the mantra that each planning application should be considered on its merits was of little assistance to the members in the present case because those merits included the extent to which there was, or was not, compliance with policy G2, and that in turn depended on an assessment of the proposal's impact on the openness of the MOL. The consideration of the pros and cons of the Options in the Supporting Statement did not address the issue that was being raised by the objectors. The brevity of the members' consideration of the impact of the proposed development on the openness and visual amenity of the MOL, and the generality with which their conclusion was expressed, were a reflection of the complete absence of any assessment of this issue in the Report.

H7 (2) This was not an ''alternative site'' case. The respondent was considering a proposal for substantial new buildings on a large site which was partly occupied by existing buildings and partly open land, within the MOL, where the policy in the UDP was that the openness and visual amenity of the MOL should not be injured by any proposal which ''might be visually detrimental by reason of

scale, siting, materials or design''. It was being contended that it would severely injure the openness and visual amenity of the MOL because the new buildings were to be sited on the open part of the application site (point (a), and that the injury to the MOL would be greatly reduced if the layout was revised so that the new buildings were sited largely on the built up, rather than the open part, of the application site (point (b)). There could be no doubt that point (a) was not merely a material, but a highly material consideration. Given the terms of policy G2, point (b) was certainly capable of being a material consideration. The respondent's submission that point (b) would be relevant only in exceptional circumstances overlooked the fact that this was not an ''alternative site'' case. It was being argued by the objectors than an alternative siting within the application site would avoid or reduce the injury to the openness of the MOL in accordance with policy G2. No exceptional circumstances were required in order to justify taking point (b) into consideration. The Report was woefully inadequate. Point (a) was simply sidestepped, and insofar as point (b) was answered at all, it was answered by the mantra ''each planning application must be considered on its merits''. In the present case, because of the policy imperative in the UDP, that proposals within the MOL should not cause injury to its openness and visual amenity, it was for the members to decide whether they should consider point (b) as part of their consideration of the merits of this application.

H8 (3) All other things being equal, the less the injury that would be caused by the application proposal, the less would be the need in terms of policy G2 to consider whether that injury might be reduced by a revised siting of the proposed new buildings within the MOL site. Where there were clear planning objections to the proposed development, e.g. because it would injure the openness and visual amenity of MOL contrary to policy G2, the more likely it was that it would be relevant, and could in some cases, be necessary, to consider whether that objection could be overcome by an alternative proposal. Whether there was a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal, and if so, how far evidence in support of that possibility or lack of it, should have been worked up in detail by the objectors or the applicant for permission, were all matters of planning judgment for the local planning authority. In the present case, members were not asked to make that judgment. They were effectively told at the onset that they could ignore point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.

H9 **Cases referred to:**

(1) *R. (on the application of Kilmartin Properties (TW) Ltd) v Tunbridge Wells BC* [2003] EWHC 3137 (Admin); [2004] Env. L.R. 36; (2004) 101(2) L.S.G. 31
(2) *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12; [2004] 2 P. & C.R. 22
(3) *R. (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ 315; [2001] 2 P.L.R. 59; [2001] P.L.C.R. 31

(4) *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; (1986) 279 E.G. 680 QBD

H10 **Legislation referred to:**

(1) Planning and Compensation Act 2004

H11 **Appeal** by the appellant, the Governing Body of Langley Park School for Girls, against the order dated February 25, 2009 of Wyn Williams J. dismissing the appellant's application for judicial review of a grant of planning permission dated August 5, 2008 by the respondent, the London Borough of Bromley, to the interested party, the Governing Body of Langley Park School for Boys. The facts are as stated in the judgment of Sullivan L.J.

H12 *R. Langham*, instructed by Kingsley Smith Solicitors LLP, for the appellant.
J. Steel Q.C. and *A. Sharland*, instructed by the London Borough of Bromley, for the respondent.
T. Hill Q.C., instructed by Trowers & Hamlins LLP, for the interested party.

JUDGMENT

SULLIVAN L.J.:

Introduction

1 This is an appeal against the Order dated February 25, 2009 of Wyn Williams J. dismissing the appellant's application for judicial review of a grant of planning permission dated August 5, 2008 by the respondent to the Interested Party (''the planning permission'') for the demolition of existing school buildings, the retention and refurbishment of certain existing buildings, and the construction of a new secondary school including provision of a 600 seat enhanced performance space, a new nine-court indoor sports hall, and other facilities at Langley Park School for Boys, Hawksbrook Lane, Beckenham, Kent (''the Boys' School'').

2 The appellant challenged the planning permission on two grounds:

i) the Statement of Reasons for granting planning permission did not reflect the respondent's decision-making process; and
ii) the respondent failed to consider the possibility of an alternative scheme on the site, referred to as ''Option 1''.

3 The hearing before Wyn Williams J. was a ''rolled up'' permission and substantive hearing. Wyn Williams J. refused permission to apply for judicial review on ground i), granted permission on ground ii), but dismissed the claim. Dyson L.J. granted permission to appeal on ground ii), but refused permission to appeal on ground i). The appellant does not renew its application for permission to appeal on ground i).

