The Queen on the Application of Heath and Hampstead Society v London Borough of Camden v Alex Vlachos, Thalis Vlachos

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
3 April 2007

CO/1454/2006

High Court of Justice Queen's Bench Division The Administrative Court

[2007] EWHC 977 (Admin), 2007 WL 919499

Before: Mr Justice Sullivan

Tuesday, 3 April 2007

Representation

Mr David Altaras (instructed by J Hunt & Lisners of Northampton) appeared on behalf of the Claimant.
Mr Peter Harrison QC (instructed by Legal Department , London Borough of Camden) appeared on behalf of the Defendant.
Mr David Elvin QC and Mr Charles Banner (instructed by David Cooper & Co) appeared on behalf of the Interested Parties.

Judgment

Mr Justice Sullivan:

1.

Introduction

2. In this application for judicial review the claimant seeks a quashing order in respect of a planning permission granted by the defendant to the interested parties on 23 January 2006 (the planning permission) for the —

> "demolition of the existing part 1, part 2-storey dwellinghouse with associated terraces and brick shed and erection of a part 2, part 3-storey dwellinghouse with associated landscaping."

The existing dwellinghouse is The Garden House in the Vale of Health, London, NW3. The Garden House is described in the officer's report at the meeting of the defendant's Development and Control Sub-committee on 19 January 2006 as —

> "a modest 2-storey pitched roof single dwellinghouse, dating from the 1950s, with a detached brick shed against the rear boundary wall near the entrance."

3. The application site is a backland site to the rear of 7–12 Heath Villas. The site slopes down towards Hampstead Pond which borders the site to the east. The Vale of Health is close to the north-western edge of Hampstead Heath and the site is within the Hampstead and Highgate Ridge Area of Special Character and the Hampstead Conservation Area. In the Development Plan it is defined as Private Open Space (POS) and, of particular relevance for the purposes of these proceedings, it is designated as Metropolitan Open Land (MOL).

MOL, The Development Plan and other Policy Guidance

4. The Development Plan comprised the London Plan and the defendant's Unitary Development Plan (UDP). When the sub-committee met on 19 January 2006 the Camden Unitary Development Plan of 2000 was the adopted plan. However the Camden Revised Deposit Draft UDP 2004 was a significant way through the adoption process. It was adopted in June 2006.

5. The parties were agreed that, in order to avoid unnecessary duplication, it was sensible to consider the policies in the revised UDP. The relevant policies in the London Plan, which replaced the guidance in RPG 3 as from February 2004, are as follows:

> **"Policy 3D.9 Metropolitan Open Land**
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> The Mayor will and boroughs should maintain the protection of Metropolitan Open Land (MOL) from inappropriate development. Any alterations to the boundary of MOL should be undertaken by boroughs through the UDP process, in consultation with the Mayor and adjoining authorities. Land designated as MOL should satisfy one or more of the following criteria:
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> • land that contributes to the physical structure of London being clearly distinguishable from the built-up area
> • land that includes open air facilities, especially for leisure, recreation, sport, arts and cultural activities and tourism which serve the whole or significant parts of London
> • land that contains features or landscapes of historic, recreational, nature conservation or habitat interest of value at metropolitan or national level
> • land that forms part of a Green Chain and meets one of the above criteria.
>
> Policies should include a presumption against inappropriate development of MOL and give the same level of protection as the Green Belt. Essential facilities for appropriate uses will only be acceptable where they do not have an adverse impact on the openness of MOL.
>
> 3.248 The Metropolitan Open Land (MOL) designation is unique to London and protects strategically important open spaces within the built environment. Although MOL may vary in size and primary function in different parts of London, it should be of strategic significance, for example by serving a wide catchment area or drawing visitors from several boroughs. MOL is the same as the Green Belt in terms of protection from development and serves a similar purpose. It performs three valuable functions:
>
> • protecting open space to provide a clear break in the urban fabric and contributing to the greener character of London
> • protecting open space to serve the needs of Londoners outside their local area
> • protecting open space that contains a feature of the landscape of national or regional significance.

> 3.249 MOL will be protected as a permanent feature, and afforded the same level of protection as the Green Belt. Appropriate development should minimise any adverse impact on the open character of MOL through sensistive design and siting and be limited to small scale structures to support outdoor open space uses. The boundary of MOL should only be altered in exceptional circumstances and should be undertaken through the UDP process in consultation with the Mayor. Development that involves the loss of MOL in return for the creation of new open space elsewhere will not be considered appropriate."

6. It will be noted that the London Plan does not define what is appropriate development within MOL. That definition is contained in Policy N1 in the Revised UDP, which is in these terms:

> **"N1 — Metropolitan Open Land**
>
> The council will only grant planning permission for appropriate development on Metropolitan Open Land. Appropriate development is considered to be:
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> a) cemeteries;
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> b) open air sport and recreational facilities;
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> c) open air leisure, arts and cultural facilities;
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> d) open air tourist facilities;
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> e) allotments;
>
> f) the construction of new buildings for essential facilities associated with criteria a), b); and
>
> g) the limited extension, alteration or replacement of existing dwellings."

