



THE ROYAL BOROUGH OF  
KENSINGTON  
AND CHELSEA

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# NEWCOMBE HOUSE

Proof of Evidence for Call-In Inquiry by  
Direction of The Secretary of State

Mike Kiely 8 October 2019

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Mike Kiely  
planning + regeneration

## Site Address

Newcombe House, 45 Notting Hill Gate, 39-41 Notting Hill Gate and 161-237 (odd) Kensington Church Street, London W8.

## Description of the development

Demolition of existing buildings and redevelopment to provide office, 55 residential units, retail uses, and a flexible surgery/office use, across six buildings (ranging from ground plus two storeys to ground plus 17 storeys), with two-storey basement together with landscaping to provide a new public square, ancillary parking and associated works.

## References

Royal Borough of Kensington and Chelsea (RBKC): PP/17/05782

Greater London Authority (GLA): 3109a

Planning Inspectorate (PINS): APP/G6100/V/19/3225884



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# 1 INTRODUCTION

- 1.1 My name is Michael Kiely. I am a chartered town planner with over 40-years' experience in local government, most of that in London and nearly 14 years at service head level and above.

## Qualifications

- 1.2 I hold the Degrees of Bachelor of Town Planning (awarded by the Polytechnic, now University, of the South Bank) and Master of Business Administration (awarded by the Open University Business School). I am a Member of the Royal Town Planning Institute, formerly president of the Planning Officers Society and now chair of its Board. I sit on numerous national and London planning advisory boards and steering groups and I work closely with government and across the sector to shape planning in England.

## Experience

- 1.3 My Local Authority CV is as follows:

Sep 1974 to Jan 1986	GREATER LONDON COUNCIL Technical & Professional Planning Officer
Jan 1986 to Jun 1987	MAIDSTONE BC Planning Officer Development Control
Jun 1987 to Aug 1989	BEXLEY LBC Senior Planning Officer Development Control
Aug 1989 to Mar 1990	HAVANT BC Deputy Team Leader Development Control
Mar 1990 to Sep 2001	MAIDSTONE BC Team Leader Development Control
Sep 2001 to Feb 2004	WALTHAM FOREST LBC Development Control Manager
Feb 2004 to Apr 2006	WALTHAM FOREST LBC Acting Head of Planning and Transportation
Apr 2006 to Apr 2009	TOWER HAMLETS LBC Head of Development Decisions
Apr 2009 to May 2015	CROYDON LBC Director of Planning and Strategic Transport

- 1.4 In 2015 I set up my consultancy, Mike Kiely planning + regeneration, to specialise in assisting local planning authorities. The main assignments I have undertaken are set out below. Other commissions include Thames Tideway Tunnel (Independent Panel Expert Member), Design Council Cabe (Built Environment Expert) and Planning Advisory Service (Specialist Planning Advisor). I act as expert witness for LPAs at public inquiries and NSIP hearings. I also work with councils and recruitment agencies to assist them with senior appointments.

Jun 2015 to Feb 2019 Re (a Barnet LBC and Capita JV) Planning Advisor

Dec 2015 to Mar 2016	LEWISHAM LBC Planning Advisor
Apr 2016 to Oct 2016	BRENT LBC Planning Advisor
Oct 2016 to present	BEXLEY LBC Planning Advisor
Mar 2017 to Sep 2019	HAVERING LBC Planning Advisor
Jun 2017 to Mar 2019	HAMMERSMITH & FULHAM LBC Planning Advisor
Feb 2019 to present	WIRRAL MBC Planning Advisor
Mar 2019 to present	LAMBETH LBC Planning Advisor
July 2019 to present	KINGSTON LBC Planning Advisor

## Role

- 1.5 I am commissioned by RBKC to give planning evidence to this Public Inquiry. I am familiar with the site and surrounding area, the relevant planning history and the policies in the NPPF and the Development Plan. The evidence which I have prepared and presented in this proof is true to the best of my knowledge. I confirm that the points and arguments expressed in my evidence are my true and professional opinions.



## 2 SCOPE OF EVIDENCE

- 2.1 My proof of evidence considers how the proposal complies with development plan policy and identifies other material planning considerations relevant to the determination of the application.
- 2.2 I focus on the overall policy context and the extent of harm caused by the development to historic assets in the vicinity. I weigh this harm against any public benefits to arrive at what I consider to be the appropriate planning balance. This balance is arrived at through a full understanding of the extent of harm, the value of any public benefits, the relevant statutory provisions and the current national, strategic and local planning policy context.
- 2.3 I will also look at whether paragraph 11 of the NPPF is engaged in the context of RBKC's five-year housing land supply and, if the tilted balance is employed, to what extent it is relevant to the determination of this application.
- 2.4 The lack of an agreement under section 106 is covered in part 6 of this proof.



### 3 BACKGROUND

- 3.1 RBKC is a Rule 6 Party in this inquiry. Originally RBKC was the Local Planning Authority. On 26 March 2018 the Mayor of London notified RBKC that he would act as the Local Planning Authority for the purposes of determining the planning application.<sup>1</sup>
- 3.2 The Statement of Common Ground between the applicant, the GLA and RBKC contains details of the relevant parties, a description of the site and the surrounding area, details of the planning application and its relevant planning history, the associated listed building consent application and a full description of the proposed development (as amended). I therefore rely on those and do not repeat them in this proof.