Factual Background

4 The ''Background and relevant facts'' are set out in some detail in [3]–[22] of the judgment of Wyn Williams J. [2009] EWHC 324 (Admin). The 6.9 ha Boys' School site is designated as Metropolitan Open Land (''MOL'') in the Bromley Unitary Development Plan (''UDP''). To the east, also on land designated as MOL, is Langley Park School for Girls (''the Girls' School'').

5 There is a substantial amount of existing floor space on the Boys' School site. The Report of the Chief Planner to the respondent's Development Control Committee at its meeting on June 17, 2008 (''the Report'') told members that there was a total of 13050sq m existing floor space with a footprint of 9882sq m (including temporary buildings). The plans of the site show that, broadly speaking, the buildings, together with areas of hard standing such as car parks, are located in the south west half of the site. Hawksbrook Lane runs along the southern boundary of this part of the site. The north east half of the site (to the north of the Girls' School) is open land laid out as sports grounds.

6 MOL in Greater London ''serves the same purpose as Green Belt and will be given the same level of protection'' (para.8.19 of the UDP). Policy G2 in the UDP says that:

> ''Within Metropolitan Open Land (MOL) as defined on the Proposals Map, permission will not be given for inappropriate development unless very special circumstances can be demonstrated that clearly outweigh the harm by reason of inappropriateness or any other harm.''

It is common ground that ''any other harm'' would include injury to the openness and visual amenity of the MOL because Policy G2 also states that:

> ''The openness and visual amenity of the MOL shall not be injured by any proposals for development within. . . the MOL which might be visually detrimental by reasons of scale, siting, materials or design.''

7 Following approval from the DfES for the capital project to rebuild the Boys' School under the ''Building Schools for the Future—One School Pathfinder'' initiative, the Frankham Consultancy Group was appointed to carry out a feasibility study. The feasibility study was completed in November 2007 (the ''Study''). Paragraph 3.5 of the Study dealt with ''Appraisal of Location Option''. Having said that it was the desire of both the Boys' School and the local planning authority to have ''least impact on the Metropolitan Open Land'', the Study said that there were ''three obvious and viable options'', looked at the advantages and disadvantages of each option, and made a recommendation as to the most suitable location.

8 The three options, ''Front of School'' (Option 1), ''Rear Field Option'' (Option 2), and ''Middle Site Option'' (Option 3) were illustrated. The illustrations are purely schematic. Option 1 sited the new school aligned on an east-west axis along the Hawksbrook Lane frontage with a shorter north-south leg occupying the site of the existing 6th form block and the tennis courts to its north. In Option 2 the new school was sited on an east-west axis wholly within the playing fields in

the north eastern part of the site. Option 3 sited the new school on a north-south axis in the middle of the site. In this option the southern part of the new school occupied the site of the existing 6th form block, and the tennis courts to its north, and the northern part of the new school occupied the western part of the playing fields. In simple terms, Option 1 very largely avoided building on the open, north-eastern part of the site. In Option 2 the new school effectively occupied the whole of the playing fields, leaving some open land around the perimeter of the new buildings. In Option 3 the new school occupied part of the playing fields.

9 Despite these differences between the Options, and the stated desire to have ''least impact on the MOL'', the feasibility study did not assess their relative impacts on the openness and visual amenity of the MOL. Although para.3.5 of the Study set out a number of factors ''For'' and ''Against'' each Option, these factors did not include the extent to which each Option would have an impact on the MOL. Having considered the Study the Boys' School chose Option 3 ''because the advantages of this Option, unlike the other two Options, clearly outweighed the disadvantages''.

10 The planning application was submitted on April 17, 2008. The Study was not presented to the members at the meeting on June 17, 2008, but three documents were available, in addition to the application and application drawings: a ''Design and Access Statement'' prepared by the Frankham Consultancy, an ''Identity and Context Plan'' prepared by the same firm, and a ''Supporting Planning Application Statement'' (''the Supporting Statement'') prepared by a firm of planning consultants.

11 The Design and Access Statement said that the site was ''designated as an important piece of Metropolitan Open Land'' and described the three siting options. The various factors ''For'' and ''Against'' each option were set out in much the same terms as in the Study. The impact of the options on the MOL was not mentioned. Although Option 3 was the Boys' School's preferred Option, the siting of the proposed buildings in the planning application differed from that shown in Option 3. The Design and Access Statement explained that a desire not to disrupt the school's operations during construction had led to the siting of the new buildings being moved ''northward and slightly eastward''. The ''Site Arrangement'' plan shows that this resulted, in effect, in a siting and layout which was a hybrid between Option 3 and Option 2. Since the new buildings were not merely moved northwards, but were also moved eastwards, they occupied a larger part, more than half, of the existing playing fields. The implications for the MOL of this changed siting were not addressed in either the Design and Access Statement or the Identity and Context Plan, which again described Options 1–3 and their advantages and disadvantages, but did not deal with their impacts on the MOL.

12 The Supporting Statement explained the selection process for the chosen site layout, and clarified ''some of the key issues determining the ultimate selection of the preferred layout/siting option'' (para.8.15). The three Options were briefly described and the arguments ''For'' and ''Against'' were summarised. One of the arguments ''Against'' Option 1 was that:

> ''A four storey building will have a significant visual impact upon the Metropolitan Open Land when viewed from key vantage points.''

