Case No: AC-2024-LON-002871

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
[2025] EWHC 896 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 21 March 2025

BEFORE:

HER HONOUR JUDGE ALICE ROBINSON
(Sitting as a Judge of the High Court)

BETWEEN:

THE KING
(on the application of) **FOUNTAIN HOUSE RESIDENTS' ASSOCIATION**

Claimant

- and -

WESTMINSTER CITY COUNCIL

Defendant

- and -

(1) CENTRAL LONDON INVESTMENTS LIMITED
(2) BAKER STREET (2015) LIMITED

Interested Parties

MR C STREETON and **MR C MERRETT** (instructed by Lee Bolton Monier-Williams LLP) on behalf of the Claimant**.**
MR J PARKER (instructed by Planning Legal Team, Bi-borough Legal Services, Westminster City Council) appeared on behalf of the Defendant.
MR R TAYLOR KC (instructed by RFB Legal) appeared on behalf of the Interested Parties.

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. THE DEPUTY JUDGE: This is an application for judicial review to quash a decision of Westminster City Council (the Council) dated 15 July 2024 to grant planning permission for redevelopment of a vacant car showroom to a hotel (the Permission) at Fountain House, 77 Park Lane, London W1K 7TP (the Property). The claimant is an unincorporated association, acting through Mrs Rebecca Thomas, which comprises residents of the Property. The claimant has standing to bring a public law challenge as confirmed by Lieven J. in Aireborough Neighbourhood Development Forum v Leeds City Council [2020] EWHC 45 (Admin). The interested parties (IPs) are the freehold owners of the Property.

2. The claimant was represented by Mr Charles Streeton and Mr Charles Merrett. The Council was represented by Mr Jack Parker and the IPs by Mr Reuben Taylor KC.

Factual background

3. The Property is a purpose-built 11 storey inter-war mansion block located on the east side of Park Lane which occupies an entire street block bounded by Park Lane, Mount Street, Aldford Street and Park Street. It comprises a mixture of commercial uses on the lower levels and flats on part ground and first to tenth floors, accessed via a grand entrance on Park Street. The ground floor was previously used for displaying motor vehicles, the lower ground floor area was used as offices and the basement was used partly for displaying cars but mostly for storing vehicles (the Site).

4. Planning permission was granted on 6 July 2023 for conversion of the basement (and ground floor entrances, stair/lift cores and a vehicle access ramp linking ground and basement levels) of the Property to provide a 66-bedroom (room only) hotel with ancillary back-of-house facilities but no catering or conference facilities, together with minor external works and internal plant at basement and ground floor levels. This did not include the lower ground floor offices which are included in the Permission.

5. Subsequently, an application for planning permission was made for

> "Use of former car showroom comprising part ground floor, part lower ground floor and basement of building for hotel use (C1), alterations including replacement of roller shutter with louvred pedestrian gate and double door and replacement of car lift entrance with a door and fixed glazed panel (Mount Street frontage), replacement of double door with fixed glazed panels (Park Lane frontage), and installation of plant at ground floor (by

a car ramp) and basement levels and in 'Courtyard'/first floor level of central lightwell to Fountain House [the Development]".

6. The Development involved an increase in the number of hotel bedrooms from 66 to 131. Again, no onsite food or drink facilities were to be provided.

7. The claimant objected to the application and made written representations. In January 2024, the applicant submitted written representations in response. The Council uploaded that document onto the Council's website intending that it be available for public inspection in accordance with the Local Government Act 1972 (the 1972 Act) ss.100A-100E. However, as a result of an inadvertent error, due to the options selected when the document was uploaded, it was not visible to the public.

8. The planning officer produced a report for members (OR) which dealt with the objections and the applicant's response in some detail. Mr Streeton referred to the OR's summary of the objections on land use with which he did not quarrel:

- "Hotel development unacceptable in principle in this residential location;

- Loss of car showroom;

- Claim that the car showroom offices are not ancillary to that use and that it is a dual use and loss of office to hotel is contrary to Council policy to protect office accommodation including a lack of marketing of the offices;

- No marketing evidence to support contention that there is no demand for a car showroom use or an alternative use;

- Use contrary to policies requiring development to respond positively to the character and quality of the particular characteristics of the immediate vicinity of the development site.

- A residential flat, a community asset, or a precious local utility of being lost due to development concerns".

Mr Streeton did not refer to the summary of objections on other grounds.

9. In the detailed section addressing land use considerations, under the sub-heading "Commercial Uses/Character of the area" the OR states:

> "The City Plan Glossary defines 'Predominantly commercial neighbourhoods' within the CAZ as areas ' … where the majority of ground floor uses comprise of a range of commercial activity'. Park Lane, a principal London thoroughfare, is characterised by commercial uses at ground floor level, including offices, shops and large hotels. Chapter 4.3 of the MNP [Mayfair Neighbourhood Plan] 'Commercial' (where detailed policies relates to office development) refers (paragraph 4.3.2) to the 'predominantly residential neighbourhoods of West Mayfair'. It is accepted that the site is located adjacent to the westernmost boundary of West Mayfair and that there is also a lot of residential accommodation in the vicinity, including a ground floor along Park Street and on the upper floors of the application site. However, the site fronts Park Lane which is characterised by ground floor commercial uses.
>
> In practice therefore the site is considered to be located in a commercial or mixed-use area, rather than in a location which is 'predominantly residential character'. This was accepted by the Planning Application Sub-Committee when considering the earlier application".

10. Under the sub-heading "Loss of the car showroom including its offices", the OR referred to the applicant's case that there was no longer a demand for car showrooms in this location. The OR continues:

> "Objectors believe that the applicant's Planning Statement starts from the false premise that the current use of the site is not a main town centre use and that the definition of main town centre uses includes both 'retail development', which they claim self-evidently includes car showrooms, and also offices, and as such should be

protected. Reference is made to London Plan SD4 seeks specifically to protect 'retail clusters', including specialist clusters, within the CAZ, and objectors believe that one such cluster is the cluster of high end car show-rooms on Park Lane. The loss, to hotel use, of such a showroom as part of the cluster in this location is contrary to that policy. Objectors also refer to the fact that the applicant has chosen not to provide any independent evidence regarding the prospect of the site being used for purposes falling within Class E.

However, officers are of the view that although car showrooms have a retail function, they are very specialist and it is for that reason they are classified as sui generis rather than classified with usual retailing activities within Class E (a) for display or retail sale of goods. Neither the London Plan nor the City Plan have any policy specifically to protect car showrooms – and in fact make no mention of them at all. City Plan policy 13 does not require marketing information to be submitted in support of proposals for new hotel development within the CAZ, unless the existing premises are in office use or any other Class E (commercial, business and service) use, or education or community use. In these circumstances, the applicants are not required to submit marketing evidence either to demonstrate that there is no demand for a car showroom use on the site or that there is no demand for an alternative replacement use. The objections based on loss of retail use are therefore not considered to be sustainable.

There is also an objection that the applicant is wrong to suggest that the offices at lower ground floor level are just ancillary to the car showroom. The objectors argue that the nature and extent of the office provision goes beyond what could properly be described as ancillary and claim that the use is a dual use with reference to the legal decision, *Trio Thames Ltd v Secretary of State* [1984] JPL 183), which is important, given the protection given to office space under the Westminster City Plan.

Policy 13. D. 2. Of the City Plan states that:

'The net loss of office floorspace from the CAZ:…to hotel use will only be permitted where there is no interest in its continued use for office or any other Class E (commercial, business and service) uses education or community use, as demonstrated by vacancy and appropriate marketing for a period of at least 12 months'.