The explanatory text is in these terms:

> "4.8 Metropolitan Open Land, as shown on the Proposals Map, is open space that is clearly distinguishable from the built-up area and is significant beyond the Borough and therefore receives the same presumption against development as green belt land. Metropolitan Open Land brings benefits to the whole of London by providing useful and attractive breaks in the built-up area and by retaining a variety of high quality open spaces, landscapes and areas important for their recreational, amenity, bio-diversity, structural, educational, social and cultural roles.
>
> 4.9 There are four main areas of Metropolitan Open Land in Camden:
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> > Hampstead Heath and 14 adjoining areas;
> > Regents Park;
> > Primrose Hill and the adjoining Barrow Hill Reservoir and the area made up of Highgate Cemetery (East and West); and

> Waterlow Park and Fairseat.

4.10 There is a long-term commitment by local and central government to maintain and enhance Metropolitan Open Land by keeping it free from inappropriate development and their uses. As set out in policy N2A, only development ancillary to a use taking place on Metropolitan Open Land, for which there is a demonstrable need that cannot reasonably be satisfied elsewhere, is appropriate. Appropriate uses on Metropolitan Open Land, which recognise the landscape and nature conservation value of the land and its importance as a place of informal recreation, are set out in policy N1. For the purpose of N1, new buildings for essential facilities should be genuinely required for uses of land that preserve the openness of Metropolitan Open Land. Examples of these are outlined in Planning Policy Guidance 2: Green Belts. The Council will also welcome the removal of existing non-appropriate buildings."

7. Since the Development Plan makes it clear that "MOL is the same as Green Belt in terms of protection and serves a similar purpose" (see above), the policy guidance in PPG 2 : Green Belts is of particular significance. Paragraph 1.4 of PPG 2 identifies the underlying purpose of Green Belts:

"1.4 The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the most important attribute of Green Belts is their openness."

Paragraphs 3.1 and 3.2 are in these terms:

"3.1 The general policies controlling development in the countryside apply with equal force in the Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances. See paragraphs 3.4, 3.8, 3.11 and 3.12 below as to development which is inappropriate.

3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations. In view of the presumption against inappropriate development, the Secretary of State will attach substantial weight to the harm to the Green Belt when considering any planning application or appeal concerning such development."

Paragraphs 3.4 and 3.6 deal with new buildings in the Green Belt:

"3.4 The construction of new buildings inside a Green Belt is inappropriate unless i is for the following purposes:

— agriculture and forestry …;
— essential facilities for outdoor sport and outdoor recreation, for cemeteries, and for other uses of land which preserve the openness of the Green Belt and which do not conflict with the purposes of including land in it …;

> — limited extension, alteration or replacement of existing dwellings (subject to paragraph 3.6 below);
> — limited infilling in existing villages … and limited affordable housing for local community needs under development plan policies according to PPG 3 …; or
> — limited in filling or redevelopment of major existing developed sites identified in adopted local plans, which meets the criteria in paragraph C3 or C4 of Annex C1.
>
> …
>
> 3.6 Provided that it does not result in disproportionate additions over and above the size of the *original* building, the extension or alteration of dwellings is not inappropriate in Green Belts. The replacement of existing dwellings need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces. Development plans should make clear the approach local planning authorities will take, including the circumstances (if any) under which replacement dwellings are acceptable."

Paragraph g) of Policy N1 in the UDP repeats the third indent in paragraph 3.4 of PPG 2 .

8. It is common ground that the interested parties propose to replace the existing Garden House with a new dwelling rather than extend or alter the existing dwelling. The relevant test in paragraph 3.6 of PPG 2 was therefore that such a replacement dwelling "need not be inappropriate, providing the new dwelling is not materially larger than the dwelling it replaces".

The Issue

9. It was not suggested to the sub-committee that this was a case where very special circumstances would justify inappropriate development within Metropolitan Open Land. Thus the key question which the sub-committee had to address was: is the proposed new dwelling "materially larger" than the existing dwelling? In a nutshell, the issue between the parties is as follows. On behalf of the claimant, Mr Altaras submits that the officer's report and subsequent advice during the committee's discussions did not properly advise members so as to enable them to answer that key question, and that if the question is properly addressed there can be only one answer — that the proposed new dwelling was materially larger than the existing dwelling. Any other conclusion would be perverse.

10. On behalf of the defendant, Mr Harrison QC (whose submissions were adopted by Mr Elvin QC on behalf of the interested parties) submitted that the officer's advice enabled members to address the key question, that they did in fact address that question, and their conclusion that the proposed new dwelling was not materially larger than the existing dwelling was one that was reasonably open to them. Their conclusion was a matter of planning judgment with which this court should not interfere.

The Parties' Submissions

11. Mr Altaras' primary submission was that when deciding whether a replacement was "materially larger" than the dwelling which it replaced, the local planning authority was simply concerned with a mathematical comparison of the relevant dimensions, whether footprint, floor space, built volume, width, height, etc. Questions of visual impact, and in particular the effect of the new dwelling on the perceived openness of Metropolitan Open Land, were irrelevant at that stage of the exercise. They might subsequently become relevant when a decision had been taken as to whether the replacement dwelling was or was not appropriate development in Metropolitan Open Land. If it was concluded (on the basis of a comparison of the relevant dimensions) that the replacement dwelling was not materially larger than the existing dwelling, then the merits of the application — including, for example, its visual impact and, in the circumstances of the present case, whether the

new dwelling would preserve or enhance the character or appearance of the conservation area — would be considered in the normal way.

