TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPULSORY PURCHASE ACT 2004

WHITECHAPEL BELL FOUNDRY
APPLICATION BY RAYCLIFF (WHITECHAPEL) LLP

Inquiry sat 6-9, 13-16, 27-28 October 2020

CLOSING SUBMISSIONS BY RE-FORM

INTRODUCTION

1. The Whitechapel Bell Foundry, listed at Grade II*, is one of the country's most important industrial heritage assets. If the Raycliff application is approved, the Foundry will be seriously harmed.

2. It seems entirely appropriate that the Secretary of State has called-in the application, given that it represents a test case for the conservation of our industrial heritage. If the law and policy on heritage conservation are not to be diminished, this application should be refused.

3. As the evidence at the inquiry has shown, this is a proposal which sprang from commercial opportunism. The previous owners and operators of the Foundry sold it to a speculator without having carried out a thorough investigation of its potential future use for Foundry purposes. That speculator sold it to Raycliff, a venture capital company, who conceived of the site as a hotel and associated uses. There is nothing objectionable in commercial opportunism itself – the problems come when sites are acquired with outcomes in mind which do not accord with the regulation of land use and heritage.

4. The headwinds of the planning system began to blow. Raycliff's response, a classic exercise in retro-fitting and *ex post facto* justification, is now constructed in this way: the Foundry use has gone (it is said); extensive work to the fabric of the Listed Building needs to be cross-subsidised by the hotel proposal (a large proportion of which is outside the Foundry site; that there is no other viable way to conserve the heritage asset; and therefore the benefits of the proposal – including a so-called 'Foundry', the parameters of which were still developing even in October 2020's s.106 re-drafts – are said outweigh the harm. In recent times the Raycliff proposals have even been promoted on social media under the label 'Save the Bell Foundry'.

5. Saying things does not make them true, of course. The fundamental problem with the application – and why it is rightly a matter of significant public disapproval and keen interest from the Secretary of State – is that it would not conserve the heritage significance of the site. It would harm it, and much more significantly than Raycliff suggests. And in doing so, it would irreparably damage something of local and national value.

6. When a development scheme would cause harm to a Grade II* Listed Building, there is a strong presumption against granting permission.

7. Raycliff's case under-estimates the harm, and over-values the benefits they say the scheme would bring and fails to rebut the strong presumption that the Court has established.

8. By contrast, Re-Form's approach is that the Foundry should be used as a foundry, conserving the essential characteristics of the use, the spaces and character of the Listed Building. It is a serious proposition, conceived of and developed by a group (including Factum) which has a track record in conserving our industrial heritage as well as a vision for the future of the Foundry which completely outshines the expedient commercial re-development represented by the hotel-led Raycliff proposal. Its authenticity represents the right way to conserve this crucial part of our national heritage.

9. For reasons that are self-evident, Re-Form have not made a planning application and are dependent on the outcome of this application process. But the evidence shows that they are fully prepared to take the Foundry forward if the Secretary of State creates the opportunity for that to happen.

10. It is directly relevant to the question of heritage impact and conservation that there has been an extremely high level of opposition expressed locally to the proposal, including some 27,000 signatures to the petition that the Inspector and Secretary of State have seen. The potential impact of the Raycliff proposals is deeply felt by local people, community leaders, artists and makers, and heritage and conservation experts alike. The remainder of these submissions try to keep the main points in view at all times, and to explain by reference to the evidence before the Secretary of State why the application should be refused.

KEY LAW AND POLICY

11. The **first** point is that once a heritage asset has been permanently harmed, something irrevocable has occurred.

12. That is one of the reasons why s.66(1) of the Listed Buildings and Conservation Areas Act 1990 requires the Secretary of State to have *special regard* to the desirability of preserving the building (including any features of special architectural or historic interest it possesses).