The applicant's response to this point is to refer to another legal decision concerning the identification of a planning unit and whether separate uses may exist, *Burdle v Secretary of State for the Environment* [1972] 3 All E.R 240. This ruled that the unit of occupation should be considered the planning unit, unless a smaller unit is recognised which is separate in use both physically and functionally to the main use. The previous tenant, BMW Mini occupied the ground floor, lower-ground floor and the basement area included in this application. There is/was free movement between the office at lower ground and the area used for displaying cars at ground floor level, with a staircase connecting these two areas, and therefore the office is not physically separate. Further, the office was used in connection with the area of the unit used for displaying and selling cars at ground level, which is a typical setup for a car showroom and so is not functionally separate to the main use. The area included in the proposal is one planning unit and hence, the proposal would not present a loss of office space, and therefore no marketing evidence is required to be provided as there is no policy conflict. Officers agree with this interpretation and do not consider the objection to loss of office accommodation, nor any objection relating to this issue, to be sustainable".

11. Under the sub-heading "Hotel use" and "Policy context", the OR refers to policies of the Westminster City Plan (City Plan) and London Plan concerning demand for visitors and then continues:

"Policy 15 of the City Plan (Visitor Economy) states that the Council will maintain and enhance the attractiveness of Westminster as a visitor destination, balancing the needs of visitors, businesses and local communities, and directs new hotels and conference facilities to specific locations, including commercial areas of the CAZ. The supporting text (paragraphs

15.13 and 15.14) acknowledges that the CAZ, as the central commercial hub, with excellent national and international transport connections, is an appropriate location for hotels and conference facilities. However, when assessing the acceptability of new hotel proposals, the site location, relationship to neighbouring uses, scale of accommodation and facilities proposed (the number of bedrooms and nature of other services the hotel offers) and highways and parking, will be taken into account. The Plan recognises the need to ensure a balance between hotel and residential uses so that they can all function well, while also ensuring a good quality of life for residents. It also acknowledges that particularly large or intensively used hotels may not be compatible within predominantly residential streets, because the amount of activity they generate can cause amenity problems.

Appendix 7 of the MNP sets out the objectives of its policies including Objective 4 which aims to 'support and enhance Mayfair as London's leading destination for high quality retail, art galleries, restaurants and hotels'.

Park Lane is characterised by commercial uses at ground floor level and is home to a number of large hotels including the Grosvenor House Hotel, which is located on the opposite side of Mount Street and the Dorchester Hotel, to the south. The provision of more hotel accommodation in Westminster is supported development plan policies and is considered appropriate in principle in this mixed-use location, close to the attractions of the West End and served by excellent transport links, subject to an assessment of its impact in amenity and highways terms."

12. Under a sub-heading, "Proposed use and impact on amenity", Mr Streeton referred to the section of the OR on policy MPL3 of the MNP:

"Objectors also refer to Policy MPL3 of the Mayfair Neighbourhood Plan, which states that in order to transform Park Lane, 'development proposals brought forward by sites which front onto Park Lane' must 'enliven the street scene and activate building

> frontages by introducing new retail, cultural, or leisure uses'. Objectors believe that the proposal does none of these things and that 'the applicants' suggestion that the proposal will have the effect of 'enlivening the street scene and activating the building frontage, through locating the main entrance and reception of the hotel onto Park Lane' is worse than tenuous. The proposal will not activate the frontage here. It will de-activate it, removing from it the interest provided by the existing car show room. The proposal is contrary to policy MPL3.' Officers do not agree with this interpretation – although not a retail, cultural or leisure use referred to in Policy MPL3, it is considered that the 160 hotel reception in this location is likely to provide a more active frontage than a car showroom."

13. The OR went on at length to deal with other amenity matters, a variety of other topics and a long section on "Residential Amenity", none of which was referred to by Mr Streeton. The OR concluded that:

> "The proposal is acceptable in land use terms and subject to appropriate conditions is considered acceptable in terms of its impact upon the amenity of neighbouring occupiers and local environmental quality."

The OR recommended that planning permission be granted.

14. The claimant instructed a planning consultant, Alfie Yeatman, to act on its behalf who spoke at the meeting of the Council's Planning Committee on 9 July 2024 which considered the planning application. The planning officer said during the course of his presentation:

> "Arguments about the office accommodation being standalone use and therefore this proposal being contrary to that in terms of the loss of that use are not accepted by officers as they were clearly part of the showrooms and ancillary to the showroom and its use."

15. The officer also referred to some late representations from the claimant. Mr Yeatman spoke about a number of matters relating entirely to residential amenity. He made no observations about land-use matters.

16. The committee accepted the OR's recommendation and resolved to grant planning permission. The Decision Notice is dated 15 July 2024.

Grounds of challenge

17. There are three grounds of challenge. On 7 October 2024, permission was granted on ground 1 by Karen Ridge, sitting as a Deputy High Court Judge, but she refused permission on grounds 2 and 3. The claimant renewed the challenge on those two grounds and, on 23 October 2024, Tim Corner KC, sitting as a Deputy High Court Judge, ordered that the renewed challenge should be considered at a rolled-up hearing with a substantive hearing on ground 1.

18. The Permission is said to be unlawful for the following reasons:

(1) The Council conflated the test for the planning unit with the test for whether the use of that unit was a mixed use. The Council has erred in law in this regard, including by misunderstanding the relevant legal test, reaching a decision involving a logical gap or leap of reasoning, failing adequately to explain its conclusion on this issue and/or misinterpreting Policy 13 of the City Plan.

(2) The Council misinterpreted or irrationally applied development policies protecting the existing retail use of the Site, including London Plan Policy SD4, City Plan Policies 14 & 15 and policy MPL3 of the Mayfair Neighbourhood Plan.

(3) The Council failed to include the applicant's "response" to objections from members of the claimant as a background paper contrary to section

100D of the 1972 Act or otherwise to provide the claimant with the opportunity to review or comment upon that document.

Legal principles

19. There is no dispute as to the law which applies to a challenge to the grant of planning permission.

20. Planning applications must be determined in accordance with the Development Plan unless "material considerations" indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990).

21. Planning decisions will be open to challenge if they disclose a failure to have regard to a policy in the Development Plan which is relevant to the application, or a failure properly to interpret a relevant policy (see: *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, per Lord Clyde, at p. 1459). While the correct interpretation of planning policy is a matter of law for the Court, the application of the provisions of a Development Plan to a given set of facts will often require the exercise of planning judgment, which is a matter for the decision maker, subject only to challenge on the grounds of irrationality or perversity (see: *Tesco Stores Ltd v Dundee County Council* [2012] UKSC 13; [2012] PTSR 983, per Lord Reed at [18]-[19]; and *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610; [2018] 2 P. & C.R. 9, per Lindblom LJ at [16]).

22. The principles on which the Court will act when criticism is made of an officer's report to a planning committee are well settled: *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, per Lindblom LJ at [42]). In particular:

    (1) Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of

Baroness Hale of Richmond JSC in *R (Morge) v Hampshire County Council* [2011] PTSR 337, para 36 and the judgment of Sullivan J in *R v Mendip District Council, Ex p Fabre* [2017] PTSR 1112 at 1120.

(2) Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v Herefordshire Council* [2017] 1 WLR 411 at para 7.

(3) The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(4) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example, *R (Loader) v Rother District Council* [2017] JPL 25), or has plainly misdirected the members as to the meaning of a relevant policy: see, for example, *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43 . There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law: see, for example, *R (Williams) v Powys County Council* [2018] 1 WLR 439. But, unless there is some distinct and material defect in the officer's advice, the court will not interfere.

23. In establishing whether a local planning authority's decision making has been vitiated by an error of law, the Court will review the decision with realism and common sense, avoiding an excessively legalistic approach. It will not focus on the precise phrasing of individual sentences or paragraphs in an officer's report, without seeking their real meaning when taken in context (see: *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92, per Lindblom LJ at [37]).

24. Mr Parker indicated that the Council is prepared to accept, for the purpose of this decision, that it was required to give reasons for its decision. The standard of reasons required was as set down by Lord Brown in *South Buckinghamshire District Council v Porter* (No.2) [2004] UKHL 33, [2004] 1WLR 1953 at [36] (see the discussion *in Watton v Cornwall Council* [2023] EWHC 2436 (Admin.) at [24] – [29]).