12. On the other hand, if it was concluded (on the basis of comparison of relevant dimensions) that the replacement dwelling was materially larger than the existing dwelling, then very special circumstances would have to be demonstrated to justify the grant of planning permission. But those circumstances could include, for example, that a smaller but particularly unattractive and visually intrusive dwelling would be replaced by a materially larger but much more attractive dwelling which, by reason of careful design, would be much less visually intrusive.

13. If that primary submission was rejected, and it was permissible to have regard to qualitative factors such as visual impact when deciding whether a replacement dwelling was materially larger than an existing dwelling, he submitted that those factors could not exclude quantitative factors altogether: if a replacement dwelling was, in terms of measurable dimensions, say, twice as large as the dwelling it replaced, then it was "materially larger" however inconspicuous it might be in visual terms.

14. Mr Harrison and Mr Elvin submitted that the key question was not whether the replacement dwelling was larger than the existing dwelling (which might well require a straightforward mathematical calculation) but whether it was materially larger. Whether an increase in size was or was not material was a matter of planning judgment and that judgment would necessarily be informed by the underlying policy objective. Thus, the visual impact of an increase in size was a relevant consideration. The exercise was not simply a mathematical one of comparing dimensions old and new. The defendant and the interested parties pointed out that neither Policy N1 in the UDP nor paragraph 3.6 of PPG 2 contained any mathematical formula, for example, an increase in floor space of up to 10 per cent ws appropriate development. This was to be contrasted with the more prescriptive advice in Annex C to PPG 2 which deals with the circumstances in which the redevelopment of major existing developed sites in the Green Belt, such as hospitals, military establishments, etc., may be appropriate development. Paragraph C4 contains specific limitations on the height and footprint of any new buildings in those circumstances.

15. Both the defendant and the interested parties relied on the decision of Mr Christopher Lockhart-Mummery QC, sitting as a Deputy Judge of the Queen's Bench Division, in Surrey Homes Limited v Secretary of State for Environment, Transport and the Regions, CO/1273/2000 , as supporting their submission that the question "is the replacement dwelling materially larger than the existing dwelling?" was not to be answered simply by a comparison of dimensions. In Surrey Homes the court was concerned with a replacement house in the Metropolitan Green Belt. The existing dwelling had a total floor space of 617 sq metres and the proposed replacement dwelling had a floor space of 666 sq metres, an increase of 7.9 per cent (see paragraph 3 of the judgment). In paragraphs 22 to 24 the learned deputy judge said:

> "22 The second, and potentially more important submission, is that both in PPG 2 , and perhaps more particularly in Policy RUD 7, the term 'materially larger' is to be judged exclusively by reference to floor space. It was submitted that if a house is not materially larger in floor space terms than the one it is to replace, it cannot appear larger and, in particular, cannot be 'materially larger' for the purposes of the relevant policies.
>
> 23 I do not accept this submission. In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion.
>
> But I entertain no doubt that the concept of whether the dwelling is 'materially larger' cannot be assessed by reference to matters such as bulk, height, mass and prominence. These are all matters going to the openness of the Green Belt. They are plainly all material considerations relevant to deciding on the meaning of the term in the context in which it arise, namely Green Belt policy.

> 24 Indeed, were it otherwise, absurd results could arise. One could have equivalent or possibly even reduced floor space, but disposed within a tower-like structure, having far more impact on the Green Belt. It would give a strange result, in my judgment, if an inspector were debarred from concluding that the proposed structure harmed oppenness and was inappropriate development."

16. Mr Altaras submitted that Surrey Homes was wrongly decided in this respect; alternatively, that he could not distinguish since it related to replacement dwellings in the Green Belt as opposed to Metropolitan Open Land. To be fair to Mr Altaras, the latter submission was made but faintly. It is plainly untenable since the development plan makes it plain that Metropolitan Open Land is to be given the same level of protection as Green Belt (see above). Thus the advice in paragraph 3.6 of PPG 2 (however it may be interpreted) is of equal relevance to replacement dwellings in Metropolitan Open Land.

17. Mr Altaras referred to an earlier decision by the same deputy judge — Brentwood Borough Council v Secretary of State for Environment, Transport and the Regions — dated 18 December 1998 . In that case, which was concerned with an extension to a dwelling in the Green Belt, the relevant development plan policy contained specific guidance in respect of the size of permissible extensions:

> "The total size of the dwelling as extended will not normally exceed the original habitable floor space by more than 37 sq metres."