The Supporting Statement said that:

> ''Clearly the negative aspects of this option significantly outweigh the advantages.'' (8.17).

13 One of the arguments ''Against'' Option 2 was that it would have a ''significant impact on views of designated Metropolitan Open Land when viewed from vantage points to the east''. An argument ''For'' Option 3 was that:

> ''A centrally located building would help to enhance the perception of the school being set within grounds when viewed from both an easterly and westerly vantage point. This will enhance the perception of openness from a greater variety of vantage points than the existing school, thus promoting the visual objectives of Metropolitan Open Land Policy.''

No adverse impact on MOL was mentioned in the arguments ''Against'' Option 3; and it was said that as a result of the Study it was:

> ''chosen as being the optimum layout solution for the replacement school in educational, operational, environmental and planning terms.'' (8.22).

14 The report then assessed ''the planning considerations based on the chosen scheme option'' (8.23). Before considering that assessment, it will be noted that there had been no assessment of the relative impact of the three Options on the openness and visual amenity of the MOL prior to the adoption of Option 3 as the optimum layout solution; and that although visual impact upon the MOL was mentioned (for the first time, in the Supporting Statement) the references were brief in the extreme and could not sensibly be described as an assessment of the extent to which the openness and visual amenity of the MOL would (or would not) be injured by each siting Option.

15 Paragraph 8.24 of the Supporting Statement said that the site's designation within MOL had had ''a significant constraining influence over the final form of the development''. Paragraph 8.28 said that it was clear:

> ''that any scheme of development within the MOL must seek to minimise any adverse impact on the open character of the MOL through sensitive design and siting. This requirement to minimising (sic) the visual impact of the new school upon the MOL has been a fundamental element in the initial conceptualisation and design of the replacement school''.

The existing and proposed floorspace and footprint were discussed, and it was said that there would be an overall reduction in ''footprint envelope'' which would ''directly contribute to enhancing the openness of the site and this area of designated MOL''. (8.38). Paragraph 8.40 said that:

> ''By locating the new school centrally within the grounds and locating playing pitches at both the western and eastern end of the site, this will help to enhance the setting of the school from either direction. As a consequence the

perception of visual openness, (the principal purpose of MOL designated land), will be enhanced when viewed from adjacent land.''

16 The Supporting Statement said that the ''scale bulk and height of the MOL Development will be appropriate and sympathetic within its' MOL context'' (8.42). The conclusions in paras 8.38, 8.40 and 8.42 were repeated (paras 8.53–8.55) and it was said that:

> ''8.57 On the basis of this before and after comparison of the visual openness of the site it is maintained that the application scheme represents a positive enhancement worthy of planning approval on MOL grounds. This judgment is reached even before considering the additional very special circumstances which apply in this case on the basis of substantial improvement in education facilities for [the Boys' School]. . .''
> ''8.58 It is maintained that the positive visual impact of the new development in comparison to existing ensures broad compliance and promotion of MOL policy objectives. This is achieved due to the sensitive location and design of the proposed new building, a building which actually increases the level of total floorspace provided. Notwithstanding the strength of this planning application on the basis of visual assessment alone, it is strengthened still further by the very special circumstances case which applies on the basis of educational need, as recognised by Ofsted and the Department of Education and Skills.''

17 The Supporting Statement gives the impression that Option 3 was the ''Chosen Scheme Option''. It does not draw attention to the change from Option 3 to the application proposal whereby a greater proportion of the open part of the site would be occupied by new buildings, nor does it discuss the implications of that change for the openness and visual amenity of the MOL, save insofar as it refers to the visual impact of the application proposal.

The Report

18 The Report briefly described the application site and the proposed development, set out the existing and proposed school building footprints and floor areas, said that the application was accompanied by the Supporting Statement, and summarised the key points made in the Supporting Statement. In respect of MOL the key points were:

> ''Metropolitan Open Land (MOL)
> purpose of proposal is to provide a fit for purpose modern replacement school—an increased amount of floorspace will be required.
> there will be no intensification in school activities but proposal will provide the flexibility offered by the enhanced performance space (where peak activities will occur outside school hours).
> void spaces between existing buildings do not contribute to openness of MOL and existing school is a sprawl.
> proposed school building is coordinated and uses land efficiently.

siting of school building will enhance MOL benefits from certain vantage points.
proposed built form will be appropriate in this setting and in MOL context.
proposed sports and recreation facilities will provide student and community benefits.
enhanced performance facility is ancillary to Class D1 educational use but is also suitable for wider community use.
envelope of built form reduced therefore visual openness of the site is enhanced.
there is a demonstrable educational need.''

19 The report referred to the Design and Access Statement and said that it and the Supporting Statement:

> ''detailed various advantages and disadvantages relating to three options. The advantages and disadvantages of the chosen option are considered as follows. . .''

The arguments ''For'' and ''Against'' Option 3 in the Supporting Statement were then summarised as ''Advantages'' and ''Disadvantages'' respectively.

20 The Report summarised the responses to public consultation. Nearby residents' representations included, in respect of MOL:

- ''Loss of large area of open, green space''
- ''Alternative options would better preserve openness of MOL'', and
- ''Replacement school on site of existing buildings would be preferable''.