25. The duty in *Porter* is to provide reasons in respect of the main issues. A decision maker does not need to rehearse every argument relating to each matter. The duty to give reasons does not extend to explaining how each conclusion on each issue has been reached; there is not a duty to give reasons for reasons: *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing And Communities & Ors* [2023] EWHC 2842 (Admin.) at [68].

Ground 1

26. Mr Streeton submitted that, when advising that the lower ground floor offices were ancillary to the car showroom use, the Council made an error of law by applying the wrong legal test. As a result, the OR wrongly advised that there was no conflict with City Plan Policy 13D which resists the loss of office floorspace:

> "The net loss of office floorspace from the CAZ: 1…; 2. to hotel use will only be permitted where there is no interest in its continued use for office or any other Class E (commercial, business and service) uses education or community use, as demonstrated by vacancy and appropriate marketing for a period of at least 12 months."

27. The claimant objected to the development on the grounds that the nature and extent of the office provision goes beyond that which could properly be described as ancillary. If that was correct, the Site was in a mixed or a dual use and loss of the office floor space would be contrary to Policy 13 D.2.

28. Specifically, Mr Streeton submitted that the OR referred to and applied the test in *Burdle v Secretary of State for the Environment* as to whether the offices fell within the same planning unit as the car showroom, as opposed to considering whether the nature and extent of the office use was incidental in type and scale to the primary use such that it could legitimately be said to form part of that use which, he submitted, is the test for determining whether one use is ancillary to another.

29. In *Burdle*, Bridge J said at p.1212 (that reference is to WLR 1972):

> "What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.
>
> First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from G. Percy Trentham Ltd. v. Gloucestershire County Council [1966] 1 W.L.R. 506 , where Diplock L.J. said, at p. 513:
>
> 'What is the unit which the local authority are entitled to look at and deal within an enforcement notice for the purpose of determining whether or not there has been a 'material change in the use of any buildings or other land'? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a

particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose'.

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."

30. Mr Streeton submitted that the test in *Burdle* applied by the OR was that the unit of occupation should be considered the planning unit unless a smaller unit is recognised which is physically and functionally separate from the main use. By contrast, the test for whether one use is ancillary to another is not just a question of whether there is a functional connection between the two. It had to be shown that one use is incidental to the primary use. As he put it, a functional connection is a necessary but not sufficient condition for a use to be ancillary. The OR dealt with functional connection but omitted going on to consider whether the office use was incidental to the car showroom use.

31. In support of that submission he relied upon three authorities.

(1) In *Trio Thames v Secretary of State for Environment and Reading BC* [1984] JPL 183, it was held that use of a building as a restaurant and nightclub, between which patrons could move freely, was a mixed night club and restaurant use. It was not a primary restaurant use with ancillary dancing facilities. Plainly, there was a functional connection between the two.

(2) In *Lydcare Ltd v Secretary of State* [1984] JPL 809, the Court of Appeal held that the use of premises for viewing films in cubicles by feeding coins into automatic machines was not incidental to use as a shop, notwithstanding the functional connection between the two.

(3) In *Harrods*, the Court of Appeal held that the chairman of a department store landing a helicopter on the roof of that store to be able to come to and from work on Monday to Friday, whilst functionally connected to the running of those premises as a shop was not ancillary because it was not incidental in scale and kind (see para. 14). Indeed, in *Harrods* the Court of Appeal expressly rejected the submission on behalf of Harrods that planning permission was not required because "there was a functional connection between the new activity and the primary use" (see paras. 14 and 20 per Schiemann LJ).

32. As a result, Mr Streeton submitted that the Council had erred in law by applying the wrong test and had thereby failed properly to consider whether the office use was ancillary to the car showroom use or whether this case fell within Bridge J's

second example of a single planning unit with a composite or mixed use. He drew attention to the plans and submitted that the offices were substantial in scale and on the same footprint as the car showroom.

33. Mr Parker conceded that, if the Site was in a mixed use, rather than the offices being ancillary to the car showroom use, then the Development would involve a loss of office floorspace and Policy 13D would apply. However, he submitted that it was for the Council to determine, in the exercise of its judgment, whether the Development would lead to the loss of office floor space within the meaning of Policy 13 so as to engage the protection afforded by it.

34. He submitted that there is no dispute between the parties as to the proper interpretation of Policy 13. The protection afforded by it is only engaged where there is a "primary" office use (whether the only use or as part of a mixed/dual use) and not where the office use is merely "ancillary" to the primary use of the Site. The Council was required to exercise a judgment as to whether the Development would result in the loss of office floor space.

35. It was expressly noted in the OR that an objection had been made (by the claimant) that the existing use was not merely a car showroom, but rather a mixed use comprising a car showroom and office use, thus engaging Policy 13. That objection was dealt with in detail in the OR. It is tolerably (i.e. "sufficiently" by reference to the principles in *Porter*) clear from the officer's report that the Council rejected the claimant's assertion that the application Site was previously in a mixed use, including an office use, and determined the application on the basis that the Site was previously in use as a car showroom to which the small area of office space on the lower ground floor was ancillary.

36. That the Council approached the application in this way is evident, not least, Mr Parker submitted, from the fact that the OR refers to the office building being used in connection with the display and sale of cars and to the fact that the office was "not functionally separate to the main use." (Mr Parker's emphasis). The only sensible way to read this part of the report is to understand it to mean that the office was identified, in the exercise of the Council's judgment, to be part of the same planning unit as the car showroom and ancillary to "the" "main" use (i.e. the only main use) as a car showroom, such that the protection afforded by Policy 13 to office uses was not applicable to the application.

37. Mr Parker submitted that the claimant's submissions were devoid of reality: why would BMW have offices below a car showroom if not to use them, together with the car showroom? The claimant was searching for legalistic errors rather than trying to understand the meaning of the OR in context.

38. To the extent that there was any ambiguity in the OR, Mr Parker submitted that such ambiguity was resolved by way of the advice given orally to members of the sub-committee at the meeting by the planning officer, where it was made clear that:

> "Arguments about the office accommodation being standalone use and therefore this proposal being contrary to that in terms of the loss of that use are not accepted by officers as they were clearly part of the showrooms and ancillary to the showroom and its use."

He submitted that the Council's judgment that Policy 13 was not applicable was plainly open to the Council in the circumstances. It was not irrational. The *Porter* standard of reasoning only required reasons to be given for the main issue arising, namely whether Policy 13 was applicable to the application. The Council gave reasons to explain why Policy 13 was not applicable, namely that the application Site was previously in use as a car showroom and would not involve the loss of the office floorspace. The *Porter* standard of reasoning did not thereafter require the Council to provide reasons as to how this conclusion had been reached (i.e. why the Council found the previous use of the application Site to be a car showroom, rather than a mixed use). Such a requirement would amount to a requirement to give reasons for reasons, which is beyond the scope of the duty imposed by *Porter* (see *Bramwell Solar Farm*). Even if the Council was required to descend to that level of reasoning, the reasons for the Council's judgment on this issue are clear, namely that the Council found that the "main use" of the application Site had been as a car showroom whereas the office use, such as it was, was not the "main use", with the consequence the previous use of the Site was as a car showroom to which the office space was ancillary.

39. Mr Parker submitted that the authorities relied upon by Mr Streeton take the analysis no further. They are all cases which were concerned with the scope of

permitted uses in planning terms. There was no misunderstanding of the principles in *Burdle* and the report does not conflate the identification of the planning unit with the identification of the previous use of the Site. There was no gap in logic or reason and the reasons given for the Council's findings were adequate.

