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## OPINION

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1. Accessed via Nursery Lane, London, W10, is an area of open land leased by the owner (the Legard family) to two or more businesses engaged in growing and selling plants and providing landscaping services. It seems that historically more growing took place than at present and the site's current use is said to be more akin to a storage and depot use in connection with activities carried on elsewhere by a garden centre (Clifton Nurseries) and a landscape contractor (G.J. Corbett Garden and Landscape Ltd). Sales do not take place on site.
2. The leases either have expired or will soon expire and the owner of the site wishes to redevelop the site for housing. For that purpose, the owner has selected a developer, Metropolis Property Limited ("MPL") to prepare development proposals.
3. On its northern, eastern and western boundaries, the site is surrounded by private dwellings fronting respectively Dalgarno Gardens, Highlever Road and Brewster Gardens; on its southern side is a sheltered housing development accessed from Nursery Lane which is a cul-de-sac running westwards off Highlever Road.
4. Local residents wish to ensure that the site remains open land. Their wishes are shared by two local associations, the St. Helens Residents Association ("StHRA") and the St. Quintin and Woodlands Neighbourhood Forum (StQ&WNF).

5. Pursuant to paragraph 6 of Schedule 4B of the Town and Country Planning Act 1990, the StQ&WNF has prepared a Neighbourhood Plan (“NP”) in which it is proposed that the Nursery Lane site should be designated as a “Local Green Space” (“LGS”) in order that, as provided by paragraph 76 of the National Planning Policy Framework (“NPPF”), new development on it can be prevented except in “*very special circumstances*” (see Draft Neighbourhood Plan Policy StQW4a and Annex C). Also proposed in the NP is Policy 4b that there should be no housing development on the so-called St. Quintin Backlands and Policy 4c that there should be no housing development on land not previously developed.
6. The Neighbourhood Plan was first published in draft in 2014. No doubt because of the threat posed by the proposed LGS designation on the Nursery Lane site, the owner and MPL have objected to that (and other) proposals in the Plan.
7. The production of the Neighbourhood Plan is well advanced and is expected to be the subject of formal examination in September 2015. If the Independent Examiner is satisfied with the Plan, he will recommend that it will be submitted to a referendum.
8. Once a Neighbourhood Plan passes the referendum stage, it will become part of the adopted development plan pursuant to which any application for planning permission is to be determined. Once that occurs, an application to develop for housing a site designated in the development plan as Local Green Space and/or subject to Policies 4b and/or 4c will have little chance of succeeding.

9. In November 2014, Christopher Lockhart-Mummery QC provided for the StQ&WNF a “*health check report*” on a pre-Consultation draft of the Neighbourhood Plan. At paragraph 7 of his report, he stated that in his opinion “*the NP has been the subject of appropriate pre-submission consultation and publicity, and that there has been a programme of community engagement proportionate to the scale and complexity of the NP*”. At paragraph 9 he expressed the view that “*the NP is an exceptionally well-reasoned planning document which – subject to some reconsideration of detailed elements – amply deserves to form a future element of the statutory development plan*”. That is high praise from one of this country’s most experienced and distinguished Queen’s Counsel specialising in planning law. Furthermore, based on my own skill and experience as specialist Queen’s Counsel practising in this area, I agree with Mr Lockhart-Mummery QC’s judgment.
10. In the light of Mr Lockhart-Mummery QC’s comments, StQ&WNF amended the draft NP; the current Consultation Draft reflects those amendments.
11. An application dated 30<sup>th</sup> April 2015 was submitted by MPL for planning permission to develop the Nursery Lane site for residential development comprising twenty four-bedroom family homes.
12. The submission of the application by MPL seems to me to be intended to pre-empt the neighbourhood planning process by obtaining a planning permission in advance of the NP becoming part of the statutory development plan. I am troubled by the deployment of that tactic. It appears to me to be disrespectful of the local democratic process and of the greater emphasis introduced by the Localism Act 2011 on

ascertaining and respecting the will of local people. In the NPPF (published in March 2012) paragraph 184 states that “[n]eighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community”. In the light of that advice, in my opinion, the Royal Borough of Kensington and Chelsea (“RBKC”), as elected Local Planning Authority should not allow itself to become a party to MPL’s tactic of pre-empting a final decision on the NP. The question therefore is how, in the circumstances I have outlined, the RBKC should respond to the application.