#### Previous Planning Application

- 3.3 On 30 November 2015 an application (PP/15/07602) was made to RBKC as the Local Planning Authority on the same site for:

*Demolition of the existing buildings and redevelopment to provide office, residential, and retail uses, and a flexible surgery/office use, across six buildings (ranging from ground plus two storeys to ground plus 17 storeys), together with landscaping to provide a new public square, ancillary parking and associated works.*

#### RBKC'S Decision

- 3.4 On 17 March 2016 RBKC's Planning Committee resolved that, subject to receiving no Direction to the contrary by the Mayor of London, to refuse planning permission for the following reasons:
1. The height of the tall building would be significantly taller than the existing building and the surrounding townscape. The architecture of the proposed tall building would be of insufficient high design quality and would not have a wholly positive impact on the townscape. It would result in harm to the setting of nearby listed buildings and conservation areas, including important local views and would result in substantial harm to those heritage assets. The proposals are contrary to policies of the London Plan, in particular policies 7.4, 7.6 and 7.7, and Local Plan policies

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<sup>1</sup> Under Article 7 of the Mayor of London Order pursuant to powers conferred by Section 2A of the 1990 Act



- CL1, CL2, CL3, CL4, CL11 and CL12. The public benefits would be insufficient to outweigh those harms.
2. The proposals result in the loss of social rented floorspace within the Royal Borough, contrary to policies of the London Plan, in particular Policy 3.14, and the Local Plan, in particular policy CH3.
  3. In the absence of agreed Section 106 obligations, and provisions under section 16 of the General Powers Act, which would secure the necessary mitigation measures and infrastructure which are necessary to make the development acceptable, the proposal would be contrary to policies of the London Plan, in particular policies 3.12 and 3.16, the Local Plan, in particular policy C1, CT1 and CH2.
- 3.5 The Mayor of London confirmed, in a letter dated 28 April 2016, that he was content to allow RBKC to determine the application and RBKC issued the decision notice on 29 April 2016.

### Inspector's Decision

- 3.6 On 3 May 2016 the applicant appealed the refusal of planning permission to the Secretary of State. A public Inquiry was held on 14 to 17 February 2017 and the appeal was dismissed on 12 June 2017 on the basis of inadequate provision of affordable housing due to uncertainties around the reliability of the financial viability appraisal.
- 3.7 In reading the Inspector's decision on the previous application, it appears to me that he did not apply the right test with respect to weighing the harm to heritage assets. In paragraph 41 he states, following the acknowledgement of some harm to heritage assets in some views, that "in none of the cases where there would be any harm to a heritage asset would this amount to substantial harm under paragraphs 132-134 of the NPPF". He concludes his assessment of impact on settings in paragraph 42 with, "I find that the impact would be well below the hurdle for substantial harm".
- 3.8 But substantial harm is not the hurdle. Furthermore, the Inspector may have been misled by the 2012 NPPF paragraph 134 which appears to advocate a straightforward balancing exercise where the harm to a designated heritage asset is less than substantial. This has been corrected in the latest NPPF following Barnwell.<sup>2</sup>

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<sup>2</sup> The judgment of the Court of Appeal (Maurice Kay LJ, Sullivan LJ and Rafferty LJ) in *Barnwell Manor Wind Energy Ltd v East Northants District Council, English Heritage, National Trust & SSCLG* [2014] ([CD 11.7](#))





- 3.9 The 2012 NPPF did not clearly reflect the correct application of the law <sup>3</sup> and did not contain the clear advice now in paragraph 193 of the latest NPPF that, "great weight should be given to the asset's conservation" and that "this is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance".
- 3.10 The inspector seemed to be searching for substantial harm to justify refusal and gave the acknowledged less than substantial harm, less than substantial weight particularly where he states in his conclusions at paragraph 63, that the less than substantial harm to heritage assets would have "a small negative impact". This, as Barnwell makes clear, is not the correct interpretation of the statutory protection afforded to such assets as contained in sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990. The balancing exercise in a case of less than substantial harm against public benefits cannot simply be a "normal" planning balancing exercise as the decision maker, as a matter of law, is required to give considerable weight and importance to the harm to heritage assets in line with their sections 66 and 72 duties. It is also telling that the Inspector does not mention these sections and the associated duties in his decision letter.

## Current Planning Application

- 3.11 On 8 September 2017 the same applicant submitted the application subject of this inquiry to RBKC. That application sought to address the grounds of dismissal of the previous appeal. It was unaltered with respect to its relationship with the heritage assets in the vicinity.

## RBKC's Consideration

- 3.12 On 14 March 2018 RBKC's Planning Committee resolved that it was minded to refuse planning permission for the development and referred the matter to the GLA under Stage 2. <sup>4</sup>

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<sup>3</sup> Sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990

<sup>4</sup> Article 5 of the Mayor of London Order



### Mayor of London as LPA

- 3.13 On 26 March 2018 the Mayor of London took over the determination of the application as detailed above in paragraph 3.1. The GLA negotiated amendments to the proposal with the applicant. The impact of these changes on heritage assets in the vicinity are assessed in the proof evidence by RBKC's Conservation and Design Team Leader, Sarah Buckingham.
- 3.14 On 11 July 2018 the GLA sought the views of RBKC on the amended application. On 7 August 2018 RBKC's Planning Committee resolved that it objected to the amended development.
- 3.15 On 18 September 2018 a public Representation Hearing was held at which the Mayor of London decided to grant permission for the amended application subject to planning conditions and completion of a section 106 legal agreement.