The objection from the Girls' School was said to include the following (among many other) points:

- ''Layout is not best option to maintain openness of MOL and conflicts with development plan''.
- ''Site of existing school will remain brownfield''.
- ''Rebuilding of school on existing site is only option that would accord with PPG2 and PPS1.''

21 The Report accurately summarised the objections of the Girls' School on MOL grounds. The Chair of the Governors had written a lengthy objection letter dated May 22, 2008 and the Headteacher, Ms Sage, was permitted to make a short statement to the meeting. Both the letter and the statement made it clear that the Girls' School was not objecting to the principle of redeveloping the Boys' School, but that it was objecting to the proposed siting and design on the basis that the new school would be sited on the open part of the site, ''in the most prominent and destructive location possible'', and that the Report did not take into account Option 1, which, with ''significant modification'', would have a less harmful effect on the openness of the MOL.

22 Having listed the relevant policies in the UDP, including Policy G2, the Report said:

> "The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options. However, each planning application should be treated on its individual merits.
> The site is designated Metropolitan Open Land and Policy G2 states that permission will not be given for inappropriate development unless very special circumstances can be demonstrated that clearly outweigh the harm by inappropriateness or any other harm. It goes on to state that the openness and visual amenity of the MOL shall not be injured by any proposals for development within or conspicuous from the MOL which might be visually detrimental by reasons of scale, siting, materials or design. A school is by definition inappropriate development in MOL but on the basis that there is an established educational use on the site it can be considered that very special circumstances exist to justify such inappropriate development."

23 After referring to a number of other matters, the Report said that:

> "Concerns regarding pre-application consultation are noted. The main issues to be considered in this case are whether very special circumstances have been demonstrated to justify inappropriate development in MOL, the impact of the proposal on the openness of MOL and the character of the area, and the impact on the amenities of nearby residential properties and Langley Park School for Girls."

24 The Report's "Conclusions" said that the proposal for the replacement school was by definition inappropriate development within the MOL. Although the Report had said that the impact of the proposal on the openness of the MOL was one of the main issues to be considered, the conclusion which dealt with that issue merely said that:

> "The proposal will involve the reconfiguration of built form on the site and the footprint of the proposed school will increase by 1,338m2 whilst the floor area will increase by 3547m2. The impact of the amount of built form on the site and the effect of the reconfigured layout should be carefully considered in terms of its impact on the openness of MOL."

Having referred to the impact of the proposal on the Girls' School and on nearby residential properties, the Report concluded by saying that:

> "On balance, the proposal may be considered acceptable."

25 Although the Report correctly summarised Policy G2, including the requirement that the openness and visual amenity of the MOL shall not be injured by any proposals for development within it; advised members that the impact of the proposal on the openness of the MOL was one of the main issues to be considered; and said that the impact of the amount of built form on the site and the effect of the reconfigured layout should be "carefully considered in terms of its impact on the openness of MOL"; it did not contain any analysis of that impact.

Nor did the Report express any conclusion as to the extent (if any) to which the openness and visual amenity of the MOL would be injured by the proposed development.

26 The Report's only response to those consultees, including the Girls School, who had contended that alternative options would do less injury to the openness of the MOL would appear to be the advice to members that:

> ''The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options. However each planning application should be treated on its individual merits.''

27 Recitation of the mantra—that each planning application should be considered on its merits—could have been of little assistance to members in the present case because those ''merits'' included the extent to which there was, or was not, compliance with Policy G2, and that in turn depended on an assessment of the proposal's impact on the openness of the MOL. The consideration of the pros and cons of the various siting Options in the Supporting Statement did not address the issue that was being raised by the objectors: the relative impact of the different siting Options on the openness of the MOL; nor did it explain the implications for openness of the MOL of the change from Option 3 to the application scheme.

The Reasons for granting permission

28 An ''Informative'' at the end of the decision notice tells the reader that ''This is a summary of the main reasons for this decision as required by law. . . For further details please see the application report. . .'' The ''Summary'' is unusually lengthy and detailed, and in ground i) of its challenge before Wyn Williams J. the appellant contended that it did not accurately represent the members' views. That contention, which was disputed by the respondent, was rejected by Wyn Williams J. It is therefore fair to take the ''Reasons for the grant of Permission'' at face value as accurately representing the members' reasons for granting permission.

29 The first paragraph of the Reasons says that:

> ''Members noted that on behalf of the Langley Park Girls School it was submitted that there was an alternative site for the new school called Option 1. In the opinion of those representing the Girls school there were significant advantages in locating the new buildings there. However the application which is for full planning permission did not contain that option. Members considered it is the acceptability of the application before Committee that had to be determined. Members did not regard that it would be appropriate to defer the application for a new proposal based on Option 1 to be brought before them as the applicant was entitled to have the acceptability or otherwise of its own proposal assessed.''

30 The members considered the application on the basis that it was for inappropriate development in MOL, and said that a balancing exercise was necessary to ascertain whether the harm by reason of inappropriateness (referred to as the ''harm by definition'') and any other harm were overcome by the very special circumstances put forward to justify the proposed development.