13. In *Jones v Mordue*[1], the Court of Appeal effectively aligned the application of the relevant set of paragraphs in the NPPF with the following of the statutory duty. That is partly because NPPF 184 says (underlining added) that "[t]hese assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations." For that reason, *considerable importance and weight*

[1] [2016] 1 WLR 2682 CD 8.3 here.

must be given to the policy objective of preserving (ie not harming[2]) the building and any features with the relevant interest[3].

14. In terms of the Inspector's question about the approach to the LBC provisions: the restriction on works in section 7 of the Planning (Listed Buildings and Conservation Areas) Act 1990 bites on any works for the demolition of a listed building or alterations or extensions which would affect its character as a building of special interest. There are two stages to this analysis (i) whether works entail demolition, alteration or extension of the listed building; and (ii) whether they would affect its character. The question of whether the hotel is an extension to the listed building is a matter of fact and degree for the decision-maker, but the degree of connectivity and physical connection might well suggest that it is; as would the extended definition in s.1(5) which suggests that the hotel will fall within the scope of s.7 once constructed as an "*object or structure fixed to the building*". Of course, listed building consent will still only be required if the construction of the hotel would affect the listed building's character as a building of special interest.

15. The requirements to have special regard in s.16(2) and s.66(1) are in identical terms and should, *prima facie*, be addressed in the same manner. In ***Whitby v Secretary of State for Transport*** [2015] EWHC 2804 (Admin), Lang J referred to the decision of the Court of Appeal in ***Barnwell Manor Wind Energy Limited v East Northamptonshire DC*** [2015] 1 W.L.R. 45 and to the review of the case-law undertaken in the judgment of Sullivan LJ and took the view that the principles discussed applied to the determination of an application for listed building consent under s.16 (see [49]). While the NPPF does not state that it is a material consideration in listed building consent decisions, the conclusions of the Court of Appeal in ***Mordue*** that what is now paragraphs 193-196 lay down an approach which corresponds with the duty in s.66(1) indicate that those paragraphs can also be applied to s.16(2).

16. This being the case, the answer to the Inspector's question as to how it should be applied to proposed works that are in part harmful, but in other parts beneficial, is as set out in

[2] This fundamental point was clear as long ago as *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 144 at 150A-G.
[3] *Jones v Mordue* [2016] 1 WLR 2682 at [28] (CD 8.3).

Kay v SSHCLG [2020] EWHC 2292 (Admin)[4]. The decision-maker starts by establishing the extent and nature of the harm, leaving out any beneficial impact. They should then turn to weigh the harms against the public benefits of the proposal, including heritage benefits. Listed building consent should not be granted unless the scheme is, on balance, acceptable.

17. The **second** point is that if a proposal is found to cause harm to designated asset, then there is a strong presumption against its authorisation[5].

18. The timeframe for consideration of these matters is therefore the very long term, and it is central to law and policy that decisions made now recognise the consequences of allowing harm.

19. The **third** point is that when undertaking any balancing exercise under paragraph 196 of the NPPF, one should not assume it is a simply 'unweighted' balance to begin with, but is pre-weighted or 'tilted' towards conservation of the asset. This was made clear in *R(Leckhampton Green Land Action Group) v Tewkesbury BC*[6].

20. **Fourth**, the balancing exercise under paragraph 196 is triggered by a finding of harm; it should place all the heritage harm on the negative side of the tilted balance; then see if there are benefits (which might include heritage benefits) of sufficient weight to outweigh the weight to be given to the harms: see *Kay v SSHCLG*[7].

21. **Fifth**, the decision maker may find that one of the public benefits is that the application proposal is what the NPPF calls the "optimum viable use" ('OVU'). The Courts have upheld the relevance of a thorough examination of possible less harmful alternatives to a development which causes harm in heritage terms. In *R(Gibson) v Waverley Borough Council* [2015] EWHC 3784, the Court said:

> "69.. I do not doubt the correctness of what was said by Lindblom J, as he then was, in the context of heritage harm in .. *Forge Field Society v Sevenoaks* [2015] JPL 22 when he said this:

[4] CD 8.10
[5] *R(Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895.
[6] [2017] EWHC 198 at [40]. Copy to be provided to the Inspector.
[7] [2020] EWHC 2292 at [34].