The inspector allowed the appeal. The local planning authority challenged the decision on a number of grounds. On page 9 of the transcript the learned deputy judge said:

> "I turn to deal with the fourth ground of challenge which Mr Ground was uncertain whether to press home. It is accepted on behalf of the Secretary of State that the 'original' building, for the purposes of paragraph 3.6 of PPG 2 , denotes for the purposes of the present case, the original dwelling of 1948 comprising 45 sq metres. The proposals, therefore, in the terms of paragraph 3.6 involved an addition resulting in 123 sq metres in comparison to the original floor space of 45 sq metres. Paragraph 3.6 does not incorporate any term of flexibility, such as 'normally'. Further, there are no considerations expressly imported into paragraph 3.6 relating to openness or activity. As I understand it, paragraph 3.6 is intended to be an objective criterion by reference to size, needing other factors which might be capable of being introduced in the context of whether very special circumstances exist such as to justify inappropriate development in the Green Belt.
>
> In relation to this critical part of national policy the Inspector finds that the proposal would 'not conflict' with it. No reason is given by him relating to the essential criterion of proportionate size. Where one is dealing with a proposal involving approximately a threefold increase in size, it was, in my judgment, incumbent upon this Inspector to give reasons for what otherwise would be a most startling conclusion. No such reasons relevant to the specific criterion in question were given. On this further ground, I would quash this decision letter."

18. Mr Harrison pointed out correctly that ground 4 was essentially a reasons challenge. The issue raised in the present case was not before the court.

Surrey Homes — My Conclusions

19. I do not accept the submission that Surrey Homes was wrongly decided. It follows that I do not accept the submission that when deciding whether the replacement dwelling is or is not "materially larger" than the dwelling it replaces, the local planning authority is solely concerned with a mathematical comparison of relevant dimensions.

20. However I do accept Mr Altaras's fall back submission that the exercise under paragraph 3.6 is primarily an objective one by reference to size. Which physical dimension is most relevant for the purpose of assessing the relative size of the existing and replacement dwellinghouse, will depend on the circumstances of the particular case. It may be floor space, footprint, built volume, height, width, etc. But, as Mr Lockhart-Mummery said in Surrey Homes :

> "… In most cases floor space will undoubtedly be the starting point, if indeed it is not the most important criterion."

It is one thing to say that in a case where the increase in dimensions is marginal in quantitative terms, some regard may be had to other matters "such as bulk, height, mass and prominence"; it is quite another thing to set consideration of the physical increase in size to one side altogether, and, in effect, to substitute a test such as "providing the new dwelling is not more visually intrusive than the dwelling it replaces" for the test in paragraph 3.6 : "providing the new dwelling is not materially larger than the dwelling it replaces."

21. Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact. There are good reasons why the relevant test for replacement dwellings in the Green Belt and Metropolitan Open Land is one of size rather than visual impact. The essential characteristic of Green Belts and Metropolitan Open Land is their openness (see paragraph 7 above). The extent to which that openness is, or is not, visible from public vantage points and the extent to which a new building in the Green Belt would be visually intrusive are a separate issue. Paragraph 3.15 of PPG 2 deals with "visual amenity" in the Green Belt in those terms:

> "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design."

The fact that a materially larger (in terms in footprint, floor space or building volume) replacement dwelling is more concealed from public view than a smaller but more prominent existing dwelling does not mean that the replacement dwelling is appropriate development in the Green Belt or Metropolitan Open Land.

22. The loss of openness (ie unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness, which will have to be outweighed by those special circumstances if planning permission

is to be granted (paragraph 3.15 of PPG 2 , above). If the materially larger replacement dwelling is less visually intrusive than the existing dwelling then that would be a factor which could be taken into consideration when deciding whether the harm by reason of inappropriateness was outweighed by very special circumstances.

Dimensions

23. Against this background, I turn to the comparative dimensions of the proposed replacement dwelling and the existing dwelling. In terms of floor space, the report told members that the floor space of the existing dwelling was 186 sq metres and that of the replacement dwelling was 626 sq metres. The first of these figures was subsequently revised by the officer during the members' discussion of the report. The officer stated that the figure was closer to 146 sq metres, the figure that had been put forward by the claimant. The interested parties' architect explained that the figure of 186 sq metres included the garden shed. Thus there was at least a three-fold or a four-fold increase in floor space (depending on whether or not one included a garden shed in the calculation). In terms of built volume, the officer did not question the calculation which was put forward by the claimant that there was almost a four-fold increase. In terms of footprint, the officer advised members that there was a doubling in size. The claimant contended that, looking at the building alone, the footprint was increased by nearly two-and-a-half times. Considering the external paving alone, the claimant contended that there was a five-fold increase in size.

24. Since the exercise is primarily an objective one by reference to size rather than visual impact, the replacement dwelling is “plainly materially” larger than the existing dwelling. Mr Altaras rightly submitted that it would be a nonsense to say that a house which was either twice or four times bigger than another house (depending on which method of measurement was adopted) was not “materially larger” than that other house. Mr Harrison fairly conceded that even if visual impact was a relevant consideration and the view was taken that a replacement building would not be visually intrusive, there would come a point where it could not sensibly be denied that an increase in physical size (measured by a reference to relevant dimensions) was material. Even on Mr Harrison's approach, which wrongly, in my judgment, accords pre-eminence to visual impact rather than physical measurement, that point must have been passed on the facts of the present case.