31 The members noted that the proposal was for development up to two storeys in height while the existing school buildings varied from one to three storeys in height:

> ''They also noted that while the new school would be located primarily on a part of the site not covered by buildings, other areas of the site, particularly along Hawksbrook Lane would be opened up.''

Having considered the impact of the proposals on the amenities of nearby residents and on the Girls' school, and referred to the members' site visit, the Reasons continued:

> ''Having considered these harms and all other matters raised in representations Members considered that the development would cause some harm to the policies to protect Metropolitan Open Land in that a larger area of the site would be occupied by buildings but that this harm was reduced by some improvements to visual amenity both in terms of the 2 storey nature of the development and the opening up of areas formerly covered by buildings. Any harm to the amenities of local residents or to the Girls School could be addressed by condition.''

32 The Members then considered whether there were any very special circumstances that might provide a justification for the development. They set out the education arguments and the arguments in favour of the enhanced performance space. The Members' conclusion was:

> ''Members considered that the educational arguments were very persuasive and found them to constitute very special circumstances in favour of the proposal. They also considered that the benefits to children and young people in the Borough of the enhanced performance space did provide a very special circumstance to justify including that part of the proposal within the development. When these factors were balanced against impact of the proposal on the openness of MOL with regard to existing and proposed footprints and against any potential for harm to the amenities of nearby residents and the Girls school, Members concluded that these harms were overcome by the very special circumstances shown and that the application should be permitted. It was considered the benefits of the proposal outweighed any harm and very special circumstances had been demonstrated to justify the proposal subject to the conditions recommended by the Acting Chief Planner.''

33 The brevity of the Members' consideration of the impact of the proposed development on the openness and visual amenity of the MOL, and the generality with which their conclusion was expressed—''. . .some harm to the policies to

protect MOL. . .but that this harm was reduced by some improvements to visual amenity''—are perhaps a reflection of the complete absence of any assessment of this issue in the Report. On behalf of the respondent Mr Steel Q.C. accepted that there was no such assessment in the Report, but submitted that it could be inferred that the Report's author agreed with and endorsed the assessment in the Supporting Statement.

34 The Report does not say that, and if the intention had been to endorse the assessment of impact on the MOL, such as it was, in the Supporting Statement, it is surprising that the Report did not advise members that, in terms of visual openness, the application scheme represented ''a positive enhancement'', and had a ''positive visual impact'' (see [16] above). If this proposition had been accepted by the respondent's Chief Planner it would, given the terms of Policy G2, have been a powerful reason for not refusing planning permission by reason of ''other harm''. In any event, the Reasons indicate that the members concluded that there would be ''some harm'' to the MOL, and although they considered that this harm would be ''reduced'', the reasons do not suggest that they believed that there would be a ''positive visual impact''.

The grounds of challenge

35 In its Skeleton Argument for the hearing before Wyn Williams J. the appellant contended that the respondent's failure to consider the possibility of an alternative scheme had been unlawful because:

i) The Report

> ''Did not identify the 'other harm' caused by the application scheme (i.e. the actual impact on openness caused by the proposal) and therefore did not grapple with the central issue—whether the claimed educational benefits meant that the particular impact on openness was inevitable or whether they could be achieved with less harm to the MOL.'' ([41]).

ii) It was put to the respondent by the Girls' School that Option 1 would involve much less ''other'' harm. ([42]).

iii) It was material for the members to consider whether the educational need relied on as the very special circumstances could be met in a less harmful way given, (i) the way in which the application was presented in the Report; and (ii) the Girls' School's objection. ([46]).

iv) The reasons for granting permission asserted that the members had not considered question (iii). ([47]).

v) The fact that there was no application for planning permission for Option 1 before the members did not entitle them to decline to consider question (iii). ([48]).

36 I have set out the terms of the appellant's Skeleton Argument before Wyn Williams J., and in particular step (i) of the appellant's argument, because it was said by Mr Steel during the course of his submissions that prior to the hearing before

this Court, the appellant had not contended that the grant of permission was unlawful because the respondent had failed properly to assess the impact of the proposed development on the openness and visual amenity of the MOL. Unsurprisingly, that was the starting point of the appellant's "Option 1" ground.

Discussion

37 In its Summary Grounds of Resistance to the appellant's Application for Permission to apply for Judicial Review the respondent said that:

> "There is no requirement of law or planning policy that obliges a Council to consider or seek out an alternative site in relation to proposed development in Green Belt/MOL. Applications must be considered on their own merits unless there are exceptional circumstances."

Before Wyn Williams J. the respondent submitted that "Alternative sites or schemes are only potentially a material consideration and then only in exceptional circumstances". In support of that submission two authorities were relied upon: *R. (on the application of J (A Child)) v North Warwickshire BC* [2001] EWCA Civ.315 and *R. (on the application of Kilmartin Properties (TW) Ltd) v Tunbridge Wells BC* [2003] EWHC 3137 (Admin); see [58] and [59] of the judgment of Wyn Williams J.