> "if there is a need for development of the kind proposed, which in this case there was, but the development would cause harm to heritage assets, which in this case it would, the possibility of the development being undertaken on an alternative site on which that harm can be avoided altogether will add force to the statutory presumption in favour of preservation. Indeed, the presumption itself implies the need for suitably rigorous assessment of potential alternatives."
>
> 70. Whilst that observation was made in the context of harm to heritage assets and the need to consider alternative sites, I accept that there is a need to consider alternative, less harmful uses of the same site when evaluating a proposal that would cause harm to a heritage asset… However, the way in which that evaluation may be carried out will vary from case to case…"

22. In the more recent case of *City & Country Bramshill Limited v SSHCLG* [2019] EWHC 3437, those observations were developed. The Court referred to them, and then said this about the role of alternatives (my underlining):

> "86. Accordingly, the possibility of alternative modes of development at the site of the heritage asset is of particular importance. I do not consider that a decision maker is only entitled to have regard to such a possibility in cases <u>where a specific alternative development has been put forward in some detail or even in outline</u>."

23. So *Bramshill*, an up to date authority, is clear that in the heritage context, it is not necessary to put forward a competing planning application, or to set out the approach in anything like the kind of detail that Re-Form has at this inquiry; indeed, what has been done is clearly within the guidelines that the court in *Bramshill* set down.

RAYCLIFF'S APPLICATION AND ITS CASE

The genesis of the proposal and its legacy

24. Raycliff's case is that the proposals before the Secretary of State are "heritage-led". As the evidence shows, that is not really the case. What has happened is that the site was sold by the previous owners, flipped by the purchaser to Raycliff, and then its hotel scheme advanced.

25. The July 2018 consultation proposals – ie, what Raycliff put into the public domain and sought views on – is a hotel with a café[8]. The hotel and café would in part occupy the Listed Building, and therefore Mr Fryer's work was underway to assess what might need to be done. But the context was the proposals as they then were. There was no suggestion even of a living museum at the time.

26. Raycliff say that it was just a first stab, and the scheme developed to respect the heritage asset, but it is important to reflect on the legacy of that initial concept. It has led to an obvious conflict within the Raycliff case. On the one hand, the case mounted is that the fabric repair has to be done all at once, and to the specification assumed by Mr Fryer and costed by Aecom. But that is a function of the fact that this has always been a commercial scheme, which adopts a certain finish (so as not to detract from the high-end hotel scheme to which it is attached and to which it will physically form an adjunct).

27. Now a foundry space is promoted, but its size, location, specification, screening-off from the café, and so on, are still dictated by the hotel style concept that Raycliff started with. There is little value in telling the Secretary of State that a real foundry would cost more than Re-Form says, if you have costed the Raycliff scheme instead.

28. And so the tension is between the idea of a foundry as beneficial (indeed a "major benefit"[9]) is at odds with the rather bijoux way it has had to be drawn up. The design, or operational assessment, of a real foundry would not start from where Raycliff started, and it would not end up with the token space on which it now relies. The foundry space (and the associated s.106, about which more below) tells you all you need to know about why the Raycliff proposal has never, and cannot ever, escape from its original misguided premise.

The current proposals - compartmentalisation

29. What is actually now proposed? The hotel occupies separate land never owned by the Foundry's previous owner, and the Foundry's non-listed segment. On the Listed

[8] See the analysis of this in the Re-Form Rebuttal Document.
[9] Dr Filmer-Sankey's Heritage Statement, CD 3.2. para 4.2.3 and XX

Building site, Raycliff propose what appears to be a separate mixed-use planning unit scheme involving B2, B1 and A3[10].

30. However, the latest version of the conditions at the very end of the inquiry incorporates an attempt to 'fix' floorspace quanta and locations within the scheme by reference to the application drawings. It is said that this would allow the removal of PD rights to be effective.