40. Mr Taylor referred to the claimant's objection to the Development on this issue:

> "As the Applicant makes clear, the current use of the Site is sui generis, with the display of motor vehicles on the ground floor and offices on the lower ground floor. The Applicant is wrong, however, to suggest at para. 2.2 of its Planning Statement that these offices are simply to be regarded as ancillary to the showroom. The nature and extent of the office provision goes beyond what could properly be described as ancillary. The use is a dual use (see *Trio Thames Ltd v Secretary of State* [1984] JPL 183). That is important, given the protection given to office space under the Westminster City Plan…. …the current use of the site includes office use, and the current retail use as a car showroom is a main town centre use, such that it is simply wrong to argue that the proposal does not involve the loss of a use protected by policy (c.f. Planning Statement para. 4.8)."

41. Mr Taylor submitted that it can be seen that the claimant asserted that the Site was in a dual use since the office use was not ancillary to the car showroom use but adduced no evidence relating to the alleged lack of functional connection of the office use to the car showroom use. Further, the claimant asserted that the dual office use/car showroom use that it identified was a retail use and thus a main town centre use for the purposes of planning policy.

42. Mr Taylor referred to *Burdle* and submitted that the question of whether a site was in a dual use is a question of fact and degree for the decision maker. A dual/mixed or composite use is one where:

    a. There is no physical separation within the unit of occupation; and

b. It is not possible to say that one use is ancillary to the other i.e. there is a lack of functional connection.

He submitted that a dual use arises where there is no physical separation of either of two uses and where each use has reached a point where it has lost its functional connection to the other to such a degree that it can be judged to be without any ancillary link to the other use. Whether that is the case is a question of fact and degree for the planning decision maker, challengeable only on rationality grounds.

43. Mr Taylor submitted that the claimant had misread and misunderstood the cases of *Trio Thames, Lydcare* and *Harrods*. Properly understood, they consider whether there is a functional connection between two uses such that one can be said to be ancillary to the other. A use which is not functionally separate retains its ancillary link.

44. He submitted that the key questions the Council had to resolve in applying Policy 13 and determining the application for planning permission were:

a. Was the office element of use physically separate from the car showroom element of use? (Question A)

b. If not, is there any evidence that any part of the office element of use was functionally separate from the car showroom element of the use? (Question B)

c. If so, has the office element of use reached a point where it has lost its functional connection to such a degree that it is no longer ancillary to the car showroom element of the use? (Question C).

45. If the answer to Question B is that there is no evidence that any part of the office element of use was functionally separate from the car showroom element of the use, then a dual use cannot arise and there is no need to go on to consider Question C. A dual use could only arise if the answer to Question A is no, Question B is yes and Question C is yes.

46. He submitted that the claimant provided no evidence to the Council as to the actual nature of the use. It produced no evidence relating to Question A or Question B. In other words, it did not produce any evidence to demonstrate that any office element of the use was functionally unrelated to the car showroom element of use. The Claimant has not explained whether it asserts that an office element of the use was unrelated to any showroom use and, if so, the nature of such office use. The applicant's case, as set out in its Planning Statement in support of the application and its response to the objections, was that the office use was not functionally separate from the car showroom use.

47. Mr Taylor submitted that the analysis in the OR answered the questions he posed in this way:

> Question A – no, the office use was not physically separate from the car showroom use
>
> Question B – no, there is no evidence the office use was functionally separate from the car showroom use.
>
> Question C – as a result this did not arise for consideration since there was no evidence before the Council which could rationally found a conclusion that there was an element of office use which was not related to the car showroom use.

48. Mr Taylor submitted that the substance of the officer's reasoning is that there was no evidence of functional separation, such that the office element of use could be seen to be a separate use operating in its own right within the same planning unit as the car showroom use. In other words, the Council concluded that the offices

remained ancillary to the primary use of the Site as a car showroom and rejected the Claimant's assertion to the contrary.

49. Mr Taylor went on to make submissions as to the implications of the claimant's argument on the lawfulness of the uses of the Site. In the event, I do not need to address that.

50. Both Mr Parker and Mr Taylor also made submissions, relying upon s.31(2A) of the Senior Courts Act. Again, in light of my decision, it is not necessary to address those.

51. In my judgment, it is necessary to remember the whole purpose of establishing whether one use is ancillary to another or whether they constitute a dual (or composite) use is to determine what is "the use" of a site for planning purposes, so as to enable one to determine, in the event of any change, whether there has been a material change of use such that planning permission is required. Not surprisingly, when judging whether that exercise has been carried out lawfully, the approach of the courts has varied depending on the particular circumstances of the case.

52. This point was made very well by Schiemann LJ in *Harrods* at paragraph 20:

> "In my judgment, the proper approach to these cases by the local planning authority is to start by considering whether what is involved amounts to a material change of use. That is the statutory test. The case law reveals the application of that test to a variety of different situations. In the course of doing that different phrases have been used. I gave some examples in my judgment in Millington, which Sullivan J. cited in the present case. But it would be wrong to substitute some phrase from one or other judgment for the statutory formula. Those phrases are merely an aid to judicial exegesis."

53. That is reflected in the way the matter is put in the three authorities relied upon by Mr Streeton. *Trio Thames* concerned the interpretation of a planning permission for "restaurant with dine and dance facilities." The site was being used as a night club and restaurant. The appellants conceded that there was a mixed use. The only question was whether it was a use which fell within the planning permission, properly interpreted. The outcome was that leave to appeal against the Secretary of State's decision was granted on the grounds that "there might be cases where, on questions of fact and degree, the Secretary of State might take the view that, even though there was a mixed use, it could be carried on under a planning permission for a single, primary use." (p.185)

54. During the course of his judgment, Forbes J said, "the term 'mixed use' described the situation where within one planning unit two uses, functioning separately, were being carried on and neither use could properly be regarded as being ancillary to the other", p.184 (my emphasis). At other points in the judgment Forbes J referred to whether the two uses were different in character, p.184. Thus, different phrases were used to assist in trying to establish whether the mixed use was permitted by the planning permission and one of them was whether the uses were functioning separately.

55. In *Lydcare*, premises were previously used as a shop. At some stage, the basement began to be used also for the viewing by customers of films in coin-operated booths. The Secretary of State concluded that "the view is taken that the installation and continuing provision of these facilities constitute a separate main use of the premises" (p.189). It was argued that was wrong in law because the premises remained used as a shop within the relevant use classes order.

56. In *Lydcare*, it was also conceded that the new use was a mixed use which constituted a material change of use. The issue was whether the new mixed use fell within the relevant use classes order. In holding that it did not, the court held that the premises had a mixed use for (a) retail trade, which was a shop use, and (b) a non-retail trade use, which was not a shop use, namely the viewing of films, per Sir John Donaldson at p.194 and Slade LJ at p.195. I accept Mr Taylor's submission that, underlying that analysis, was that there was no functional connection between the viewing of films and a shop: the viewing of films was not a shop use.

57. As I have already said, in *Harrods* the Court referred to different ways in which the test as to whether a use was ancillary could be put. The Secretary of State had concluded that:

> "… the way in which [the chairman of Harrods] chooses to achieve his attendance is considered to be much more related to the needs or requirements of the store owner than to the purposes of the main retail use of the store, in that the helipad would not support or facilitate that main use and it does not directly represent part of the trading activities of the store".

In other words, there was no functional connection between the uses.

58. The Court of Appeal quoted, with approval, passages from the judgment below of Sullivan J, including para. 97:

> "The ancillary use principle was developed by the courts as a response to practical realities on the ground: the factory containing administrative offices; the car park associated with the office building; the storage area associated with the shop. It gives the occupier a valuable measure of flexibility to respond to changing needs. But restricting that degree of flexibility to ancillary uses which are 'ordinarily incidental' to the primary use of the planning unit as a whole does not prevent the introduction of the extraordinary, or the unusual. It merely subjects it to the need to apply for planning permission".

This, again, emphasises the objective of the development of the "ancillary use" principle, namely for the purposes of deciding whether a material change of use has occurred.

59. The Court also referred to the decision in *Hussain v Secretary of State for the Environment* [1971] 23 P&CR 330, where a greengrocers and butchers shop catering for the Muslim community started keeping and slaughtering chickens. Lord Widgery CJ said this, in relation to the Secretary of State's decision, that there had been a material change of use:

> "If I had to make the decision myself, I should without hesitation have reached the same conclusion: that the introduction of this new and additional activity, very considerable in volume, was quite enough on its face to produce a material change in the use of the premises as a whole."