### Call-in by Secretary of State

- 3.16 On 14 March 2019 the Secretary of State exercised his powers <sup>5</sup> to require the Mayor of London to refer the application to him for determination.
- 3.17 On 30 May 2019 RBKC's Planning Committee resolved that it maintained its objection to the amended application. The grounds were:
1. The height of the tall building would be significantly taller than the existing building and the surrounding townscape at a very high land point in the borough. The architecture of the proposed tall building would be of insufficient high design quality and would not have a wholly positive impact on the townscape. The tall building and increased massing to KCS1 and WPB3 buildings would result in harm to the setting of nearby listed buildings and conservation areas, including important local views and when moving around the conservation areas experiencing them as a whole. This would result in less than substantial harm to those heritage assets, to which the Council attaches considerable importance and weight. The proposals are contrary to policies of the London Plan, in particular policies 7.4, 7.6, 7.7 and 7.8, and the Consolidated Local Plan, in particular policies CL1, CL2, CL3, CL4, CL11 and CL12, and the Notting Hill Gate SPD and Building Height in the Royal Borough SPD. The public benefits would be insufficient to outweigh those harms

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<sup>5</sup> Section 77 of the Town and Country Planning Act 1990



2. Although more affordable housing floorspace is proposed than currently exists, the proposals would result in the loss of social rented homes within the borough, and the Council is not satisfied that the approach to developing the site provides the maximum reasonable amount of affordable housing, contrary to policies of the London Plan, in particular policies 3.12 and 3.14, and the Consolidated Local Plan, in particular policies CH2 and CH3.
- 3.18 On 17 September 2019, RBKC's Planning Committee, decided to withdraw objection 2. The Planning Inspectorate, applicant and GLA were informed of this decision by letter on 18 September 2018 which set out the Council's reasons for withdrawal of this objection (a copy of the letter is attached at Appendix 1).



## 4 PLANNING APPRAISAL

- 4.1 The evidence in this section relates solely to the first ground of objection resolved by RBKC's Planning Committee on 30 May 2019 and reconfirmed on 17 September 2019.
- 4.2 I will look at material changes to national planning policy since the last appeal decision on this site and how they justify a reappraisal of the planning balance in this case between the harm to heritage assets and any public benefits. Before that I will examine the extent to which paragraph 11 is engaged and if it has any impact on the substantive matters in the determination of this application.

### NPPF Paragraph 11

- 4.3 This paragraph in the 2019 NPPF sets out the operation of the presumption in favour of development <sup>6</sup> and how decision making should take place where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date. With respect to applications involving the provision of housing, out-of-date includes situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73 of the 2019 NPPF); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years.
- 4.4 With respect to RBKC, the position is:
- On 11 September 2019 RBKC adopted a new local plan. The adopted plan underwent a rigorous examination process which required an evidential demonstration that RBKC could confirm a five-year housing land supply. The adopted local plan passed this examination and it was clearly demonstrated that RBKC has a five-year housing land supply. In addition and in accordance with paragraph 74 of the 2019 NPPF, "a five-year supply of deliverable housing sites, with the appropriate buffer, can be demonstrated where it has been established in a recently adopted plan".
  - With respect to the Housing Delivery Test, paragraph 77 of the LPPR Inspector's report into the new local plan states that: "I have considered the application of the Housing Delivery Test (HDT) in paragraph 73 of the revised NPPF, which would become a material consideration in the calculation of the five-year housing

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<sup>6</sup> S38(6) and the expectation to approve development proposals that accord with an up-to-date development plan without delay



requirement in the borough following the adoption of the Plan. The results of the HDT for 2018 were published in February 2019. These show that for the three-year period 2015-2018, housing delivery in Kensington and Chelsea was 137% of the housing requirement for this period. As a result, on adoption the revised NPPF would expect no more than a 5% buffer to be applied in the borough."

- 4.5 Paragraph 11(d) of the 2019 NPPF is therefore not engaged, and the so-called tilted balance does not apply.
- 4.6 If the Inspector finds that he considers that the tilted balance might be engaged, it is submitted that it makes no material difference to RBKC's case in the determination of this application. The policies the Council is relying upon are (inter alia) policies in the NPPF relating to designated heritage assets, which are among the "policies in [the NPPF] that protect areas or assets of particular importance provides a clear reason for refusing the development proposed".<sup>7</sup>

## Material Changes to National Planning Policy

- 4.7 Since the determination of the previous application on appeal, the following changes have emerged that are relevant to the consideration of the current application.
- 4.8 The latest NPPF reflects developments in case law (Barnwell, as referenced above, in particular) related to the determination of planning applications that cause harm to heritage assets. The way substantial harm and less than substantial harm where weighted in the balance has been found in the Court of Appeal to have been incorrectly applied with decision makers erring in giving less than substantial harm, less than substantial weight. As set out above, the NPPF has a new sentence in paragraph 193 to make the position clear.
- 4.9 A significantly greater emphasis has emerged from MHCLG since the previous appeal decision on the importance of achieving good-quality design and the fundamental need to create high quality buildings and places in the planning and development process. This is evidenced by:
- On 25 April 2018 MHCLG held a conference (Achieving Well-Designed Places) in London attended by over 300 people to start a conversation with the sector on how they could improve design quality through the planning process. This was followed up by three regional seminars. This engagement was part of the work by

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<sup>7</sup> NPPF 2019 paragraph 11(d)(i) and footnote 6



MHCLG in drafting the revised NPPF and giving effect to its stronger emphasis on delivering good design.

- The 2019 version of the NPPF has a greater emphasis on achieving well-designed places and changes the overall policy position from “The Government attaches great importance to the design of the built environment”<sup>8</sup> to “The creation of high quality buildings and places is fundamental to what the planning and development process should achieve”<sup>9</sup>. The titles of the respective sections in the NPPFs have also changed from “Requiring Good Design” in 2012 to “Achieving Well-Designed Places” in 2019 signalling a more focused approach from Government towards delivery.
- Government subsequently set up the Building Better, Building Beautiful Commission “to tackle the challenge of poor quality design and build of homes and places, across the country and help ensure as we build for the future, we do so with popular consent. The Commission will gather evidence from both the public and private sector to develop practical policy solutions to ensure the design and style of new developments, including new settlements and the country’s high streets, help to grow a sense of community and place, not undermine it.”<sup>10</sup> It produced an Interim Report, *Creating space for beauty*, on 9 July 2019.<sup>11</sup>
- MHCLG are contemplating the production of a National (England) design guide that is intended to be part of the PPG. This was announced at the event that launched the publication of the Commission’s interim report.