13. Both the Legard family as owner of the Nursery Lane site and MPL as the aspiring developer, made representations to StQ&WNF on the Consultation Draft of the NP. The representations were settled respectively by Rolfe Judd Planning and CgMs Consulting, both of which are well known planning consultancies. I have read carefully both set of representations. The substance of them is repeated in Rolfe Judd’s Planning Statement submitted with the application for planning permission. In essence, Rolfe Judd’s contention is that there is no sound basis for seeking to designate the Nursery Lane site as Local Green Space. If their analysis were correct, to grant permission in advance of the examination of the NP might be a proper course. In my opinion, however, their analysis is faulty and the issue of whether designation as LGS would be appropriate should be decided through the examination and referendum process as should the acceptability of Policies 4b and 4c.
14. At the heart of my judgement that permission should not be granted in advance of the conclusion of the process for finalising the NP, is my judgement that, to put it at its lowest, it is not self-evident that the Nursery Lane site should not be protected as LGS

and there should be a proper process of public examination in which all parties can be involved before that decision is taken. In planning law, there is no provision for such an examination at the application stage of a proposal for planning permission; RBKC as the Local Planning Authority charged with determining the application, could choose to grant it without giving to objectors the opportunity to present evidence or to test forensically the case put forward at the application for the grant of permission.

15. The case for the grant of permission is founded on the following propositions which I have summarised from Rolfe Judd's Planning Statement ("RJ/PS"):

- (i) The site at present is in private ownership with no public access to it. It was not identified as Open Space in RBKC's Open Space Audit in 2004 (RJ/PS paragraphs 4.4.23; 5.1.15 to 5.1.17);
- (ii) The site is unsightly, is of low ecological value and contributes nothing to local amenity (RJ/PS, paras.2.1.2; 5.1.2);
- (iii) The site "*has many of the characteristics of previously developed land*" ("PDL") (RJ/PS para.4.1.18; 5.1.5 to 5.1.12).
- (iv) The site is largely hidden from view from surrounding streets (RJ/PS paragraph 5.1.2).
- (v) The site is "*backland*" the development of which is encouraged in the London Plan (RJ/PS paras.5.1.18 to 5.1.20).

- (vi) Although the 1990 Conservation Area Proposal Statement “*identifies backland spaces as contributing significantly to the character of the Conservation Area*”, most of those spaces have now been developed and the Nursery Lane site “*does not contribute positively to the character of the surrounding areas*”. There is identified in the Conservation Area Proposals Statement a desire that the site would return to a historic leisure or recreational use but, in the draft Heritage Statement, it is stated that “*the prospect of the site being used for those purposes is low*” (RJ/PS paras.5.1.2, 5.1.3 and 5.1.4).
- (vii) The site does not satisfy the criteria in paragraph 77 of the NPPF for designation as Local Green Space namely (RJ/PS paras.4.9.20; 5.1.30 to 5.1.36)
- reasonable proximity to the community it serves;
  - being local in character rather than an extensive tract of land;
  - demonstrably special to a local community;
  - having a particular local significance, for example, because of its beauty, historic significance, recreational value, tranquillity or ecology.
- (viii) The Neighbourhood Plan should be accorded no more than “*limited weight*” having “*only reached consultation stage*” (RJ/PS para.4.9.7).

- (ix) The site should be identified as a housing site within the draft Neighbourhood Plan “*capable of delivering a substantial number of family homes required to meet local housing targets and local housing need*” (RJ/PS para.4.9.32).
  - (x) The “*broader sustainability objectives*” in RBKC’s Core Strategy and the London Plan “*can be fully realised on this site*” (RJ/PS para.6.1.18).
16. The argument advanced by Rolfe Judd in its Planning Statement is cogent. It does not follow however that it is convincing. Furthermore, in my opinion, an equally cogent argument can be advanced that the Nursery Lane site should be allocated in due course as Local Green Space in the Neighbourhood Plan. It is not necessary to decide which argument should succeed; what is necessary is that the debate should not be usurped by planning permission being granted prior to the conclusion of the Neighbourhood Plan process.
17. The argument in favour of the site being allocated formally as Local Green Space and the argument that, in any event, permission for MPL’s proposal should not be granted at the present time, are as follows:
- (i) The original open land behind the three streets surrounding the site was left as such intentionally as part of the design concept for the block.
  - (ii) For a long time the site was put to recreational use (tennis club) serving the locality.