In my judgment, this again focuses on a lack of functional connection between the new and former use, as well as questions of scale.

60. After para.20, in which Schiemann LJ had referred to different phrases being used to ascertain whether a material change of use had occurred, he went on to say in para.22:

> "It is important to emphasise that when a shop owner wants to introduce an activity which is reasonably incidental to the running of his shop but which is not reasonably incidental to the running of most shops, he is not necessarily introducing an activity which will produce a material change of use. That is a matter of fact and degree which can be evaluated without reference to the Use Classes Order. … The judge was right to reject Mr Roots' approach. It is not appropriate to concentrate on what is incidental to this particular shop, given the way it is run, and given its needs. The right approach is to see what shops in general have as reasonably incidental activities. And the reason that is the right approach is, in my judgment, the reason given by Mr Sales. Planning is concerned with balancing the interests of the community with the interests of the landowner--and one of the things one seeks to avoid is having too much regulation--but on the other hand another thing one seeks to avoid is giving the opportunity to bypass a careful scrutiny of activities which do impact severely (or can do) on neighbours."

61. Sedley LJ put it this way in para.27: "The sole question, accordingly, is what activities legitimately form part of the extant shop use?" Both of these passages focus on whether there is a functional connection between the two uses.

62. Having regard to the analysis in the authorities to which I have referred, I do not consider that the planning officer was wrong to address the issue of whether the offices were ancillary to the car showroom use by reference to their functional connection. In contrast to *Lydcare, Hussain* and *Harrods*, there was no suggestion that, in principle, offices were not a use which was ordinarily incidental to a car showroom use; that issue simply did not arise on the facts of this case.

63. Mr Streeton referred to the size of the offices on the lower ground floor. However, it is far from clear that they occupy a large area compared to the car showroom. The ground floor and part of the basement was used for the display of vehicles and the rest of the basement was used for the storage of vehicles. In any event, the planning officer can be taken to be fully aware of the Site and the scale of its various uses.

64. The OR stated:

> "the office was used in connection with the area of the unit used for displaying and selling cars at ground level, which is a typical setup for a car showroom and so is not functionally separate to the main use."

That this passage related to the question of whether the offices were ancillary is confirmed by the officer's remarks to the Committee

65. Once the officer had decided, as a matter of fact and degree, that there was no functional separation between the two uses, he was perfectly entitled to find that the office use was ancillary as well as being part of the same planning unit.

66. On that basis, the advice to members that there was no objection to the loss of the office space was a conclusion open to the planning officer. There was no error of law and no failure to give adequate reasons.

67. For all these reasons I conclude that ground 1 fails.

Ground 2

68. Mr Streeton submitted that the Council misinterpreted a number of policies, namely London Plan Policy SD4, City Plan Policies 14 and 15 and Policy MPL3 of the MNP. It is convenient for me to deal with the policy arguments and my conclusions on each of them in turn.

London Plan Policy SD4

69. Policy SD4 provides so far as material:

> "F. The vitality, viability, adaptation and diversification of the international shopping and leisure destinations of the West End (including Oxford Street, Regent Street, Bond Street and the wider West End Retail and Leisure Special Policy Area) and Knightsbridge together with the other CAZ retail clusters including locally-oriented retail and related uses should be supported."

70. Mr Streeton submitted that London Plan Policy SD4 is entitled "The Central Activities Zone" and paragraph F seeks specifically to protect "retail clusters", including specialist clusters, within the CAZ. That is consistent with the strategic functions of the CAZ which the supporting text makes clear includes retailing, including specialist outlets of regional, national and international importance. One such cluster is the cluster of high-end car show-rooms on Park Lane. Loss to hotel use of such a showroom, as part of the cluster in this location, is contrary to that policy.

71. The Council wrongly held that sui generis retail uses did not benefit from the protection given to retail uses by policy SD4 of the London Plan. The OR asserts that the existing use of the Site as a car showroom is not protected by any development plan policy because there is no explicit reference to car showrooms within either the London Plan or the Westminster City Plan. He submitted that is

wrong. As a retail use, use as a car showroom is protected by policies which protect retail uses whether they fall within Class E or not. Indeed, the London Plan is clear that the purpose of Policy SD4 is to protect "niche retailing" clusters. Rather than mention the nature of every conceivable "niche", the Plan protects the clusters as a matter of principle. Just because a car-showroom is a sui generis use does not mean that it is not a retail use protected by relevant development plan policy.

72. In holding that the policies in the development plan that protected retail use did not protect sui generis retail uses such as car showrooms, even where those uses formed part of a historic cluster of niche retailers (in the case of Park Lane the cluster being the agglomeration of high-end car retailers resulting from the historic significance of Park Lane as an arterial route), he submitted that the Council misinterpreted Policy SD4. As a result of this misinterpretation, it failed to afford the Site the protection required as a retail cluster. That was an error of law.

73. Mr Parker submitted that the Council expressly considered, and rejected, in the exercise of its judgment, the assertion that the existing car showroom was part of a "retail cluster" within the meaning of London Plan Policy SD4(F). The reasons for that judgment were set out in the officer's report. It was open to the Council, in the exercise of its judgment, to find that the car showroom was not part of a retail cluster on the basis that, although car showrooms have a retail function, they are very specialist and it is for that reason they are classified as sui generis rather than classified with usual retailing activities within Class E (a) for the display or retail sale of goods. Neither the London Plan nor the City Plan have any policy specifically to protect car showrooms.

74. He submitted that the Council's judgment did not involve any arguable misinterpretation of policy, nor was it arguably irrational.

75. Mr Taylor submitted that the London Plan provides further elaboration in relation to CAZ retail clusters:

a. At para.2.4.12 (c) "CAZ retail clusters" are defined as "significant mixed-use clusters with a predominant retail function and in terms of scale broadly

comparable to Major or District centres in the London Plan town centre network (see Annex 1)."

b. Within Annex 1 of the London Plan, Table A1.1 classifies London's larger town centres into five categories: International, Metropolitan, Major and District centres, as well as CAZ retail clusters.

c. Table A1.1 identifies CAZ retail clusters in locations all over London but does not identify any such cluster in the Park Lane area.

d. At para.2.4.12 (e) of the London Plan "Specialist retail destinations/clusters" is defined as including for example Covent Garden, arcades, street markets, covered and specialist markets, niche retailing, and retail and related facilities that serve specific communities (see Policy E9 Retail, markets and hot food takeaways).

e. There is no CAZ Cluster nor any specialist cluster marked on Figure 2.16 of the London Plan in the Park Lane area and see the list of specialist clusters.

f. The Westminster City Plan does not define this area as a specialist retail cluster.

Accordingly, he submitted that Policy SD4 is not a protective policy in relation to retail, as alleged by the Claimant; rather, it is a policy that "The vitality, viability, adaptation and diversification" of defined centres including identified CAZ retail clusters and specialist destinations/cluster should be supported. The Park Lane area is not within such a CAZ retail cluster nor any identified specialist retail cluster. Further, Policy SD4 supports adaptation and diversification of such clusters, in any event.

76. In my judgment, the claimant's argument fails. Both the claimant and the Council's written submissions have overlooked that the phrase "CAZ retail

clusters" in Policy SD4F is a term defined in the London Plan: see para.2.4.12.c and Annex 1 as applying to specific defined areas of which Park Lane is not one. Accordingly, Park Lane is not a "CAZ retail cluster" and this part of Policy SD4F simply does not apply.