38 Both the *North Warwickshire* and the *Tunbridge Wells* cases were "alternative site" cases, i.e. the objectors were contending that the need for the development could and should be met on a site other than the application site. This was not an "alternative site" case. The respondent was considering a proposal for substantial new buildings on a large site which was partly occupied by existing buildings and partly open land, within the MOL, where the policy in the UDP was that the openness and visual amenity of the MOL should not be injured by any proposal which "might be visually detrimental by reason of scale, siting, materials or design". (emphasis added).

39 It was being contended by those who were objecting to the proposed development (including the appellant) that:

i) it would severely injure the openness and visual amenity of the MOL because the new buildings were to be sited on the open part of the application site ("Point (a)");
ii) the injury to the MOL would be greatly reduced if the layout was revised so that the new buildings were sited largely on the built-up, rather than the open part, of the application site ("Point (b)").

40 There can be no doubt that Point (a) was not merely a material, but a highly material consideration: one of the "main issues" according to the Report. Given the terms of Policy G2, Point (b) was certainly capable of being a material consideration. The respondent's submission that Point (b) would be relevant "only in exceptional circumstances" overlooks the fact that this was not an "alternative site" case: it was being argued by objectors that an alternative siting within the application site would avoid or reduce the injury to the openness of the

MOL in accordance with Policy G2. No ''exceptional circumstances'' were required in order to justify taking Point (b) into consideration.

41 I readily accept the respondent's submission that whether Point (b) was to be regarded as a material consideration, and if so, what weight should be attributed to it, was a matter for the members to decide. I also accept that the authorities demonstrate that the Court will not interfere with the members' judgment on such an issue save on ''*Wednesbury* grounds''. However, those grounds are not limited to irrationality: the decision taker must direct himself properly in law, take account of relevant, and ignore irrelevant matters.

42 The Report advising the members was woefully inadequate. Point (a) was simply sidestepped: the members were told that the impact of the proposals on the openness of the MOL should be ''carefully considered'', but there was no attempt in the Report to assess that impact, or to express any conclusion, even in the most general terms, as to its extent.

43 Insofar as Point (b) was answered at all, it was answered by the mantra—''each planning application must be considered on its merits''. The statement that the application detailed ''the pros and cons of the various siting options'' would have been of no assistance because there was no assessment of their relative impacts of the options on the MOL, and the information as to their impacts individually was sparse in the extreme. In the present case, because of the policy imperative in the UDP, that proposals within the MOL should not cause injury to its openness and visual amenity, it was for the members to decide whether they should consider Point (b) as part of their consideration of the ''merits'' of this application. Consideration of Point (a)—what, if any, injury to the openness and visual amenity of the MOL would be caused by the application proposal, including the proposed siting of the buildings within the application site would be, if not the first, then at least an important factor in deciding whether Point (b) should be considered.

44 All other things being equal, the less the injury that would be caused by the application proposal, the less would be the need in terms of Policy G2 to consider whether that injury might be reduced by a revised siting of the proposed new buildings within the MOL site. Where there are no clear planning objections to a proposed development alternative proposals (whether for an alternative site, or a different siting within the same site) will normally be irrelevant: see *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ. 1346; [2004] 2 P. & C.R. 405, per Auld L.J. at [33].

45 Where there are clear planning objections to a proposed development, e.g. because it would injure the openness and visual amenity of MOL contrary to Policy G2, the more likely it is that it will be relevant, and may in some cases be necessary, to consider whether that objection could be overcome by an alternative proposal. See *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P. & C.R. 239, per Simon Brown J. (as he then was) at 299:

> ''Where, however there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere.''

46 The *Trusthouse Forte* case was an ''alternative site'' case, but the principle must apply with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself.

47 The Report effectively advised the members that they need not consider Point (b) because the application had to be ''considered on its merits''. Despite the terms of Policy G2, no consideration was given to, and members were not asked to consider, whether Point (b) should be considered as part of those ''merits''. The reasons for adopting this approach are not explained in the Report, but it would appear from the respondent's submissions in response to these proceedings ([37] above) that it equated Point (b) with an ''alternative site'' objection, and considered that there were no ''exceptional circumstances'' justifying the consideration of such an objection.

48 The members followed the advice in the Report. The Reasons state that the application, which was for full planning permission, did not contain Option 1, and the members had to consider the acceptability of the application (i.e. to consider the application ''on its merits''). The fact that Option 1 was not included in the Interested Party's planning application was not a sound reason for not considering the objectors' Point (b). It is hardly surprising that the application did not contain an alternative siting option. It would appear that the members took the advice in the Report that ''each application should be considered on its merits'' to mean that since Option 1 was not included in the application, Point (b) could not form part of the ''merits'' which they were required to consider.

49 The Reasons make it clear that it was decided at the outset that Point (b) need not be considered, before any consideration was given by the members to Point (a). That is unsurprising, given the advice in the Report, and the lack of any assessment in the Report of the impact of the application proposals on the openness of the MOL. Even if the members had been minded to consider the extent to which the proposed siting of the buildings would injure the openness of the MOL before deciding whether the extent of that injury might justify consideration of the other issue raised by objectors—that the injury could be avoided or reduced by alternative siting within the application site (Point (b))—they would have found it difficult, if not well-nigh impossible, to reach any meaningful conclusion, given the complete lack of information on Point (a) in the Report.