- (iii) Hardly surprisingly therefore, when the Conservation Area was designated, the site was identified as a feature worthy of conservation.
- (iv) Although the southern part has been developed for sheltered housing, the undeveloped part has remained as open land, albeit put latterly to commercial use in connection with horticulture.
- (v) The sheltered housing development was undertaken by RBKC in 1977 following the acquisition of that part of the site from the owner.
- (vi) The permission for sheltered housing followed a planning appeal in 1972 to the Secretary of State for the Environment. In the Inspector's report the northern part of the site was described as in use for nursery and as such "*an amenity which is greatly valued*" and as an "*open space*" which "*provides little benefit for other people, because it is scarcely seen*" but which "*does make the general environment a little less crowded and a little more interesting*". In favouring retention of the nursery use the Inspector recorded that there was a "*housing need which is considerable ... and likely to be increased*".
- (vii) In 1982, RBKC refused planning permission for a development of twenty three houses on the nursery land. A total of ninety two persons opposed the proposal. In the first reason for refusal, the proposal was said to be contrary to the policies in the Leisure and Recreation Chapter of the District Plan (1982) for ensuring that "*existing open space, both public and private, is protected*



*from development or change of use*". In the second reason for refusal, it was stated that the proposal *"would be detrimental to the character of this designated Conservation Area by virtue of eroding one of the back-land [sic] open spaces which are a valuable characteristic of the area, thus detracting from the visual amenity and sense of openness now enjoyed by those who live around"*.

- (viii) The Oxford Gardens Conservation Area Proposals Statement ("CAPS") was prepared in 1979 pursuant to the Civic Amenities Act 1974 and was last updated in 1990. In a recent report by the Executive Director of Planning and Borough Development, it was stated that the CAPS was due to be reviewed pursuant to a *"Conservation Area Appraisal"* *"after the Neighbourhood Plan examiner has reported on the eligibility of the backland sites for Local Green Space designation"*.
- (ix) That Report by the Executive Director was in response to a petition with 2556 signatures to the Council requesting that it support the LGS designation in the Neighbourhood Plan.
- (x) The original CAPS recorded that *"[t]he designers of both estates [Oxford Gardens and St. Quintin] took care to incorporate space in the street layout. Road widths, gaps, return frontages, backlands and gardens combine to create a distinctive open character for the area ... Backland formed by the enclosed terraces of the St Quintin Estate exist at Highlever Road, Barlby Road and Kelfield Gardens. Some leisure and recreational activities have made good*

*use of these spaces and proposals to develop them with more housing will not be permitted*". The policy against housing development was added in 1990.

- (xi) It is apparent from the foregoing that not only is the Neighbourhood Plan at a critical intermediate stage, but so is the policy for the Conservation Area.
  
- (xii) The fact that the site was not included in RBKC's Open Space Audit 2004 ("OS Audit") merely reflects the fact that, being private land in commercial use, it does not fall within the definition of open space employed for the purpose of the Audit. It does not alter the fact that the site is, as a matter of fact, open land with the potential to become public or private open space. That potential is in my opinion important since, as is recorded in the Audit, the Royal Borough has the highest number of residents per hectare of any borough in London and has the fourth lowest amount of space per resident (see OS Audit paragraph 1.5). Furthermore, at paragraph 1.8 of the Audit, it is stated that "*[i]n view of the densely built up nature of the borough it is unlikely that further large areas of open space can be provided*".
  
- (xiii) In my opinion, there is a clear evidential basis for the opinion that, although the Nursery Lane site is unkempt at present; although it is largely hidden from view from surrounding streets in the Conservation Area; and although it is put to a private commercial use, nonetheless it remains, as the recent petition demonstrates, an amenity greatly valued by the community at large as well as by the residents of the dwellings backing on to it. It remains also an important feature in the Conservation Area with potential for enhancement.

Furthermore, since most of the original backland sites have been lost to development, the Nursery Lane site's importance as one of the original planned backland sites must have increased.

- (xiv) In a Conservation Area, there is a statutory duty, under s.72 of the Conservation Areas Act 1990, to pay "*special attention ... to the desirability of preserving or enhancing the character or appearance*" of that area. In the *Barnwell Manor* case (2014 EWCA (Civ) 137), the Court of Appeal has emphasised that the nature of that duty is greater than a mere obligation to have taken into account the desirability of preservation or enhancement. In my opinion, having regard to the matters which I have identified, there is a very serious issue to be decided in relation to the Nursery Lane site and whether to permit its development or protect its present open character which cannot be resolved by the glib proposition relied upon on behalf of MPL that, compared to the present appearance of the site, the proposed development will be attractive and therefore will discharge the duty to enhance (RJ/PS section 5.6). The issue therefore, should not be decided unilaterally by the LPA granting permission pursuant to the application; it should be one of the matters to be considered at the examination stage of the Neighbourhood Plan,
- (xv) To dismiss the visual amenity value of the open land on the basis that it is largely invisible from surrounding streets is to ignore its value in that regard to the residents of the surrounding forty two dwellings.