77. In his oral submissions, Mr Streeton relied upon other retail centres referred to in para.2.4.12 of the London Plan. However, paras.2.4.12.d and 2.4.12.f refer to retail centres or clusters that are either "locally defined" or "defined in Local Plans", neither of which applies to Park Lane. As to sub-para.2.4.12.e, specialist retail destinations/clusters, I accept the submissions of Mr Parker and Mr Taylor that, where the policy leaves it to the judgment of the local planning authority as to whether a particular area falls within this definition, the OR was entitled to advise that:

> "officers are of the view that although car showrooms have a retail function, they are very specialist and it is for that reason they are classified as sui generis rather than classified with usual retailing activities within Class E (a) for display or retail sale of goods. Neither the London Plan nor the City Plan have any policy specifically to protect car showrooms – and in fact make no mention of them at all."

That was a matter of planning judgment for the Council and there is no arguable case that it was a judgment to which the OR and Council were not entitled to come.

78. Insofar as Mr Streeton relied upon the reference in Policy SD4F to support "locally orientated retail and related uses", in my judgment, the same applies.

City Plan policies 14 and 15

79. Mr Streeton submitted that Westminster City Plan Policy 15 is entitled "Visitor economy" and is clear as to where new hotel development should be directed.. Policy 15.G states that:

"New hotels and conference facilities will be directed towards:

1. commercial areas of the CAZ; and

2. town centres that are District Centres or higher in the town centre hierarchy"

80. Under Policy 15.G(1), new hotels will be directed to "commercial areas". This does not include mixed-use areas – which is how the Council characterised the area in which the Site is located.

81. That contrasts with other policies in the City Plan, including (for example) Policies 13.A(1) and 14.G, which refer to "commercial or mixed-use" areas together. Under Policy 15.G, only if the area in which the Site falls is commercial (as opposed to mixed use) will it comply with 15.G(1). Read fairly and as a whole, the spatial strategy in the City Plan is to direct hotel development to commercial-use areas specifically. The necessary corollary of that is to direct hotels away from other areas (such as mixed-use neighbourhoods). The correct interpretation of Policy 15.G, therefore, is that hotels are only acceptable in commercial areas, and not commercial or mixed-use areas.

82. The OR's conclusion that "the provision of more hotel accommodation in Westminster is supported by development plan policies and is considered appropriate in principle in this mixed-use location" is, thus, a misinterpretation of Policy 15.

83. Mr Parker submitted that the Council expressly considered whether the proposed hotel use was acceptable in this location having regard to the nature of the locality and by reference to relevant development plan policies, which include not only Policy 15 of the City Plan but also Policy 14.

84. The Council expressly noted the content of the Policy 15 in the OR and, in particular, the fact that it directs new hotels to specific locations, including commercial areas of the CAZ. Any suggestion that the Council failed to take this policy into account or otherwise misinterpreted it is unarguable.

85. However, in deciding that the principle of the use was acceptable in this location, the Council also had in mind Policy 14 which is directed, among other things, to the types of uses that will be acceptable in the CAZ.

86. He submitted it was open to the Council to find that the proposed use was acceptable, in principle, by reference to Policy 14G, which provides that town centre uses will be supported, in principle, throughout those parts of the CAZ with a commercial or mixed-use character, having regard to the existing mix of land uses and neighbourhood plan policies.

87. In that regard, the Council considered the existing mix of land uses and relevant neighbourhood plan policies. The OR noted the definition of "commercial neighbourhoods" within the City Plan Glossary as being those areas where the majority of ground floor uses comprise a range of commercial activity and the Council determined, in the exercise of its judgment, that the Site was in a commercial or mixed-use area. There was no misunderstanding of policy in that finding, which was a matter of planning judgment. The judgment reached by the Council was not arguably irrational.

88. Mr Taylor submitted that this ground proceeds on the basis that, since the Council concluded that the Site falls within a mixed-use area, ”it was not open to the Council to find (as it did) that the proposal accorded with Policy 15G(1).”

89. He referred to the explanatory text to policy 15 which states:

> “15.13 The CAZ is the centre of commerce and activity in London, served by excellent national and international public transport connections. It is therefore an appropriate location for hotels and conference facilities. Hotels and conference facilities may also be

> appropriate in all town centres (except local centres), where they enhance their role and function and there are no adverse impacts on the wider area, including on residential properties. When assessing proposals for new hotels, hotel extensions and conference facilities, we will take into account the site location, relationship to neighbouring uses, scale of accommodation and facilities proposed (the number of bedrooms and nature of other services the hotel offers), highways and parking…
>
> 15.14 There is a need to ensure a balance between hotel and residential uses so that they can all function well, while also ensuring a good quality of life for residents. Particularly large or intensively used hotels or conference facilities are often not compatible with predominantly residential streets, because the amount of activity they generate can cause amenity problems."

90. Thus, he submitted that the City Plan explains that the CAZ is an "appropriate location for hotels and conference facilities". The phrase "commercial areas of the CAZ" must be construed in the light of this indication that locations within the CAZ are appropriate for hotels. Further, the Plan is clear that there is an element of judgment to be applied in maintaining an appropriate balance between hotels and residential uses in any given location.

91. Mr Taylor referred to the passage in the OR which considers the character of the area in which the Site lay and the officer's conclusion that:

> "In practice therefore the site is considered to be located in a commercial or mixed use area, rather than in a location which is 'predominantly residential character'. This was accepted by the Planning Application Sub-Committee when considering the earlier application." (Mr Taylor's emphasis)

The OR continued:

> "Park Lane is characterised by commercial uses at ground floor level and is home to a number of large hotels including the Grosvenor House Hotel, which is located on the opposite side of Mount Street and the Dorchester Hotel, to the south. The provision of more hotel accommodation in Westminster is supportive of development plan policies and is considered appropriate in principle in this mixed-use location, close to the attractions of the West End and served by excellent transport links, subject to an assessment of its impact in amenity and highways terms."

92. Mr Taylor submitted that it can be seen that, read fairly and as a whole, the officer's report advised that the Site is within a commercial area within the CAZ which is also a mixed-use location. That was a matter of planning judgment for the Council having regard to the nature of the area. The judgment reached was not irrational.

93. I accept that submission. In my judgment, the claimant's approach to the officer's planning assessment of the Site's location is unduly legalistic. The officer carefully assessed the nature of the Site's location, recognising that Park Lane is characterised by commercial uses at ground level, but also that it is adjacent to the westernmost boundary of West Mayfair where there is a lot of residential development. The conclusion that the Site could be considered to lie in a commercial or mixed-use area (my emphasis) was a matter of planning judgment for the Council. The fact that the OR later refers to the Site line within a mixed-use area does not detract from the fact that it clearly states that the Site lies within a commercial area as well.

94. Given that para.15.13 of the explanatory text to Policy 15 expressly states that the CAZ is an appropriate location for hotels and that proposals for new hotels should take into account site location, neighbouring uses and other factors, this approach was entirely in accordance with policy. Furthermore, the officer has concluded that the Site could be considered to be in a commercial area of the CAZ which is the location to which Policy 15 directs hotel development. The fact that other policies apply to commercial and mixed-use areas does not detract from the officer's planning assessment of the character of the area in which the Site falls. Nor does it support Mr Streeton's interpretation of Policy 15G, namely that it only applies to locations which are "commercial areas" and cannot properly also be described as "mixed use areas."

95. In my view, this part of ground 2 is also wholly without merit.

Mayfair Neighbourhood Plan policy MPL3

96. Policy MPL3 of the Mayfair Neighbourhood Plan is entitled "Park Lane's Public Realm & Street Frontage'. It provides that:

> "Development proposals brought forward by sites which front onto Park Lane and which enliven the street scene and activate the building frontages by introducing new retail, restaurant, cultural or leisure uses will be supported, subject to addressing amenity and highways concerns" (claimant's emphasis)

97. Mr Streeton submitted that the OR misinterpreted this policy, concluding that the Development is supported by MPL3 notwithstanding that it also accepts the Development is "not a retail, cultural, or leisure use". Had the OR properly understood Policy MPL3, the Council would have been bound to find a conflict with the policy given the acceptance that a hotel is not one of the permitted uses.