4.10 Good design is not restricted to the design of a building, but equally relates to the spaces between buildings and the relationship of a building to its neighbours. The latter will be particularly important where those neighbours have their own intrinsic design quality. In this case the neighbouring heritage assets comprise several listed buildings (including Grade I and II\*), a Grade I Registered Park and Garden and four conservation areas.

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<sup>8</sup> NPPF 2012 paragraph 56

<sup>9</sup> NPPF 2019 paragraph 124

<sup>10</sup> Purpose / role of the Commission from its Terms of Reference:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/792148/terms\\_of\\_reference.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/792148/terms_of_reference.pdf)

<sup>11</sup> <https://www.gov.uk/government/publications/creating-space-for-beauty-interim-report-of-the-building-better-building-beautiful-commission>



## Compliance with the Development Plan

- 4.11 The Statement of Common Ground between the applicant, GLA and RBKC contains an overview of relevant planning policy (including emerging policy) and associated guidance, other policy documents (including the NPPF and PPG) are identified and the relevant site designations are set out. I therefore rely on those and do not repeat them here.

### Matters that are Acceptable

- 4.12 The issues agreed between the parties are set out in section 7 of the Statement of Common Ground and, in summary, comprise the following:
- The principle of redevelopment, subject to quality thresholds which are not achieved (see below under Public Benefits)
  - The proposed range and quantity of uses are appropriate for the site (including affordable housing) and are acceptable
  - The design of the public square will enable the continuation of the Farmer's Market, but noting that the public square itself is considered desirable by RBKC rather than essential (see below under Public Benefits)
  - The general layout of the buildings at ground level is acceptable
  - The inclusion of basement development is acceptable
  - The provision of transport and servicing to the development is acceptable
  - The provision of step free access to Notting Hill Gate underground station is beneficial albeit it is only possible to one of the four platforms
  - Detailed matters such as energy and sustainability, flooding, sunlight, daylight and overshadowing, privacy and overlooking, noise, air quality, ecology, trees, microclimate, archaeology and the provision of play space are acceptable
- 4.13 Some of the above issues would require either safeguarding through appropriate planning conditions or secured through planning obligations in a section 106 agreement.
- 4.14 Whilst the principle of a replacement tall building is acceptable, any increase in height should be modest.<sup>12</sup> It is the harm from the increase in height of the tower by some 55%, particularly on heritage assets in the surrounding area that is of concern to RBKC.

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<sup>12</sup> Notting Hill Gate SPD May 2015 paragraph 4.17

### London Plan Policy Conflicts

- 4.15 The Mayor of London is currently preparing a new London Plan to update the adopted Plan (March 2016). The draft London Plan is a material consideration in planning decisions with the weight given to it a matter for the decision maker, however it gains more weight as it moves through the process to adoption.
- 4.16 The Examination in Public took place earlier this year and following this, the Mayor of London published a Consolidated Suggested Changes Version of the draft Plan in July 2019.
- 4.17 Policy 7.4 of the London Plan <sup>13</sup> compels development to respect local character and have regard to the form, function, and structure of an area, place or street and the scale, mass and orientation of surrounding buildings. It should improve an area's visual or physical connection with natural features. It is considered that the proposal does not comply with this policy because of the lack of regard to the character of the surrounding area, specifically its historic assets.
- 4.18 Policy 7.6 of the London Plan requires architecture to make a positive contribution to a coherent public realm, streetscape and wider cityscape. It should incorporate the highest quality materials and design appropriate to its context. It is considered that the proposal does not comply with this policy because of the adverse impact of its tall tower on the surrounding historic assets.
- 4.19 Policy D2 (Delivering Good Design) of the draft London Plan <sup>14</sup> substantially replaces policies 7.4 and 7.7 and maintains the London-wide policy requirement to respect local character and to produce developments that make a positive contribution to a coherent public realm, streetscape and wider cityscape. Accordingly, the proposal does also not comply with this emerging policy.
- 4.20 Policy 7.7 of the London Plan expects tall and large buildings should be part of a planned approach to changing or developing an area by the identification of appropriate, sensitive and inappropriate locations. Tall and large buildings should not have an unacceptably harmful impact on their surroundings. It is considered that the proposal does not comply with this policy because this area has not been identified as a location for tall buildings. Policy D8 (Tall Buildings) of the draft London Plan replaces this policy and the proposed development similarly fails to comply with it.

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<sup>13</sup> London Plan March 2016: The Spatial Development Strategy for London Consolidated with Alterations Since 2011

<sup>14</sup> Draft London Plan – consolidated changes version – July 2019





- 4.21 Policy 7.8 of the London Plan envisages development affecting heritage assets and their settings to conserve their significance by being sympathetic to their form, scale, materials and architectural detail. It is considered that the proposal does not comply with this policy due to the harm it causes to historic assets. Policy HC1 (Heritage Conservation and Growth) of the draft London replaces this policy and the proposed development similarly fails to comply with it.

### Local Plan Policy Conflicts

- 4.22 On 11 September 2019 RBKC adopted its Local Plan Partial Review (LPPR) Publication Policies, February 2017. The Council is in the process of producing a single updated Local Plan 2019 document to include the main modifications recommended by the LPPR Inspector and the minor/additional modifications published by the Council by the end of September 2019. Until this is published, the LPPR Publication Policies (February 2017) must be read alongside the Consolidated Table of Modifications.