- (xvi) With regard to the contribution to visual amenity provided by the site, for MPL it is contended that the site is previously developed land as defined in the Glossary in the NPPF. Whether that contention is correct is far from certain; but it is a sterile debate since there is no policy prohibition against PDL becoming LGS. Furthermore, the extent to which the site has lost its open and verdant character as a result of previous development in connection with the former tennis club and nursery garden uses is limited.
- (xvii) There are clearly grounds for disagreeing with Rolfe Judd's analysis of whether the site satisfies the criteria in paragraph 77 of the NPPF because:
- (i) the site serves as a visual amenity to residents who live round it and is reasonably proximate to them; furthermore, if it were to be designated formally as LGS and cease to be put to a private commercial use, it could serve the wider community;
  - (ii) the site is not extensive and is local in character;
  - (iii) the petition demonstrates that the site is special to the community;
  - (iv) the site has historic significance as a feature of the original estate layout; it is potentially, if not actually, tranquil; it is capable of increasing in ecological value; it has beautiful features (for example, the magnificent weeping willows in the centre of the site); its beauty

could be augmented. The issues arising under paragraph 77 are again ones which should be left to the examiner to determine.

- (xviii) Rolfe Judd appears to consider that the judgement about the suitability of designating the site as LGS must be taken by reference to its present condition, use and ownership. In my opinion that is wrong. In planning the future of a site, it seems to me that the site's potential must be taken into account, in particular, what would happen if the site were to be designated in a particular fashion. It is manifest that the site has the potential to become an extremely attractive local green space.
- (xix) The present owner of the site, the Legard family, has shown no interest in facilitating the formal transformation of the site to open space. Indeed, Sir Charles Legard has sent to RBKC's Planning Department a letter supporting MPL's proposed housing development. That appears to me to be due to the far higher value the site would have for housing which has been pursued since the 1970's. The letter contains a one sided analysis of the issues which does not assist the resolution of the issue of whether the site should be developed for housing or safeguarded as local Green Space. The fact that, so far, no housing development has been allowed testifies, of course, to the force of the argument for protecting it as open land. If the site were to be formally so designated, it seems to me that the Legard family would have to acknowledge that it is not acceptable to develop it for housing and therefore the family should be prepared to sell it for open space use. I am instructed that local residents are prepared to purchase it for that purpose and are able to raise an

appropriate sum. If the Legard family were not willing to sell, RBKC could promote a compulsory purchase order (“CPO”) (following formal designation as LGS) on the basis that it would be in the public interest to secure its future as LGS. The CPO could be on the basis that local people underwrite the cost.

- (xx) Rolfe Judd, in its analysis, attempts to overcome the case for the site becoming LGS by reference to the contribution which the site would make to housing supply in the Borough. The number of houses proposed is twenty. Furthermore, based on the asking price of a recently completed development in Pangbourne Avenue, I would expect the proposed houses to be put on the market for between three and four million pounds. To suggest that the need to provide houses at that end of the market is critical is nonsense; all the more nonsensical is the notion that providing a few houses of that type should justify the loss of the site as a local green space.
- (xxi) The attempt by Rolfe Judd to pray in aid sustainability as justification for permitting the type of development proposed (RJ/PS para.4.1.10) is equally nonsensical. In recent years, sustainability has become the touchstone of all planning judgements. In my opinion, it is a concept which is often both imperfectly understood and applied. The essential theme of sustainability is that development undertaken to meet present needs must not compromise the ability of future generations to meet their needs. It appears to me that it is a grotesque distortion of the concept of sustainability to describe as sustainable the sacrifice of a site capable of providing open space to contribute to meeting current and future needs in order to provide a few houses for the very wealthy.

(xxii) In Rolfe Judd's Planning Statement (RJ/PS para.6.1.18), it is contended that planning permission should be granted having regard to the terms of s.36(6) of the Planning and Compulsory Purchase Act 2004 which provides that applications for planning permission should be determined in accordance with the statutory development plan unless material considerations indicate otherwise.

(xxiii) In so far as Rolfe Judd does claim that the proposed development accords with planning policy it relies on (RJ/PS para.6.1.3):

- (a) *“Paragraphs 17 and 111 of the NPPF”* relating allegedly to making effective use of a site *“with the characteristics of previously developed land with low environmental quality”* (the eighth of *“core planning principles”* in paragraph 17 refers to PDL).
- (b) *“Policy 3.3 [of the London Plan (as amended)] and the Housing SPG”* relating to *“making effective but sensitive use of a backland site to meet new housing to meet the demand within London for new Homes”*.
- (c) Policies CP1, CP2, CH1 and CL1 of RBKC's Core Strategy relating to *“bringing forward a residential development to meet housing needs for the borough”* and providing *“a form of development which is wholly in keeping with the context and character of the surrounding area”*.