98. Mr Streeton also submitted that this results in a conflict with Westminster City Plan Policy 14, entitled "Town centres, high streets and the CAZ", which makes clear that town centre uses in parts of the CAZ with either a commercial or a mixed-use character must have regard to neighbourhood plan policies. Policy 14.G provides that:

> "Town centre uses will also be supported in principle throughout the parts of the CAZ with a commercial or mixed-use character, having regard to the existing mix of land uses and neighbourhood plan policies."

99. He submitted that, given the Council were bound to have found conflict with MPL3 because hotel use is not a permitted use, it follows that the Council were bound to find conflict with Policy 14 as that only allows for support for town centre uses that, inter alia, have regard to neighbourhood plan policies.

100. Mr Parker submitted that the OR set out the terms of the policy, including the requirement that development proposals should "enliven the street scene and activate building frontages by introducing new retail, cultural, or leisure uses." There can be no sensible suggestion that the Council misunderstood the policy. It was, thereafter, open to the Council to reach the judgment that a hotel reception in this location was likely to provide a more active frontage than a car showroom, even though the Development was not a retail, cultural or leisure use, and to find that the Development was acceptable on that basis. The Council did not arguably misinterpret Policy MPL3, it merely exercised a planning judgment as to the acceptability of the Development, having regard to the particular circumstances of the application.

101. Mr Taylor submitted that the applicant's case was that the proposal would meet the aims of Policy MPL1.3 by enlivening the street scene and activating the building frontage, through locating the main entrance and reception of the hotel onto Park Lane. He referred to the passage in the OR dealing with this issue and, in particular, to the conclusion:

> "Officers do not agree with this interpretation – although not a retail, cultural or leisure use referred to in Policy MPL3, it is considered that the hotel reception in this location is likely to provide a more active frontage than a car showroom."

102. Mr Taylor submitted that Development Plan policies are to be construed sensibly and with their policy objective in mind. The objective of Policy MPL3 is to enliven the street scene and activate frontages on Park Lane. The Policy cannot reasonably be construed as meaning that only the specific uses listed can achieve that objective. Further, a reasonable reader would construe Policy MPL3 as a positively-worded policy; proposals which enliven and activate building frontages "will be supported". Thus, if a proposal meets that policy objective, it obtains the support of that policy. Policy MPL3 does not state that proposals

which do not provide “retail, restaurant, cultural or leisure uses” fronting onto Park Lane are to be refused.

103. It was then a question of judgment for the Council as to whether the Development would meet the policy objectives of Policy MPL3 or not. The Council determined that the proposed Development would provide a more active frontage that the existing use as a car showroom and so it gained the support of Policy MPL3. That was a judgment that was reasonably and rationally open to the Council.

104. In my judgment Mr Taylor’s submissions are correct. Policy MPL3 is headed "Park Lane’s Public Realm & Street Frontage”. The reasoned justification includes the following (I take this from the adopted plan not the draft version contained in the court bundle):

> “3.2.16 Transformational change to Park Lane is the Forum’s priority in this location. However, we recognise that in the short term, enhancements can quickly be made, while proposals for transformational change are worked up. Subject to the availability of funds, further improvements can and should be made to existing crossings, and public realm in Park Lane in its [existing] manifestation. Subways, whilst most likely removed in the transformational change scenario, could be improved in the short term.
>
> 3.2.17 The public realm on the east side of Park Lane is both poor and dangerous. Pavements are inadequate in terms of width and quality. Air quality is poor – identified to be some of the worst in the country. Traffic moves very fast alongside. The issues are most pressing in the northern part of Park Lane, but apply with great force along its entire length. It is a dispiriting place to walk, and dissuades all but the most hardy pedestrians from traversing north to south, let alone east to west.
>
> 3.2.18 The opportunity for improvements are obvious: the existing conditions are a long way from an 'attractive and safe pedestrian

environment' with priority given to walking; they are a long way from having the negative impact of traffic minimised.

3.2.19 Understandably, many of the nationally significant hotels along Park Lane have turned their backs on the street. Even main entrances to the hotels, such as the Grosvenor House Hotel, feel unsafe, requiring parking on Park Lane itself."

105. In my judgment the entire focus of this section of the Neighbourhood plan is on improving the environment of Park Lane. Insofar as it deals with land uses, it is in that context. The object of supporting retail, restaurant, cultural and leisure uses is to improve the public realm, not by virtue of the acceptability of those land uses per se but because of their effect on the environment. That is contrasted in para.3.2.19 with the hotels which "have turned their back on the street".

106. If the proposed hotel is an acceptable land use in this location, which the officer advised that it was, then the key issue so far as the MNP was concerned is whether it would "enliven the street scene and activate the building frontages." That was a question of planning judgment for the Council. The purpose of MPL3 is not to thwart proposals which in land use terms are otherwise perfectly acceptable, rather to ensure that they improve the environment in the way in which the Policy describes. The Council was entitled to conclude that "the hotel reception in this location is likely to provide a more active frontage than a car showroom" and to reject the claimant's argument that the proposed development was contrary to Policy MPL3.

Ground 3

107. Mr Streeton submitted that the Council failed to include the applicant's "response" to objections from members of the Residents' Association as a background paper, contrary to section 100D of the 1972 Act, and failed otherwise to provide the claimant with the opportunity to review or comment upon that document.

108. The 1972 Act ss. 100A to 100D applies to meetings of councils and their committees (s. 100E(1)). By s. 100B(1), the agenda and any report for a meeting shall be "open to inspection by members of the public at the offices of the council".

109. Where the whole or part of a report has to be made available for inspection, then the background papers relied upon in preparing that report must also be made available for inspection (s. 100D(1)). Section 100D(4) defines background papers as:

> "those documents relating to the subject matter of the report which—
>
> (a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and
>
> (b) have, in his opinion, been relied on to a material extent in preparing the report, but do not include any published works."

110. Mr Streeton submitted that the provision of background papers is of fundamental importance because it not only informs the public about the decision-making process, but also enables them to make informed representations: *R (Joicey) v Northumberland County Council* [2014] EWHC 3657 (Admin.) at [47]. If there is a breach, the decision maker must show that the decision would inevitably have been the same had it complied with its statutory obligation to disclose information: *Joicey* at [51].

111. Mr Streeton submitted that the applicant's response to the claimant's objections was clearly a background paper that should have been disclosed. If it had been, the claimant and other objectors would have been in a better position to make informed representations on the applicant's case concerning the use of the Site, including assisting the Council in understanding the test for a mixed use. By failing to make the response available prior to the planning committee meeting,

the Council denuded the claimant and other objectors of their right to make sensible contributions in their oral representations at the meeting.

112. On this point, he relied upon a witness statement dated 3 December 2024 by Mr Yeatman, the claimant's planning consultant, who spoke on their behalf at the planning committee meeting. Mr Yeatman stated:

> "10. In preparing my address to the members, I referred to the committee report prepared by officers, recommending approval of the application. Within this report, there are numerous references to the applicant's position on several key elements. For instance, regarding the planning use of the property and whether there was an existing office use which would trigger City Plan policy on the loss of office use. On those issues, I did not agree with the analysis put forward by the applicant.
>
> 11. Given there was no evidence of such on the Council's planning register, I was not aware that the applicant (or the applicant's planning agent) had provided a comprehensive response on the key policy matters. Whilst I was aware of the reference to the "applicant's response" on the planning unit in the officer's report, I was not aware that this had taken the form of a detailed written document, upon which the Council had relied. Nor was I aware that the applicant had addressed the other policy issues upon which I proposed to make representations.
>
> 12. I have since been provided with a copy of a 'Response to Resident Objections' from the applicant's planning agent, dated January 2024. For the avoidance of doubt, I was not aware of this document's existence prior to the planning committee, nor or it being available for review.
>
> 13. Had such correspondence been made available, I expect I would have framed my representation to the committee in a different way. It is apparent that the committee report adopted many of the planning arguments from the Response to Resident

> Objections in how some of the key issues were presented to Members, particularly with regards to land use and amenity matters. Irrespective of the merits of the arguments being used, with which I did not agree, some of which are questions of law and others of which are matters of judgment which are, to an extent, matters for officers and Members to interrogate, at the very least, I would have liked to have made Members aware of how officers had appeared to have been influenced in coming to their conclusions."