31. Whether or not that would be the case, the latest conditions further underline the physical, legal and regulatory compartmentalisation of the Foundry site under the Raycliff proposals. Whilst Mr Brierley's evidence was clear that in viability terms, the hotel pays for the works to the Foundry building, it is far less clear how it would be governed and controlled in practice. The foundry space, it appears, will be let to a third party; so will the B1 areas. The café – well, that is unclear. It is not certain by any means on the evidence whether it would be operated with or by the hotel operator.

32. These are all matters which inform a judgement about the effect of the proposal on the character of the Listed Building.

The foundry space

33. Further submissions about the type of use suggested by Raycliff follow later one, when considering the heritage evidence, but there is a very important preliminary point: it would be a grave error to interpret the s.106 as providing for 10 year's worth of foundry use on the site. It does nothing of the kind.

34. The s106 obligation to operate a foundry are with ABFA and WG, but <u>only for so long as they hold a lease</u>; there is no provision which obliges the foundry use to be instituted, or instituted before the hotel opens, for instance. Schedule 6 (2)(1) is a covenant not to occupy the foundry space until there is a lease for that area, not an enforceable covenant to occupy the foundry space.

[10] See XX of Ms Ryder and Mr Westmoreland.

35. There is no obligation to enter into a lease, which is the trigger for the 10 year occupancy covenant (Sch 6(2)(2)). Clearly, whether ABFA or WG in the end sign a lease is a commercial matter for them. No lease exists at the moment, and we have not seen any draft lease which would allow the Secretary of State any confidence either than the parties will indeed sign a lease, or on what surrender or default terms. So the 10 years is contingent on a lease, and there is no obligation to enter into one. To use a technical legal expression, the s.106 is about as much use as a chocolate tea pot.

36. This is important because the s.106 does not bind any future operators of the foundry (as defined) unless they have a lease too.

37. It is also questionable whether there is any obligation to provide any aspect of the foundry equipment (especially when there may not be a lessee to use it). The s.106 definition of "Part 1 Works" (in relation to the foundry space) simply says "[Part 1 Works] means part retention of B2 land use ... within the are shown shaded blue on Plan 1". This is not a reference to doing anything new: the existing use, without any equipment or actual foundry activities as at today's date, is a B2 use. A definition which refers to retention of an existing land use does not indicate anything by way of re-fitting or kitting out. Plan 1 is just a definition of different areas.

38. Raycliff will no doubt say that this is what you would expect commercially at the moment; but if that is true, it shows what the commercial realities in fact are in relation to the foundry space. The s.106 is just full of holes, with no party willing or able to commit to the establishment of a foundry space for any period of time despite the challenge on this point.

39. It is worth focusing again for a moment on the detail, bearing in mind that the Inquiry is being told that ABFA and WG are tantamount to business partners or JV partners with Raycliff, supporting the grant of permission and then fully committed to operating the foundry. If that were so, why are they under no obligation whatever to do so? NB:

    (1) ABFA and WG are parties only for the purposes of the obligations in Sched 4 para 21.3 and Sched 6 Part 2;
    (2) Sched 4 para 21.3 is the one requiring them to provide one apprentice/trainee in the foundry

(3) Sched 6 part 2 specifies the obligations about operating the foundry

(4) But there is no clarity about the relationship between ABFA and WG.

(5) They are not contractually bound by the s106 clause 20 duty to act in good faith and there is nothing in the s106 which states how obligations taken by more than one party are shared - severally, jointly, or jointly and severally?

(6) The HoTs seen so far shed no light on this and the fact that they are both stated as parties to the s106 suggests they haven't thought it through at all.

(7) Clause 8.3.2, and Schedule 2 part 6: ABFA and WG and any future foundry operators are only bound by the relevant bits of the s106 for so long as they have a lease of the foundry - and if they don't then they are not bound. There would be no consequences in the s.106 for ABFA, WG or Raycliff.