50 The respondent also submitted in its Skeleton Argument that even if it was under a duty to consider alternative Schemes because of exceptional circumstances ''the only alternative scheme that was raised was so vague and inchoate that it could be disregarded''. *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ1346 was cited as authority for this proposition, and reliance was placed on the judgment of Auld L.J. at [30]–[35]. Auld L.J.'s judgment should not be taken out of context. In that case

the application for planning permission was for a development that was acceptable in planning terms. There was no conflict with policy, and far from there being any other harm Auld J. said that:

> ''if considered on its own [it] would not be harmful in a planning sense and would enhance the Building and the Conservation Area of which it is part.'' ([31]).

Mount Cook had put its alternative design options to the Council, and the latter's response had been:

> ''that they were too vague for proper consideration and advice by its officers though it proffered some 'initial' advice indicating that the proposals were likely to be unacceptable.'' ([8]).

51 Against this background, it was submitted on behalf of Mount Cook that ''an alternative scheme is a material consideration to a decision on an application for planning permission even where, on the facts before the decision-maker, there is no likelihood or real possibility of that alternative scheme eventuating. . .The fact that [alternative schemes] were unlikely to come about went to their weight not their materiality'' ([26]). It is hardly surprising that this submission was rejected. An unlikely possibility that a more acceptable alternative scheme might be devised could not, on any rational basis, be a reason for refusing permission for a scheme to which there was no planning objection.

52 It does not follow that in every case the ''mere'' possibility that an alternative scheme might do less harm must be given no weight. In the *Trusthouse Forte* case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific alternative site had been identified. There is no ''one size fits all'' rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility, whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

53 Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority. In the present case the members were not asked to make that judgment. They were effectively told at the onset that they could ignore

Point (b), and did so simply because the application for planning permission did not include the alternative siting for which the objectors were contending, and the members were considering the merits of that application.

54 On behalf of the Interested Party, Mr Hill Q.C. accepted that alternative schemes may be a material planning consideration, and that the likelihood that they will be a material consideration will increase where there are clear planning objections to a proposal and a need for the development is claimed. Whether an alternative scheme is relevant in any given case:

> "will depend upon the precise circumstances of the case, as assessed by the local planning authority. There is nothing 'prescriptive' about this approach." (para.18 Skeleton).

For the reasons given above, I would accept this submission.

55 In para.19 of his Skeleton Argument, Mr Hill submitted that, inter alia, the following factors were:

> "likely to have a bearing on the issue of whether alternative [schemes] are relevant in a given case:
>
> i. the nature and degree of the harm arising from the proposal;
> ii. the nature and urgency of the need;
> iii. the scope for alternatives which could sensibly satisfy the need;
> iv. the extent to which the feasibility of such alternatives has been demonstrated (ie the weight which can be attached to them)."

The list does not purport to be an exhaustive one, but it is instructive to apply it to the present case. The members were not advised to consider factor (i) before deciding whether they would treat the suggested alternative siting in Option 1 as relevant, and given the lack of any assessment of harm in the report, they would have been unable to reach an informed conclusion in any event. The members did consider factor (ii), and did not think it appropriate to defer the application for a new proposal based on Option 1 to be brought before them. The members did not consider factors (iii) and (iv): consideration of Option 1 was ruled out because it was not included in the Interested Party's planning application, not because the members considered whether there was any scope for alternative siting, or the extent to which its feasibility had been demonstrated. The fact that Option 1 was not included in the planning application was thought to be a sufficient reason for not considering whether an alternative siting might have less impact on the openness of the MOL.

56 For these reasons, the decision to grant planning permission was seriously flawed. Insofar as the Report dealt with Point (a) it was wholly inadequate; and insofar as it directed the members as to whether Point (b) was potentially relevant it was misleading. It follows that the proper course is to make a Quashing Order in respect of the permission unless there is some good reason why the Court should, in the exercise of its discretion, decline to give the appellant such relief.

Impracticability

57 Both the respondent and the Interested Party submitted that the permission should not be quashed because Option 1 was said to be impracticable. Mr McQuillan, the respondent's Acting Chief Planner, said in his witness statement that Option 1 was ''totally impracticable''. It was merely a siting possibility which had been considered in the Study, and rejected by the Interested Party at a very early stage as ''impracticable''. Mr Steel accepted that this ''impracticability'', submission was relevant only to the exercise of the Court's discretion because it was not the basis on which the respondent had determined the application. The Study had referred to ''three obvious and viable Options''. Although the Supporting Statement said that the ''negative aspects'' of Option 1 ''significantly outweigh its advantages'', and described Option 3 as ''the preferred Option'', it did not go so far as to suggest that Option 1 was impracticable. Nor did the Report to members. It merely referred back to the earlier documents, and said that:

> ''The application details the process of choosing the location for the proposed school and considers the pros and cons of the various siting options.''

58 A note of the meeting of the Development Control Committee on June 17, 2008 records that Councillor Noad, who was the Children and Young Persons portfolio holder and not a member of the Development Control Committee, said that:

> ''Objections that the new building should be on the existing school site are not practicable as the existing school has nowhere to go while the new school is being built.''