(xxiv) Rolfe Judd's analysis of policy seems to me to be questionable for the following reasons:

- Policies 17 and 111 of the NPPF are relied on for the encouragement in them for "*the effective use of land by re-using land that has been previously developed (brownfield land), provided that it is not of high environmental value*". But Rolfe Judd does not contend that the Nursery Land site is PDL as defined in the Glossary to the NPPF. RJ's contention is limited to asserting that "*the current use has strong characteristics of previously developed land*" (RJ/PS para.5.1.12). It claims that RBKC's officers share that view and relies on pre-application advice allegedly given that "*though the site does not display all the characteristics of PDL ... it does fulfil criteria for PDL in some respects*" (RJ/PS para.5.1.12 also). I agree that the site does not satisfy fully the definition of PDL. It must follow that it is not PDL as defined. Consequently, RJ's opinion (RJ/PS para.6.1.13) that the site "*accords with*" paragraphs 17 and 111 of the NPPF is incorrect.
  
- In my opinion, whether the site is PDL is an issue which is capable of being determined through the neighbourhood planning process as part of a structured examination in which all interested parties can take part. That would accord with the first of the "*core planning principles*" in the NPPF namely that "*planning should be genuinely plan led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area.*"



*Plans should be ... based on joint working and co-operation ... They should provide a practical framework within which decisions on planning applications can be made ...*". In my opinion, if more than lip-service is to be paid to that principle, the present proposal should not be permitted in advance of the conclusion of the neighbourhood plan process.

- Even if the site were PDL, the NPPF provides that it should not be developed if it is "*of high environmental value*". Whether this site should be so classified is plainly an issue best determined through the neighbourhood plan process. It is not for Rolfe Judd on behalf of the applicant to be the arbiter of that; nor should RBKC make a final judgement on it unilaterally.
  
- Policy 3.3 of the London Plan is entitled "Increasing Housing Supply". It is not clear to me how that laudable and important general objective assists in deciding whether it would be proper for the Nursery Lane site to be used for that purpose. Indeed Policy 3.3(A) states that "*[t]he Mayor recognises the pressing need for more homes in London in order to ... provide a real choice for all Londoners in ways that meet their needs at a price they can afford*". Given the likely selling price of the houses in the proposed development, it does not appear to me to be intended to advance that objective.
  
- As for the Mayor's Housing SPG, in the Foreword, the Mayor states at the outset:

*“Providing Londoners with a genuine choice of decent homes at a price they can afford is arguably the greatest challenge for any Mayor of London.”*

Policy 3.8(A) of the SPG provides that:

*“Londoners should have a genuine choice of homes that they can afford ...”.*

In my opinion, the nature of the proposed development does not reflect any attempt to comply with that policy.

Furthermore, the Housing SPG clearly contemplates that it may be appropriate to protect backland from development (see paragraphs 1.2.2.6 and 1.2.2.9).

- As for RBKC’s Core Strategy, Policy CL1 states that:

*“The Council will require all development to respect the existing context, character, and appearance, taking opportunities available to improve the quality and character of ... the area and the way it functions, including being inclusive for all.”*

It is submitted that the proposed development does not accord with that policy. On the contrary, it is scornful of the existing context, character and appearance of the Nursery Lane site and seeks to replace it with an exclusive development of high value houses. That approach does not accord either with Policy CL3 which requires development “to preserve

*and ... enhance the character or appearance of the conservation area ...  
and protect ... its settings.”*

## 18. CONCLUSION

- (i) Rolfe Judd made the bold claim (RJ/PS para.4.1.11) that “[t]he application scheme is ... in accordance with the development plan and there are no adverse impacts which would demonstrably outweigh the very significant benefits of approving this scheme”.
- (ii) That claim is extremely tendentious. As has become so familiar in applications for planning permission for housing since the introduction of the NPPF, Rolfe Judd, on behalf of MPL, is attempting (RJ/PS para.4.1.10) to compel RBKC to rush to judgement on the application by praying in aid “*the presumption in favour of sustainable development*” under paragraph 14 of the NPPF.
- (iii) The truth is that there is a compelling argument that to develop the Nursery Lane site would be a short sighted decision to provide very expensive houses for the wealthy minority rather than protecting the site to meet the long term needs of the community for the preservation of the historic character of its townscape.

- (iv) The competing arguments should not be predetermined by granting permission for the development. The right course is to refuse permission pending the completion of the Neighbourhood Plan process.

**MATTHEW HORTON Q.C.**

**12 June 2015**

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**OPINION**

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