40. In the light of these points, we would invite the Secretary of State (1) to find that no weight can be given to any suggestion that there is a guaranteed Raycliff foundry use for any period of time, and (2) to approach the s.106 critically, because as a piece of evidence in its own right it demonstrates again that the foundry space is a token gesture, without any credible foundation: despite the efforts to rope in support from Westley and AB Foundry, they are not prepared to put their money where their mouth is. That is hugely significant in the context of this application.

The main issues affecting the Raycliff case

41. Before turning to the main areas of disputed judgement, it is worth setting out and examining a few key propositions in the Raycliff case.

42. First, the proposition that the "Foundry use has gone". This is a point taken up far too readily by the Council as well, and is in the end not sustainable:

(1) The use of the Grade II* building as a Bell Foundry has taken place since the 1740s, and B2 remains the lawful use. If Raycliff consented, the bell foundry could be re-fitted and used by Re-Form without the need for planning permission. So it has not ended for planning purposes.

(2) The departure of the Hughes company is not the same thing as the use of the building ending; indeed, temporary vacancy could not be the test for whether a heritage asset had lost its use – otherwise simple cessations would constantly be used to ground works in Listed Buildings. So the use has not "ceased" for heritage purposes.

(3) It is common sense that a historic use of a Listed Building has only been "lost" when, for whatever reason, the use will not return[11].

43. Second, the argument espoused by Raycliff, Mr Froneman for the Council and (though the terms of this are interesting) Historic England, is that the historic use which has ceased is more narrowly defined: "large church bell foundry". Mr Froneman seemed to think this was as simple as pointing to the sign above the front door on Whitechapel Rd. However, it is not – neither of the two most famous bells to be cast at the Whitechapel Bell Foundry were church bells (ie Big Ben or the Liberty Bell), and the business under the Hughes' had already gone through many market-driven changes over the years.

44. If this were the whole story as far as the historic use was concerned, then no weight should be given to the Raycliff foundry space, which is not fit for large bells or church bells. But apparently it will be of "major benefit" in heritage terms.

45. The truth is that the use was as a bell foundry. Unless the position is that a foundry use which is centred on bells will never return to the site, it is wrong to say the use has been lost. On the evidence, it is plainly impossible to say that. The HE position as expressed by Mr Dunn was notable for its superficiality – HE did not feel that they were "in a position to second guess" what they were being told by Mr Hughes about the foundry use. It is very regrettable that HE simply took that position, even to the extent of appearing at the inquiry, without properly engaging with the question of whether the Re-Form scheme showed otherwise; Mr Dunn said that he had not even read Mr Clarke or Mr Lowe's evidence[12].

[11] See Mr Dunn XX
[12] Mr Dunn XX

46. If the use has not been lost, then there are consequences – the return of such a use would obviously be the optimal use from a heritage perspective, and indeed, the closer a use was in terms of character to the use for bell founding, the more authentic and consistent with the conservation of significance. Given the gulf between what Raycliff have latterly suggested though not guaranteed, and the driving ideas in the Re-Form proposal, it is not surprising that Raycliff and its supporters are so keen on this fallaciously narrow approach to the historic use of the site.

47. Third, "OVU is not a policy requirement". Raycliff is at pains to say that even if they do not persuade the Secretary of State that the proposals are the OVU, that merely removes one of their claimed benefits, rather than counts against them. That is clearly a bogus argument and contrary to the views of the court, as set out below. As the Council's own policy[13], and the cases on OVU make clear, the need to scrutinise potential alternatives in cases of heritage harm may mean that a powerful point against the grant of permission is thereby uncovered.

48. If one acknowledges that (1) the historic use has not gone for ever, (2) that it should be defined rather more widely than simply church bells, and (3) that failure to establish that there is no alternative OVU counts against an applicant, then the Raycliff case looks very different. It is the centrality of the harm that the scheme would cause that has led to the Raycliff case depending on such tendentious propositions.