However, the Reasons do not indicate that the members of the Development Control Committee endorsed that view, although they did accept that, as one of the educational advantages, the proposal would ''enable the disruption to the school during the redevelopment process to be minimised''.

59 Minimising disruption to the school during the redevelopment process appears to have been the primary factor when the siting Options were being compared. The first of the factors ''Against'' Option 1 in the Supporting Statement was ''Major impact of construction site on existing school operations''. The first of the factors ''For'' Options 2 and 3 was ''Minimal effect on existing school during construction. . .''.

The Design and Access Statement explained that:

> ''One of the most crucial decisions made in the evaluation and feasibility stage regarding the Design for the new school was to ensure minimum disruption to the function and operation of the existing school during construction of the new school facility. This meant that the new construction should be kept away from the physical bounds of the existing school allowing adequate phasing of the development whilst maintaining the education integrity of the school. The new school building will be built in one primary phase so that at handover of this phase the entire school population can be

> moved into the new school at the start of a new term so creating minimum disruption to the teaching curriculum.''

This was the reason why the siting in the application differed from that shown in Option 3:

> ''It was also important to the educational integrity of the proposals and also on economic grounds that the need for temporary teaching facilities be kept to an absolute minimum. The proposed scheme requires no extensive temporary teaching accommodation to be provided during construction.''

60 It is readily understandable that the Interested Party, and perhaps the respondent in its capacity as Local Education Authority, would accord overriding importance to this factor. The respondent was not, however, considering this application for planning permission in its capacity as the Local Education Authority. It was considering the application as the Local Planning Authority, and was under a statutory duty to determine the application in accordance with the Development Plan (in this case the UDP) unless material considerations indicated otherwise: see s.38(6) of the Planning and Compensation Act 2004. As the Local Planning Authority, the respondent's priority in accordance with Policy G2 was to ensure that any injury to the openness and visual amenity of the MOL was, if not avoided, then at least minimised as far as possible.

61 The ''impracticability'' submission is premised on the priority accorded by the Interested Party to the objective of minimising disruption to the existing school. Siting the new buildings on the open part of the site would obviously meet this objective. The objectors were contending that siting the new buildings on the built up part of the site would better meet the policy imperative of not injuring the openness of the MOL. Whether there was a tension between the Interested Party's objective and the policy imperative, and if so how it should be resolved, e.g. by requiring the Boys' School to accept more than ''minimum disruption'' and/or the use of more than the ''absolute minimum'' of temporary teaching accommodation during the construction process, were matters for the respondent to determine as Local Planning Authority. Since the Report did not begin to engage with these issues, it is understandable that the members did not regard them as any part of the ''merits'' of the application which they had to determine. For these reasons I am not persuaded that relief should be refused on the ground of ''impracticability''.

Delay and Prejudice

62 Both the respondent and the Interested Party submitted that relief should be refused because of the appellant's ''undue delay'', or failure to act promptly, and the prejudice caused by that delay/lack of promptness. I do not accept that there was any undue delay or lack of promptness on the appellant's part. The planning permission was issued on August 5, 2008, after the Greater London Assembly and the Secretary of State for Communities and Local Government had decided that they would not intervene or call in the application. The appellant's detailed pre-action protocol letter is dated August 29, 2008. This was well

into the summer holiday period. There was no undue delay in sending the pre-action protocol letter. The respondent's reply is dated September 9. The appellant's Claim Form was filed just over a month later, on October 13, 2008, but the Boys' School was not named or served as an Interested Party. This omission was rectified on October 27, 2008. I do not accept the respondent's contention that there was undue delay in filing the Claim Form. Mr Kingsley Smith in his Witness Statement on behalf of the appellant had to refer to, and exhibit, a large number of relevant documents, many of which it has been necessary to refer to in this judgment.

63 The Interested Party has undoubtedly been prejudiced by these proceedings, but the prejudice has been caused by the mere fact that the permission has been challenged, and not because there was any undue delay or want of promptness in the making of the challenge. Prior to the grant of planning permission, the respondent's Education and Capital Projects Manager wrote to Ms Sage explaining that preparatory work would need to be carried out during the summer holiday. Works were commenced as soon as possible after the grant of permission, and according to the Witness Statement of Mr Ullman, a senior solicitor with the respondent a ''considerable amount of preparatory work'' was carried out between August 5 and August 29 when the appellant sent its pre-action protocol letter. The timetable was so tight that any challenge, however promptly it was made, would be bound to prejudice the Interested Party.

64 I recognise that the challenge to the planning permission has caused significant prejudice to the Interested Party. The main building contract has been put ''on hold'' and has had to be re-tendered. Negotiations (based on the implementation of the existing permission) are expected to conclude in September, which would allow work to commence in November 2009. However, it is almost inevitable that the recipient of a grant of planning permission will be prejudiced if the permission is quashed. In the absence of any undue delay or lack of promptness that is not, in itself, a sufficient reason for the Court to exercise its discretion not to quash the permission.

Conclusion

65 I would therefore allow the appeal and quash the planning permission.

66 **MOORE-BICK L.J.** I agree.

67 **THE CHANCELLOR OF THE HIGH COURT** I also agree.

Reporter—Janet Briscoe