25. Setting aside the claimant's calculation (which was not disputed by the officer) in respect of the increase in the external paving and looking simply at the replacement building, it was, depending on whether one measured footprint, floor space or volume, between two and four times as large as the existing dwelling. This increase in size was so substantial that there could be no doubt whatsoever that the replacement dwelling was “materially larger” than the dwelling it was to replace. The only way in which one could come to a contrary conclusion would be to set aside all measurements and approach the question “is the replacement dwelling materially larger than the existing dwelling?” solely by reference to a qualitative judgment as to its visual impact. That was the erroneous approach that was adopted in the officer's report and subsequent advice to the committee.

Officer's Report

26. Having listed a very large number of relevant policies, including policy N1 above, the report summarised the “principal material considerations”. Having described the proposal, the report then dealt with the “Principle of Development and the Demolition of Buildings in Conservation Area”.

27. Under the heading Residential Use, the report stated in paragraph 6.4:

> “The replacement single-family dwellinghouse raises no land use policy issues. Where existing dwellings do occur in MOL, it seems right to acknowledge that extensions etc, may be appropriate, and this is specifically referred to in PPG 2 on Green Belts. This guidance in paragraph 3.6 specifically states [the guidance is then set out]. The proposed residential use and its limited

extension in size are therefore considered to be appropriate. This is further discussed in paragraph 6.8 below …"

The report then dealt with bulk, height, footprint and layout. Within this section of the report the officer stated that there would be a doubling of the existing ground floor footprint. The figures for the existing and proposed floor space (the former being subsequently revised) were set out at the beginning of the report but were not the subject of further comment by the officer.

28. Under the heading Bulk, Height, Footprint and Layout, paragraph 6.5.1 of the report stated, in part:

"6.5.1 … The height of the new flat roof, which would be covered in sedum, would be 1.5 metres lower than the existing pitch roof ridge, although the new roof would be equally higher than the existing roof eaves here. The house as viewed from the front (pond) side will also be wider than the existing one by a total of 3.5 metres. Thus, it is accepted that the overall size and bulk of the front elevation visible from the pond will be greater than the existing front elevation of the house. The proposed grassy 'bund' to the east (pond) side would be some 0.8 metres above the existing ground level, and this raised embankment would result in the whole of the basement storey and the bottom part of the northern ground floor being obscured from views, especially from across the pond, so that the building would appear as a 2-storey structure with sloping lawn in front.

6.5.2 Most of the increased footprint would be towards the rear of the site, filling in the space between the rear elevation of the existing building and the rear garden wall. Thus, most of the increased bulk is directed towards the rear of the site, which is not visible from the public realm. This increase in bulk would therefore not be noticeable from the views across the pond and is therefore not considered to be visually intrusive. The increased footprint towards the pond (east) would cover part of the existing hard surface concrete slabs and raised terracing to front of the existing house. It is not considered to result in a material loss of front garden space … it is considered that the new building would appear from the pond as an essential 2-storey flat roofed building, located to the rear of the site and partially screened by greenery.

6.5.3 It is thus considered that, in this context, the combined effect of height, footprint and form would result in an envelope that would be compatible with the surrounding environment. The staggered layout, the green flat roof, the terraces and planting boxes, and large glazed areas to the front would also assist in reducing the perceived bulk of the building. The overall form and layout of the building would thus respect the varied townscape character of this area, as identified in paragraph 6.5 above.

…

6.5.6 On balance, it is considered that, in the light of the existing part 1, part 2-storey pitched roof building, the proposed massing and bulk of the new building together with its form and design in the sensitive location, would not cause demonstrable harm to the character and appearance of this part of Hampstead Conservation Area."

29. The report next dealt with design. This was followed by a section of the report which dealt with "Impact on Hampstead Conservation Area and the Heath". Within that part of the report there was paragraph 6.7.2, which was in these terms:

"6.7.2 As stated before, the proposed scheme would involve an increase in footprint that will be contained mostly within the rear of the site, and as such would not be widely visible from the public realm. Furthermore, the new building would be lower and it would similarly located to the rear of the site than the existing pitched roof building. It is considered that this visible increase in bulk at the front would not cause unreasonable loss of views of the Heath or the pond from properties along the Vale of Health and the perception of a greater mass of building bulk in respect of the front elevation would not seriously harm views from the fringes of the Heath or its setting. In addition, the green roof would assist in assimilating the new building into the natural setting in this view."

30. "Development on Metropolitan Open Land and Private Open Space" was dealt with in paragraph 6.8 of the report. It is necessary to read paragraphs 6.8 to 6.8.5 in full:

"6.8 MOL brings benefits to the whole of London and within the local urban area by providing useful and attractive breaks in the built up area and by retaining a variety of high quality open spaces, landscapes and areas important for recreation, nature conservation, cultural and historic values. There is a strong need to protect existing open land and a need to consider the nature and form of development and land uses in the vicinity of the MOL especially to protect its setting.