113. Mr Streeton submitted that, if he had known about the applicant's response, Mr Yeatman would have put matters differently to the committee. On matters of substance, he would have wished to come back on the submissions relating to functional separation and why the offices were not ordinarily incidental to the car showroom. I note there is no evidence to that effect in Mr Yeatman's witness statement. Mr Streeton submitted that amounted to substantial prejudice and it was not for the court to say how that could have affected the members' decision.

114. Mr Parker submitted that, where a decision is challenged on the ground of non-compliance with a requirement of s.100D of the 1972 Act, the Court must consider two related aspects: (1) whether there has been substantial compliance; and (2) whether the claimant has suffered material prejudice as a result of a lack of substantial compliance. Both issues are fact-sensitive: per Dove J in *R (Worcestershire Acute Hospitals NHS Trust) v Malvern Hills DC* [2023] EWHC 1995 (Admin.) at [140]–[143].

115. He submitted that, even assuming that the applicant's "response" document fell within the scope of s.100D of the 1972 Act, there was no unfairness or material prejudice whatsoever to the claimant as a result of it not being able to review or comment upon it. The document related to issues that had been fully aired and considered in the application materials and addressed in detail by the claimant in its objection. Those issues were also fully aired and considered in detail in the officer's report. The claimant was not deprived of the opportunity of commenting fully on the issues addressed in the document (and the claimant did so in detail) and sight of the document would not have made any difference to the claimant's ability to comment meaningfully on those issues (despite the claimant's contention to the contrary).

116. At the time that the claimant issued the claim, all that was said by the claimant in its Statement of Facts and Grounds (at paragraph 71) is that the claimant was deprived of the "opportunity" of "assisting" the Council in understanding the concept of the planning unit. The claimant has subsequently adduced evidence in support of its position that it has been prejudiced but none of that evidence comes close to establishing the asserted prejudice.

117. Mr Taylor submitted that, even if it is assumed that the Response is capable of being a "background paper" for the purposes of section 100D of the 1972 Act, there has been substantial compliance in that the key elements of reasoning in the document appear in the OR, and so were disclosed. It is well-established that a claimant complaining about procedural unfairness needs to show that he has thereby suffered material prejudice (*Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49]). There is no such thing as a technical breach of the rules of natural justice (*George v Secretary of State for the Environment* (1979) 38 PC&R 609, 617).

118. Mr Taylor submitted the claimant has not identified that it has suffered material prejudice as a result of a lack of substantial compliance. Indeed, it has not presented any evidence to the Council or the Court relating to the use of the Site and no factual evidence relating to the alleged lack of functional connection between the office use and the car showroom use. Despite being professionally represented by a Chartered Town Planner, the claimant has not identified anything of substance that it would have raised with the Council, if it had seen the applicant's Response prior to the meeting, which was not set out in the OR and which would have been likely to alter the decision.

119. Further, he submitted the Claimant frames its material prejudice case by reference to the issues raised in Grounds 1 and 2 (see Claimant's Skeleton Argument paragraphs 105 to 107). As a result, if the Court concludes that the matters raised in Grounds 1 and 2 do not disclose any error of law, then these matters cannot give rise to any freestanding claim of prejudice.

120. In my judgment, the Council, rightly in my view, must have been satisfied that the test in s.100D(4) was met, because the applicant's response to the claimant's objections was uploaded on to the Council's website, but, by an inadvertent error, was not made publicly available. The material which must be disclosed is "any

facts or matter on which, in the opinion of the proper officer, the report or important parts of the report is based" and "have, in his opinion, been relied upon to a material extent in preparing the report." The OR plainly is based on some of the representations in the applicant's response and relies upon them. Neither the Council nor the IPs argued to the contrary.

121. However, that is not the end of the matter. The claimant has to go on to show that there has not been substantial compliance with the duty to disclose and that it has suffered material prejudice as a result.

122. It should have been clear to Mr Yeatman that there was such a written response to the claimant's objections. In the section on "Loss of the car showroom including its offices", the OR referred to the objection that the offices are not ancillary to the car showroom, the legal authorities relied upon by the claimant and policy 13 of the City Plan. The OR then goes on to say in terms,

> "The applicant's response to this point is to refer to another legal decision concerning the identification of a planning unit and whether separate uses may exist, *Burdle v Secretary of State for the Environment* [1972] 3 All E.R 240. This ruled that the unit of occupation should be considered the planning unit, unless a smaller unit is recognised which is separate in use both physically and functionally to the main use."

The OR continues to deal with this issue at some length.

123. It should have been clear to an informed reader of the OR that the applicant had indeed submitted a written response on this issue. I reject the suggestion made by Mr Streeton that Mr Yeatman could have thought it was an oral response. First, Mr Yeatman does not say that in terms and, second, it is inherently implausible that an oral response would deal with a legal issue and in such detail. The claimant had plenty of opportunity to consider the OR in advance of the meeting but did not ask to see a copy of the applicant's response, or any note of oral discussions.

124. Further and in any event, I am satisfied that, as to the matters relied upon by Mr Streeton, there was substantial compliance with the duty to disclose. As Mr Streeton said in his oral submissions, the OR cut and pasted virtually verbatim the applicant's response on the issue of whether the office use was ancillary and expressly states that the officer agrees with the applicant on that issue. Therefore, the claimant and Mr Yeatman had every opportunity to respond to the substance of those issues, either in further written representations or orally at the meeting.

125. Further, I am not satisfied, had it seen the applicant's response, that would have made a material difference to the claimant's representations. In fact, Mr Parker drew my attention to some late written representations which were submitted by the claimant. Those focus on amenity issues. There are a few paragraphs which refer to the Site's continued potential for car showroom use but there is no reference to the office use. Further, in his oral representations to the committee, Mr Yeatman made no reference at all to land use issues per se, only the amenity consequences of the hotel use.

126. Moreover, with one exception, Mr Yeatman's witness statement does not say what further representations he would have made. If a claimant seeks to rely upon material prejudice by virtue of a failure to be able to make representations on a topic, they should set out, at least in general terms, what representations they would have made. The claimant has not done that.

127. In his reply, in reliance on the reference in paragraph 13 of Mr Yeatman's witness statement to "amenity matters", Mr Streeton started to suggest that the claimant and Mr Yeatman were prejudiced as a result of an inability to make representations on the applicant's response on matters of residential amenity. However, he had at no stage referred to any passages in the applicant's response or the OR on these issues nor were they dealt with in his Skeleton Argument. A claimant's reply is too late to change tack. Further, as I have already said, there is no evidence in Mr Yeatman's witness statement as to what he (or the claimant) would have said differently on those issues, whether orally or in writing.

128. Insofar as Mr Yeatman states he would have drawn the planning committee's attention to the fact that the OR relied heavily on the applicant's response and was influenced by the applicant in coming to their conclusions, this is also clear from the OR. The OR sets out what is described as "The applicant's response"

and then says, “Officers agree with this interpretation”. Thus, the members were well aware that this argument came from the applicant. Mr Yeatman had an opportunity to draw attention to that but chose not to do so.

129. Further, the merits of the arguments either way were for the planning officer giving advice and then for members taking the decision. Those merits could and should not have been affected by whether they were put forward by the objectors or the applicants for planning permission.

130. For all these reasons, I am not satisfied that there is an arguable case that the Council’s failure to make the applicant's response to the claimant’s representations available on its website involved a lack of substantial compliance with the duty to disclose or gave rise to material prejudice such that the failure to do so was unlawful.

131. I, therefore, refuse the application for judicial review on ground 1 and refuse to grant permission on grounds 2 and 3.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Email: civil@epiqglobal.co.uk