HERITAGE

Significance

49. There is no doubt that the Whitechapel Bell Foundry Grade II* Listed Building is a structure of the highest significance: NPPF paragraph 194 defines it as such, along with a select subset including Grade I buildings and World Heritage Sites.

[13] S.SDH3: requiring a "thorough assessment" of alternatives to the loss of use/harm

50. Paragraph 184 of the NPPF tells us that heritage assets are irreplaceable and should be conserved "in a manner appropriate to their significance". It follows that conservation of assets of the highest significance imposes a particularly heavy burden.

51. It is the case that some parts of a Listed Building may not be as significant as others. However, the assessment of significance of the fabric in this case is questionable. First, the hayloft/former stables area is given a lower significance rating because it was re-constructed post war. As Dr Filmer-Sankey accepted, however, it was re-built as part of the foundry use in the utilitarian industrial style following bomb damage. It is part of the evolution of the foundry.

52. The hayloft/stables area may be less significant than the Georgian front range or the moulding room – but that is relative. They are intact Georgian/Victorian structures in single use as part of a Grade II* Listed Building; the hayloft is a reconstructed part of that single use, also covered by the Listing when it was critically reviewed within the last 5 years. So, even if it is slightly less significant than the front range or moulding room, it is still of extremely high value in heritage terms. Dr Filmer-Sankey thought it "neutral"[14] but that is simply wrong.

53. That has never been fully faced up to by Raycliff or its advisers. Being realistic, if one is designing the kind of scheme that Raycliff intends for the site, with substantial public access, then a major intrusion of this kind is inevitable, and so some loss of high-value fabric is the cost. Dr Filmer-Sankey and Mr Dunn also appeared to make the further assumption that damage here was "probably inevitable" in any scheme for re-use of the building. That is not so – it depends on the use which is intended for it. A proper foundry would not need that degree of intrusion.

54. So, the significance of the hayloft/stables has been underestimated when bringing forward these proposals.

55. Second, there has been insufficient attention paid to the value of the internal layout of the Listed Building and the value it has evidentially and historically. The Listing speaks

[14] F-S 5.3; and see CD3.2 Heritage Statement pages 78-81.

in terms of a "distinctive and cohesive complex of domestic and industrial buildings", and the way that the building's layout naturally reflects the day-to-day requirements of the process remains an important part of its significance.

56. Mr Froneman's position[15] was that in the absence of most of the equipment, the building could be "any industrial shed" –a view at odds with Mr Dunn's assessment of the "extraordinarily atmospheric" interior of the Listed Building[16], which still speaks of its use and historic associations, (a view shared by Dr Barker-Mills). In a building whose layout, movement corridors and spaces all derive their character from the historic use, a "major component of significance" according to Mr Dunn[17].

57. Dr Filmer-Sankey's Heritage Statement significance analysis does not assess the value of the layout at all, focussing exclusively on fabric, and assuming use to have ceased. By the time of his proof[18], he had made room for the acknowledgement that there was "much of interest" in the way the "plan-form reflects its history of use as a bell foundry" – but there is no corresponding formal assessment of significance for heritage purposes.

58. So, the significance of the layout has also been underestimated.

59. Third, the issue of use again. No value is given to the use of the Listed Building in the Heritage Assessment on the basis it had ceased, indeed Dr Filmer-Sankey identified the cessation of founding as having caused harm[19]. Now the Secretary of State is apparently asked to give significant weight to the "major benefit" of the Raycliff foundry space because it restores something akin to the historic use in part of the original space. The Achilles' heel in all this is the fact that it would be the Raycliff proposal which would cause permanent loss of the historic use, not the Hughes' business closing in 2017.

60. So, the intangible core of the building's significance is its inherent use for bell founding. If that is not dead and buried, then the Raycliff assessment of significance is completely flawed.

[15] In XX on this point.
[16] Mr Dunn 6.1.4 page 22
[17] MD 6.1.44, page 22.
[18] Paragraph 3.9 page 24.
[19] F-S paragraph 6.3.