6.8.1 The general approach to MOL is to protect openness and allow only appropriate ancillary development. As discussed in paragraph 6.4 above, residential extensions/alterations may be considered appropriate development within MOL on the basis that they would not result in a significant increase in size of the original dwelling (emphasis added).

6.8.2 [Deals with certain other examples where applications/appeals had been allowed/dismissed on other sites within MOL.]

6.8.3 MOL which is defined as ' *Open Land within the built-up area which has a wider than Borough significance and which receives the same presumption against development as green belt* ' is protected by both policies EN46 and N1 (revised draft UDP) against inappropriate development in the context of protection of open land. Policy N1 specifically refers to limited extension, alteration or replacement of existing dwellings to be appropriate development on MOL.

6.8.4 The MOL in question is the private garden of the existing residential property, which is not available to the public for general enjoyment and recreation. The contribution that this private garden makes to the MOL as a whole is not considered to change as a result of the proposed replacement scheme, although the footprint of the new building will result in a minor decrease in the area designated MOL (ie the existing building occupies less MOL). However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL and the Heath . The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land, or to the nature and form of development and land uses in the vicinity of the MOL. The proposed house is not considered to alter the balance between built and open space and, on balance, the proposed replacement house on MOL & POS is therefore considered acceptable (emphasis added).

6.8.5 On balance, it is considered that the extent of the 'loss' of MOL is not significant and it will not harm the integrity of the MOL nor result in demonstrable harm to the character and appearance of the Heath at Hampstead Conservation Area."

31. The report dealt with a number of other issues such as unstable land, trees and landscaping, traffic, amenity for occupiers etc. before recommending that planning permission be granted subject to a number of conditions. The defendant's reasons for granting planning permission, as set out in the planning permission itself, stated that the proposal was in general accordance with development plan policies and referred the reader to the report for a more detailed understanding of the members' reasons for granting planning permission. In short, the members adopted the reasons given in the report as their reasons for granting permission.

32. I am mindful of the fact that the report is not to be construed as though it was a statutory instrument. The dicta of Lord Justice Hoffmann (as he then was) in *South Somerset District Council v Secretary of State for Environment [1993] 1 PLR 80* apply with even greater force to an officer's report to a planning committee. Lord Justice Hoffman was dealing with an inspector's decision letter:

> "The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to polices must be taken in the context of the general thrust of the inspector's reasoning. A reference to a policy does not necessarily mean that it played a significant part in the reasoning: it may have been mentioned only because it was urged on the inspector by one of the representatives of the parties and he wanted to make it clear that he had not overlooked it. Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the relevant policy or proposed alteration to the policy." (Page 83)

33. The parties are agreed that in a Green Belt or Metropolitan Open Land case the question whether the proposed development is appropriate or inappropriate development within the Green Belt or Metropolitan Open Land is a "threshold question". For this reason it is usually determined at the outset of any report or decision letter because a decision that the proposed development is inappropriate will result in a refusal of planning permission unless very special circumstances sufficient to outweigh the harm due to inappropriateness and any other harm have been demonstrated by the applicant. On the other hand, if the proposal is found to be appropriate development then the application will be considered in the normal way, having regard to such factors as, for example, visual impact, the impact on a conservation area, traffic considerations, and so forth.

34. It is a curious feature of this report that this "threshold question" was not raised, insofar as it was clearly raised at all, until after a lengthy discussion of, inter alia, the visual impact of the proposed replacement dwelling, its design and its impact upon the conservation area. It is particularly unfortunate that when the issue of Metropolitan Open Land was eventually dealt with in the report, the correct test was not set out in paragraph 6.8.1 (see above). This was not an extension or an alteration of an existing dwelling; it was a replacement dwelling. The question was not whether there would be "a significant increase in size" but whether the replacement dwelling was "materially larger" than the existing dwelling. Mr Harrison says that that unfortunate error is of little consequence because the correct test in paragraph 3.6 of PPG 2 was set out in paragraph 6.4. However paragraph 6.4 deals with the principle of residential use rather than the application of Metropolitan Open Land policy. It cross-refers to paragraph 6.8 for those who are concerned to understand the officer's approach to Metropolitan Open Land. It is therefore in paragraph 6.8.1 where one would expect to find the correct test for the threshold question set out.

35. While one has to read the report as a whole, paragraph 6.8.4 would appear to be the critical paragraph where, insofar as the threshold question is addressed, it is answered by the report. In its approach paragraph 6.8.4 echoes the approach that had been foreshadowed earlier in the report, for example in paragraph 6.7.2 where it was acknowledged that there would be an increase in footprint, but the point was made that this increase "will be contained mostly within the rear of the site and as such would not be widely visible from the public realm".

36. Considering paragraph 6.8.4 in a little more detail, it is difficult to see how that fact that this particular MOL was a private garden which was not available to the public for general enjoyment and recreation could be relevant to the question whether the replacement dwelling was or was not materially larger than the existing dwelling. The MOL designation protects the openness of private open space that is subject to designation just as much as it protects the openness of open space to which the public have access and which is subject to the designation. Again the emphasis in paragraph 6.8.4 is on the extent to which the enlarged footprint will be visible from the public realm:

> "However, it is considered that the enlarged footprint of the proposed dwelling is largely achieved towards the rear of the site and, as this will not be visible from the ponds, it is considered that this will only have a minimal impact on the character and setting of the MOL …"

The paragraph then goes on to contend that—

> "The replacement house is not considered to cause demonstrable harm to the existing openness or setting of the site and the surrounding land …"

The question was not whether the replacement house would cause "demonstrable harm" but whether it was materially larger than the existing house.