### Local Plan Partial Review 2019

- 4.23 Policy CR5 states that the Council will protect, enhance and make the most of existing parks, gardens and open spaces, including, at part b, through resisting development that has an adverse effect on the environmental and open character, appearance and function of Conservation Area, Metropolitan Open Land or sites which are listed within the Register of Parks and Gardens of Special Historic Interest in England, or their setting. It is considered that the proposal does not comply with this policy because of the adverse impact of the proposed development on both conservation areas and a historic park and gardens.

### Consolidated Local Plan 2015

- 4.24 There is no change to the following existing relevant policies in the Consolidated Local Plan 2015 (CLP):
- Policy CL1 – All development will be designed to respect context and character of the Royal Borough which requires development to respond to the local context
  - Policy CL 2 – All new development will be of high quality architectural and urban design
  - Policy CL3 – To preserve or enhance the character and appearance of the Royal Borough's heritage assets: conservation areas and historic spaces
  - Policy CL4 – To preserve or enhance the character and appearance of the Royal Borough's heritage assets: listed buildings, scheduled ancient monuments and sites of archaeological interest



- Policy CL11 – All new buildings' and extensions' heights will have a positive impact on the Borough's skyline that contribute to the character and quality of the area, including, at part c, requiring within conservation areas, development to preserve or enhance views that affect the setting of and from development on sites adjacent to conservation areas and listed buildings.
- Policy CL12 – That new buildings respect the setting of the Borough's valued townscapes and landscapes, through appropriate building heights

4.25 The CLP sets seven strategic objectives for the Borough that will be delivered by the policies of the Plan. The objectives particularly relevant to the Council's objection is Strategic Objective 5:

CO 5 Strategic Objective for Renewing the Legacy

*Our strategic objective to renew the legacy is not simply to ensure no diminution in the excellence we have inherited, but to pass to the next generation a borough that is better than today, of the highest quality and inclusive for all, by taking great care to maintain, conserve and enhance the glorious built heritage we have inherited and to ensure that where new development takes place it enhances the borough.*

- 4.26 In order to achieve Strategic Objective 5, Policy CL1 of the CLP will require "all development to respect the existing context, character and appearance, taking opportunities available to improve the quality and character of buildings and the area and the way it functions, including being inclusive for all. To deliver this the Council will:
- a) Require development to contribute positively to the townscape through the architecture and urban form, addressing matters such as scale, height, bulk, mass, proportion, plot width, building lines, street form, rhythm, roofscape, materials and historic fabric as well as vistas, views, gaps, and open space.
  - b) Require development to respond to the local context;
  - c) Require the density of development to be optimised, sensitive to context"
- 4.27 The proposed development fails to respect the character of surrounding heritage assets.



- 4.28 Policy CL2 sets out the Council's policy on design quality. It seeks buildings to be functional, robust, attractive, locally distinctive, sustainable, inclusive, and secure. Furthermore, the architectural style should respond to the context of the site, the buildings proposed design, form and uses, and the varied or uniform character of the townscape.
- 4.29 Again, the scheme falls short of these requirements due to its excessive height.
- 4.30 Policies relating to heritage assets are set out at Policy CL3 and Policy CL4; the former for protected areas and the latter for protected structures.
- 4.31 Policy CL3 requires development to preserve and take opportunities to enhance the cherished and familiar local scene. To deliver this, the Council will require development to preserve or enhance the character or appearance of conservation areas and protect the special architectural or historic interest of these areas and their settings. Policy CL4 requires development to protect the heritage significance, including the setting, of listed buildings, scheduled ancient monuments and sites of archaeological interest. The development would cause harm to these categories of heritage assets (except SAMs and archaeology).
- 4.32 The Council will require all development to protect and enhance views, vistas, gaps and the skyline that contribute to the character and quality of the area (Policy CL11). In doing so the Council will resist, inter alia, development which "interrupts, disrupts or detracts from strategic and local vistas, views and gaps and the skyline". The proposed tower will be visible from a much greater area than the existing tower due to its 55% height increase.
- 4.33 In relation to the height of buildings, the Council sets out at Policy CL12 that development should "respect the setting of the Borough's valued townscapes and landscapes, through appropriate building heights. To deliver this the Council will:
- a) Require proposals to strengthen our traditional townscape in terms of building heights and roofscape by requiring developments to:
    - i. Reflect the prevailing building heights within the context;
    - ii. Provide, for larger developments, a roofscape that reflects that of the context of the site;
    - iii. Seldom use height to express local landmarks so the prevailing building height is maintained;



b) Resist buildings significantly taller than the surrounding townscape other than in exceptionally rare circumstances, where the development has a wholly positive impact on the character and quality of the townscape."

4.34 The proposed development clearly fails to respond to this policy with respect to its tall tower.

#### Supplementary Planning Documents

4.35 There are a range of RBKC supplementary planning documents which are relevant to the issues in this case.

4.36 The Notting Hill Gate SPD (May 2015) has the three main objectives identified for the area:

- To improve the streets and public spaces;
- To improve the buildings and architecture; and
- To strengthen the identity of Notting Hill Gate.

4.37 The NHG SPD recognises that the Newcombe House site has an important part to play in the future of Notting Hill Gate, however, it also recognises that there are several constraints at the site, in particular development must preserve or enhance the heritage significance of the special architectural or historic interest of surrounding listed buildings and conservation areas.