37. The planning officer's approach can be paraphrased as follows:

> "The footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increase."

It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause "demonstrable harm" that led to the clear statement of policy in paragraph 3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt or Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual — possibly very modest — proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.

38. Turning to paragraph 6.8.5, the question was not whether the "loss" of Metropolitan Open Land as a result of this particular development was "significant". Again it would be extremely difficult in many cases to demonstrate that a "loss" of Metropolitan Open Land or Green Belt as a result of a particular proposal would be "significant". It is precisely this danger that the policy approach in paragraph 3.2 of PPG 6 is intended to avoid. The question was whether the replacement dwelling was materially larger, not whether it was no more visually intrusive from the Heath. The report simply failed to grapple with that key question.

Committee Discussion

39. It is unnecessary to consider the transcript of the committee's discussion in any great detail because at the end of the debate those members who voted in favour of granting planning permission adopted the report as the reasons for their decision (see Reasons for Granting Planning Permission on the planning permission itself). I do not propose therefore to extend this judgment by numerous citations from the transcript of the members' deliberations. The record of the meeting must be read as a whole, and I have done so. It is significant that the officer's lengthy introduction at the start of the meeting dealt with whether the replacement building would be more distinguished in architectural terms than the existing building. It also explained why the officer considered that the development was "an appropriate development". Unfortunately the advice did not make it clear that the question of appropriateness was to be tested by reference to size as opposed to the very many other factors — appearance etc. — which would normally be taken into consideration in deciding whether or not a proposed development was "appropriate" in planning terms.

40. Thus one finds a repeat of the approach in paragraph 6.8.4 of the report in this extract from the transcript where the officer advises the members:

> "… and so what we're looking at is whether any increase in the size of either the building in bulk and mass in terms of its footprint in erodes that openness and detracts from the metropolitan land as a whole or the setting of the Heath. Although as I pointed out at the beginning, the building will be wider, the great majority of the additional bulk that's created and the footprint in terms of how it's enlarged is done in way which won't be visible from the majority of public views. It's tucked away at the back and the side between the existing building and retaining wall at basement level and because of that, the perception of the building, although it will be wider, won't be very different in terms of the enjoyment that people have of that metropolitan open land particularly when viewed from across the ponds and as such it will have a fairly minimal effect on the character of it such that we don't think it's in conflict with the policy and the guidance as to how that policy should be interpreted."

41. To their great credit, some of the councillors, including the chairman, who voted to refuse planning permission, did realise that the real question was one of size rather than one of visual impact, but in response to questions the officer repeated the erroneous advice that had been given in the report. Two exchanges will suffice to illustrate this point. One councillor asked:

> "… EN 46 [that] refers to the replacement of existing dwellings need not be inappropriate on an MOL providing the dwelling is not materially larger than the one that it replaces. Given that in footprint terms we're talking double, in volume terms we're talking quadruple, could you answer what you would consider to be materially larger if that isn't materially larger?"

The officer answered:

> "I think the two things I would refer you back to really is that what we are looking at is appropriate development and whether this development is appropriate and the guidance in terms of the measure of that is whether it's materially larger and I think what I've tried to stress in the presentation in dealing with the questions is because of the particular context of this development, that the way it sits on its side, the way it relates to the back floor, the fact that the … overriding perception that you have of the way it relates to the character and appearance of that part of the metropolitan open land is a visual one. It's not a measure of footprint and it's not necessarily even a measure of massing and bulk. What it's looking at is whether visually you will see a different and an adverse effect on all of those things and although yes the building is significantly bigger, the footrpint's bigger, that the volume is bigger, the floor space is bigger. All of that is disposed on the site in such a way that visually although you will see a building that's about 3.5 metres wider, it will be less high, it will related in a very similar way to the open backdrop and at the levels of the site that the setting and I think it's in that context that we're saying it won't be materially bigger because you will see very little of all of that addition ." (emphasis added)

42. The chairman made a final attempt to address the key question:

> "… I think now PPG 2 was being done to death and it really does seem to show that when a building is so much bigger than that which it replaces it is not appropriate to build on the MOL even if it's at the back of the building and the fact that the design of the building fits neatly into the space and it doesn't look very big really doesn't seem to be a justification for covering this quite large area of designated metropolitan and open land with building, with concrete. The reason why this particular section was metropolitan open land is that it's a buffer between the houses in the vale and the pond. It wasn't anything to do with being part of the Heath as it were, it didn't have to run over it, it didn't matter whether it was a private garden, it didn't matter that the public weren't admitted to it, that isn't really part of the definition of metropolitan open land … I cannot see why because the building on this particular house is at the back that it makes it all right. I mean it's a bit like Peepo if you can't see it it doesn't really matter — the eye of the beholder — and this seems to me to be a wrong way to be looking at it. The precedent could be extremely worrying here … there will certainly be applications elsewhere. Finally I think I mean, why special circumstances, I can't see why it's special, it's special because it isn't seen. It doesn't make sense."

Although not expressed in the language of a formal policy document or judgment, the chairman's observations were spot on.

43. The officer's response was in these terms:

> "Well I think special circumstances is not really the thing we should be hung on. It's whether it complies with the policies that we have in our unitary development plan, significantly whether it complies with the policies in the revised deposit draft which the executive approved on the 11 of January and most importantly whether any harm will be caused and what you always have to look at is, you know, I say almost every time I present an application to you is what harm can you identify from the development and I can only reiterate what I've said previously which is that the importance

> of the metropolitan open land in this context is the openness, it's fundamentally what sits in front of the building in the way that that provides a context of the building and, you know, when we talk about concreting over metropolitan open land, virtually everything that is proposed to build over is already a hard surface and what we are saying is that the areas in which the building is proposed to be extended will have a minimal visual impact on the metropolitan open land in the way in which this building sits on its site and relates to its immediate context both in front and behind and finally I mean, I really don't think there's any danger of a precedent being created. I mean this is a unique set of circumstances. When you are looking … at the impact which the general form has whether it's an extension to an existing building, new house, a replacement to an existing house, you're looking at the particular impact which that building has and I think if the committee approved this development, it certainly wouldn't open the floodgates for all of the land you see around about it to be developed over. We would be able to look at each one in terms of whether it complied with the policies and whether any harm flowed from development and it may not stop people making applications, but it certainly wouldn't mean we have to approve them."

44. In my judgment the claimant is right to contend that this approach — to ask what harm would a particular replacement dwelling do in terms of its visual impact from public vantage points within the MOL — is the antithesis of the approach which should be adopted when deciding the threshold question: is this replacement dwelling appropriate development within Metropolitan Open Land? At the risk of repetition, the question is not whether the replacement dwelling would be more visually intrusive from the public realm, but whether it would be materially larger than the existing dwelling. That is principally a question of size, actual rather than perceived size. It is one thing to say that the perception of size may be relevant in deciding whether a measured increase in size is material, it is quite another to substitute an assessment of visual impact for a measurement of size. Although the perception of size may be relevant in marginal cases, the tail must not be allowed to wag the dog. On any basis it is impossible to avoid the conclusion that this replacement dwelling was materially larger, very much larger, than the existing house.

45. It therefore follows that this application for judicial review must be allowed and the permission quashed.

46. MR ALTARAS: I asked in my details of remedy being sought both for quashing orders in respect of the council's resolution and in respect of its grant of planning permission. It may be thought it is a belt-and-braces approach.

47. MR JUSTICE SULLIVAN: I think it is. I would hesitate to suggest you need either actually, but you can have one or the other. I think the one to choose is the quashing order for permission.

48. MR ALTARAS: Absolutely. I choose it. The only other order I seek is, by consent, that Camden pay the sum of £18,000 to the claimants by way of its costs.

49. MR JUSTICE SULLIVAN: Is that accepted?

50. MR HARRISON: It is. Could you add "£18,000 including VAT where chargeable".

51. MR JUSTICE SULLIVAN: Yes, certainly.

52. MR HARRISON: It makes a huge difference for accounting purposes.

53. MR JUSTICE SULLIVAN: I will certainly do that. The application is allowed. The defendant is to pay the claimant's costs; those costs are to be summarily assessed by agreement in the sum of £18,000 including VAT where chargeable.

54. MR HARRISON: Yes.

55. MR JUSTICE SULLIVAN: Is there anything else?

56. MR BANNER: I have an application for permission to appeal.

57. MR JUSTICE SULLIVAN: Yes?

58. MR BANNER: I make submissions on both points that there is no reasonable prospect of success and also a point of public importance. Dealing with those in turn, my submission is that there is a realistic prospect that a different judge might take a different view as to the council's interpretation of paragraph 3.6 of PPG 2 for the reasons set out in our skeleton argument by Mr Elvin yesterday.

59. The second ground, in my submission, is that this case has implications not only for MOL and replacement dwellings on that but also for replacement dwellings on the Green Belt across the country and therefore is a question of public importance which is appropriate for the Court of Appeal.

60. I also accept — regardless of how you were minded to deal with that application — that the time limit for submitting the appellant's notice is 21 days. The clock starts from the date of delivery of the transcript in relation to your judgment from today. So in order to let my clients consider their position obviously that is —

61. MR JUSTICE SULLIVAN: Thank you. I need not trouble you, Mr Altaras. Not only do I think there is not a realistic prospect of success, I think that the application was utterly hopeless. An erroneous approach to policy is particularly egregious in this case. I am perfectly happy, Mr Banner, subject to any observations Mr Altaras may want to make, to give your client 21 days from the date of receipt of the approved transcript to decide whether or not you want to appeal. It is much better that you have a firm foundation to decide rather than a necessarily hasty note because I was not going at dictation speed. There cannot be any objection to that?

62. MR ALTARAS: No.