4.38 The NHG SPD states (paragraph 4.17) that, "The Council may entertain a modest increase in height over the existing building where a scheme is proposing significant benefits to Notting Hill Gate and delivers an architecturally excellent building, provided this does not have a harmful impact on the views mentioned above."

4.39 The Building Height SPD (September 2010) identifies which areas of the borough are unable or less able to absorb new tall buildings and structures and specifically recognises that conservation areas are highly sensitive to tall buildings. The location of the proposed development is not one identified a suitable for a tall building.



## Summary

- 4.40 It is considered that the proposal does not comply with London Plan and Local Plan policies, the Notting Hill Gate SPD and the Building Height SPD and there are no material planning considerations that overcome this non-compliance. Accordingly, it follows that planning permission must be refused, the law <sup>15</sup> requiring that planning permission must be determined in accordance with the development plan unless material planning considerations indicate otherwise. I will examine whether there are other material planning considerations later in my proof, but first I will assess the harm to heritage assets caused by the proposed development.

## Harm to Historic Assets

- 4.41 Sarah Buckingham's proof of evidence identifies the relevant heritage assets, assesses and describes their significance and analyses the harm caused to them by the proposed development.
- 4.42 The relevant historic assets are listed below.

### Listed Buildings

- 4.43 The application site does not contain any listed buildings, but the proposed development has an impact on the setting of the following:
- 1 to 5 Pembridge Gardens (Grade II)
  - Kensington Palace (Grade I)
  - 19 Kensington Palace Gardens (Grade II\*)
  - 20 Kensington Palace Gardens (Grade II)
  - 10 and 11 Pembridge Square (Grade II)
- 4.44 Grade I and II\* listed buildings are of exceptional importance and any harm to these buildings must carry very significant weight in the planning decision-making process.

### Registered Parks and Gardens

- 4.45 Kensington Gardens is a Grade I Registered Park and Garden and the setting of this exceptionally important asset would be affected by the development and again any harm to this asset will carry very significant weight in the planning-decision making process.

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<sup>15</sup> Section 38(6) of the Planning and Compulsory Purchase Act 2004



### Conservation Areas

- 4.46 The application site itself is not within a conservation area, but is closely surrounded by four:
- Ladbroke (NW of the application site)
  - Pembridge (N of the application site)
  - Kensington Palace (E of the application site)
  - Kensington (SW of the application site)
- 4.47 These conservation areas encircle the application site, which sits in a small gap between them. The tall element of Newcombe House is visible in parts of all four conservation areas.

### Details of Tall Building

- 4.48 The current tall element of Newcombe House is a 12 storey (46.3m high <sup>16</sup>) office building designed as a concrete slab block on a low podium that faces towards the main thoroughfare of Notting Hill Gate on a generally W-E axis. It has a 35m wide frontage (viewed from the north and south) and is 15m in depth (viewed from the west and east).
- 4.49 The application seeks to replace the existing building (12 storey and 46.3m high) with one that is some 55% taller at 18 storeys with a maximum height of 71.8m, representing a 25.5m increase in overall height.
- 4.50 From views from the north and south, the combined width of the east and central forms is 24m wide up to level 13 and thereafter reduces to 12m wide (central form only). From views from the west and east, the combined width of the east and central forms is 23.6m up to level 13 and thereafter reduces to 19.7m (central form only).
- 4.51 From views from the north and south there is a reduction in width by 11m and then 23m (for the uppermost levels only) compared to the existing. From views from the east and west there is an increase in width by 10.6m and then 6.7m (for the uppermost levels only) compared to the existing.
- 4.52 The application building is therefore much taller and in views from the east and west materially wider than the existing building. It therefore has a much greater impact on the surrounding area and consequently greater harm to the identified historic assets. This increased impact is described in detail in Sarah Buckingham's proof of evidence.

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<sup>16</sup> All measurements approximate

### Impact of Tall Building

- 4.53 Its aesthetic design is clearly an improvement on Newcombe House, but in the opinion of RBKC it does not amount to the architecturally excellent building envisaged in local policy and guidance. This is covered in Sarah Buckingham's proof of evidence.
- 4.54 Enhancing the character of the conservation areas affected would only be achievable by the removal of the taller element of the building below a point at which it is visible from them; which is unlikely to happen. Therefore, we are assessing whether the characters of the different conservation areas are preserved as a result of this proposed development.
- 4.55 The approach adopted by the Inspector in the previous appeal focused on the relative quality of the external appearance between Newcombe House and the previous proposal. However, the policy requirement supports either a refurbishment of the existing building or a replacement that has, "... a modest increase in height ... delivers an architecturally excellent building ... that does not have a harmful impact on views ...".<sup>17</sup> The rationale behind RBKC's policy position is to preserve the character of the heritage assets by limiting any additional harm caused by a taller building.
- 4.56 The area is one that is not suitable for tall buildings. The two that exist (Newcome House and Campden Hill Towers) are products of the 1960s, that have not been repeated hereabouts since. It is reasonably safe to speculate that if the two existing tall buildings did not exist, it would be extremely difficult to make a case for a new tall building of the height of Newcombe House in this area; characterised as it is by generally low and medium rise development, much of it historic and designated as assets. The harm to historic assets, from what would be a new alien feature, would tell strongly against planning permission being granted. Newcombe House causes such harm and the proposal seeks to increase that significantly with a 55% increase in height.

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<sup>17</sup> Notting Hill Gate SPD 2015 para 4.17



- 4.57 Its harmful impact primarily emanates from its presence rather than its design. Therefore, a proposal that increases its height by some 55%, despite some narrower profiles and better external appearance, cannot preserve the character where the harm to character is as a result of an alien tall building. Improving the quality of the building might make the alien prettier, but it is still alien.
- 4.58 The result of this increase in height is that the new building would be visible from a greater extent of the surrounding area than the existing building. Larger parts of conservation areas and registered parks and gardens would be affected and the impact on listed buildings would be greater because of the increased dominance of the new taller building. This increases the harm to these important (and in some cases exceptionally important) heritage assets.
- 4.59 The tower does not contribute positively to the settings of several listed buildings, four conservation areas and a historic park and gardens of exceptional importance. This represents harm to heritage assets that must be given the appropriate weight, as required by law <sup>18</sup>, in deciding this application.

### Statutory Position

- 4.60 Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 establishes that in exercising planning powers, the Secretary of State must have special regard to the desirability of preserving a listed building or its setting or any features of special architectural or historic interest which it possesses.
- 4.61 Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 establishes that in exercising planning powers with respect to any buildings or other land in a conservation area, the Secretary of State must pay special attention to the desirability of preserving or enhancing the character or appearance of that area.
- 4.62 Whilst no statutory protection is afforded to the setting of Conservation Areas, paragraph 194 of the 2019 NPPF confirms that the significance of a designated heritage asset can be harmed by development within its setting.

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<sup>18</sup> Sections 66 and 72 of the 1990 Act



- 4.63 In this context I have set out above my conclusions on the effects of the proposal on the setting and significance of the relevant heritage assets. In doing so I have considered the range of expert opinions on the contribution of the settings to the significance of those assets and the effects of the proposal on them. This includes the heritage assessments undertaken by the appellant at the planning application stage, and those contained within Sarah Buckingham's proof of evidence, as well as the good practice advice of Historic England on this matter.
- 4.64 I conclude that the harm is significant and extensive on a range of heritage assets, some of which are exceptional being Grade I or II\*. This harm amounts to less than substantial harm but this must be given considerable weight and importance. Therefore, in the absence of compelling public benefits that clearly and demonstrably outweigh the harm to heritage assets (when they are given the appropriate weight) the application must be refused as required by s38(6) of the 2004 Act.

## Public Benefits

- 4.65 The main public benefits have been cited in the Statement of Common Ground as:
- Removal of Newcombe House
  - Provision of housing units, office and retail floorspace
  - Provision of affordable housing
  - Provision of a health centre
  - Provision of a public square
  - Provision of step-free access to Notting Hill Gate
- 4.66 I will examine each in turn, assessing their relative importance as public benefits.

## Removal of Newcombe House

- 4.67 Newcombe House, and the wider complex with Campden Hill Tower, are architecturally of their time. Newcombe House has a poor relationship with the public realm and inherent urban design weaknesses which are typical of the 1960s building period. Furthermore, Newcombe House has been poorly maintained. No objection therefore arises to the principle of its loss and replacement.



- 4.68 Despite its architectural shortcomings, the Council would not go as far as to say it has to be removed. Paragraph 3.5 of Sarah Buckingham's proof of evidence sets out how it has generally become embedded into the Notting Hill Gate landscape and sits relatively unnoticed as background architecture within many sensitive views within the wider townscape. Whilst its removal is not objected to, it is not necessary in historic asset protect or enhancement terms. The Notting Hill Gate SPD confirms this position.<sup>19</sup>
- 4.69 The acceptability of a replacement building is contingent on delivering a quality replacement, of only modest increase in height. The current proposals fall short with respect to the adverse impact of its tall building due to its 55% increase in height and therefore the potential public benefits of this element cannot be seen as positive.

### Provision of Housing Units, Office and Retail Floorspace

- 4.70 The provision of 55 residential units, new office floorspace and retail units on street frontages and around a new public square are all welcomed. They are however intrinsic to the redevelopment of the site and would be provided to some degree within all similar redevelopments. Whilst they need to be given some weight in the planning balance, they cannot on their own be sufficient to outweigh clear harm to heritage assets because of their ubiquitousness, and as a result should be given low weight in this planning balance.

### Provision of Affordable Housing

- 4.71 The increased provision of affordable housing is welcome, but it is still below the full policy requirement in that some of the intermediate tenure units are not genuinely affordable to residents in housing need in RBKC (ie they would have to earn £50,000 to £60,000 to reasonably be able afford them – see appendix 2). Whilst this represents a moderate contribution to housing provision within the borough it should also be seen as moderate in the planning balance.

### Provision of a Health Centre

- 4.72 This is a welcome feature of the land use components within the development, but its location several storeys above ground with no drop-off or pick-up arrangements makes its utility to the public sub-optimal. Whilst the provision is beneficial in principle, that benefit is diluted by its detailed design and location within the structure. Its weight in the planning balance must therefore be reduced accordingly and I would therefore attach low weight to it.

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<sup>19</sup> Notting Hill Gate SPD 2015 para 4.17

### Provision of a Public Square

- 4.73 The provision of a public square is considered to be desirable rather than essential by RBKC within the context of the policy framework for Notting Hill Gate.<sup>20</sup> There is no reference to a new public square being a pre-requisite of any development at this site. Accordingly, its provision is welcome but can only be given moderate weight in this planning balance.

### Provision of Step-Free Access to Notting Hill Gate

- 4.74 This provision is welcome, and the applicant has probably done all they can in this regard. However, the provision provides access to only one of the four platforms within the underground station. It is a clear public benefit but one that provides a partial solution. It is potentially a high benefit but must be reduced (to moderate) in the planning balance because it represents a partial solution.

### Other public benefits

- 4.75 The above represent the main public benefits that could be delivered by the development. Any other public benefits that may also be delivered are not in themselves, nor cumulatively with the main benefits, sufficient to tilt the planning balance in this application given the significant weight that the harm to heritage assets must be given.

### Conclusions

- 4.76 The proposed development undoubtedly provides a range of public benefits, but it must be remembered that most developments of this nature will provide such benefits to some extent. The benefits cumulatively have to be substantial and compelling to outweigh the harm that has been identified to a wide range of heritage assets.
- 4.77 Some potential benefits actually cause harm and cannot be given any weight as benefits (eg the replacement of Newcombe House). Other potential benefits receive low weight because their benefits are limited (eg provision of the health centre) or are likely to be intrinsic elements of any redevelopment of this site. The other benefits are all judged to be moderate.

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<sup>20</sup> Notting Hill Gate SPD 2015 para 4.7 and 4.18



- 4.78 The public benefits of the scheme do not, when taken as a whole, provide the substantial and compelling level of benefits that are sufficient to outweigh the considerable weight and importance that must be given to the less than substantial harm to heritage assets (some of which are exceptional) identified in Sarah Buckingham's proof of evidence and summarised above.

## Planning Balance

- 4.79 Paragraph 193 of the NPPF states that, "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."
- 4.80 Paragraph 196 of the NPPF sets out the test for considering less than substantial harm, "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal ...".
- 4.81 In terms of the weight to be given to the harm to designated heritage assets, the courts have confirmed that less than substantial harm does not equate to a less than substantial objection. Indeed, paragraph 193 of the 2019 NPPF now establishes that when considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation, irrespective of whether the potential harm amounts to less than substantial harm.
- 4.82 In this case, the significance of multiple heritage assets would be harmed, some of which are of exceptional quality. In the light of this, the statutory duty to have special regard to the desirability of preserving the setting of several listed buildings and to pay special attention to the desirability of preserving or enhancing the character of four conservation areas and a registered park and gardens, considerable importance and great weight must be attached to the harm to each designated heritage asset which would result.



- 4.83 Overall, the combination of the public benefits that the proposed development would bring are not sufficient to justify or outweigh the harm the proposed development would cause to the significance of multiple designated heritage assets over a wide area and thereby to the historic environment of Notting Hill Gate. As such, it would be contrary to paragraphs 194 and 196 of the Framework, which provides a clear reason for refusing the proposed development alongside the development plan policies identified.
- 4.84 Finally, the recent adoption of a new local plan by RBKC with a confirmed five-year housing land supply means that paragraph 11 of the 2019 NPPF is not engaged in the planning balance with respect to the residential development element of this application. It is further submitted that even if it was, the policies in the NPPF relating to designated heritage assets provide a clear reason for refusing this application.<sup>21</sup>

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<sup>21</sup> NPPF 2019 paragraph 11(d)(i) and footnote 6



## 5 CONDITIONS & SECTION 106 AGREEMENT

### Planning Conditions

- 5.1 Without prejudice to the Council's case, RBKC are seeking to agree a set of planning conditions with the applicant and GLA, which, if the Secretary of State is minded to grant planning permission, we consider should be attached to the decision. We hope to set out the agreed conditions in the Statement of Common Ground.

### Section 106 Agreement

- 5.2 RBKC, the applicant and the GLA are working towards an agreed and signed section 106 agreement that is hoped to be submitted prior to the start of the public inquiry.
- 5.3 At the time of drafting this proof there is no substantive change to the Council's position as set out in our Statement of Case, however, the Council would ask the Inspector to note that some of the obligations may need to be updated slightly in light of the adoption of the Council's Planning Contributions SPD (2019). As set out in the Council's letter to the Secretary of State (Appendix 1), the Council will seek a robust review mechanism to ensure that the scheme delivers the maximum reasonable amount of affordable housing.
- 5.4 In the absence of agreed obligations under section 106 of the Town and Country Planning Act 1990 and provisions under section 16 of the Greater London Council (General Powers) Act 1974 which would secure the necessary mitigation measures and infrastructure which are necessary to make the development acceptable, the proposal would be contrary to policies of the London Plan, in particular policies 3.12 and 3.16, and the Consolidated Local Plan, in particular policies C1, CT1 and CH2. If it is necessary to advance this objection it will be set out in a rebuttal proof.



## 6 CONCLUSIONS

- 6.1 The development causes harm to a significant range of heritage assets (some of which are grade I and II\*) over a wide area. In this case the harm is less than substantial but as clearly established in Barnwell and now set out in the NPPF, "great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance."
- 6.2 The previous Inspector did not seem to balance the harm correctly and concluded that as the harm did not amount to substantial harm, the public benefits outweighed it. This was not the correct way to approach the planning merits of the previous development. It is illustrative that there is no mention in his decision letter of the section 66 and section 72 duties <sup>22</sup> he was under with respect to listed buildings and to conservation areas.
- 6.3 The public benefits have been evaluated and are not considered sufficient cumulatively to outweigh the harm to heritage assets that has been identified in Sarah Buckingham's proof of evidence when that harm has been given the necessary significant weight in that planning balance. There are no other material planning considerations (such as paragraph 11 of the 2019 NPPF) that disturb this conclusion and therefore planning permission should be refused.



SIGNED:

DATE: 8 October 2019

<sup>22</sup> Planning (Listed Buildings and Conservation Areas) Act 1990



## APPENDIX 1: 18 SEPTEMBER 2019 RBKC LETTER

Letter dated 18 September 2018 to the Planning Inspectorate, applicant and GLA which set out the Council's reasons for withdrawing objection 2.



THE ROYAL BOROUGH OF  
KENSINGTON  
AND CHELSEA

**Mike Kiely**  
planning + regeneration



## APPENDIX 2: AFFORDABLE HOUSING RENTAL LEVELS NOTE

Explanatory note from RBKC setting out the shortcomings of the affordable housing offer (in respect of the proposed intermediate units).