61. Fourth, the late discovery of foundry remains under part of the 1980s building is not to be overlooked. The Council consider them to be curtilage listed. They are part of the historic foundry, are well-preserved and make quite an impact when viewed. They tell of the historic use of the site and its evolution. They lay undiscovered when Dr Filmer-Sankey did his Heritage Significance assessment and the scheme came forward; even now they are not accorded sufficient weight as part of the historic foundry.

Harm

62. The evidence has shown that in addition to under-estimating the significance of the assets in four important respect, the Heritage Statement[20] used an incorrect 'internal balance' approach to assessing the degree of harm that the Raycliff scheme would cause.

63. One can see this most clearly in the tabular summary of findings[21] - where, for instance, the foundry is said to suffer some harm[22], but due to heritage benefits the effect was "overall neutral". The result of this approach was to disguise the high degree of harm that Dr Filmer-Sankey actually accepted would be caused, masking it with his judgements about off-setting benefits; this gave a misleadingly bland cast to his impact assessment submitted to and accepted by the Council.

64. In fact, the harm would be very substantial indeed. It would arise in three main ways: (1) harm to fabric, (2) harm to layout, evidence of process and legibility, and (3) harm to significance due to harmful change of character within it.

65. As to the fabric damage, there is a measure of agreement between Dr Filmer-Sankey and Dr Barker-Mills. There would be damage consisting in the partial demolition of walls in several places to punch new openings, and the demolition of the hayloft/stables to be replaced by access and galleries modelled on a "coaching inn typology". There would also be harm to the floors – they are to be replaced and the complete destruction

[20] CD 3.2 see especially pages 92ff.
[21] Ibid
[22] See page 94

of the vaults under the 1980s frame shop. It is also notable that the details for venting of any furnace used in the foundry space is something that will require further approval by condition.

66. Given that we are talking about a Grade II* Listed Building, unique in type in England, it is disconcerting to say the least to find Dr Filmer-Sankey's assessment is that the degree of harm caused by these works would be "very minor". Closer inspection reveals that he has gone wrong partly because of the erroneous ascription of lower significance to some aspects of the asset, and partly because he has just under-assessed the degree of impact:

    (1) The punching through of wall openings destroys original fabric and intrudes into the design and function of the spaces (it has to – it is aimed at making way for wholly new patterns of use and access). There is no discounting of the weight to be given to the harm here because of "inevitability" – there is no such inevitability if the use was as a foundry.

    (2) The old stables total demolition (not just "rebuilding", as Dr Filmer-Sankey labels it[23]) would be very harmful indeed. It would cause the loss of a large historic foundry space and a significant volume of Grade II* Listed fabric, and evidence of change over time (including the way the Foundry was affected by bombing in the War, itself a time-layering of some interest). For Dr Filmer-Sankey, this would be "neutral" in its significance. Mr Dunn recognised that the replacement would not be industrial in character – or of course, in fabric. The public access enabled in part by this harm goes into the benefits side of the equation, but into the harm side, surely, goes a significant item of negative impact. Dr Filmer-Sankey has from the very first assessment underestimated the degree of impact that this would have.

    (3) Much is made by Raycliff of Mr Fryer's conservation approach to 'lightly brushing down the walls', as if the development stage will be a dreamy ballet of slow-moving curators delicately swishing around the interior of the building. Little mention is made of the fact that the floor of the historic foundry space is proposed to be ripped up entirely. It may be that such an intervention is in keeping with the kind of end

[23] F-S paragraph 5.3

product Raycliff seeks, but it is obviously damaging to listed fabric and to character. Little if any assessment has been made of this harm. Similarly, the complete loss of the vaulted chambers is accorded very little weight as harm. These are more, serious, underestimates. The overall shying away from the degree of actual harm affects not just the evidence of Dr Filmer-Sankey but overall planning judgements too[24].

67. Turning to layout, process and legibility, it is worth recalling the condition session and the new suite of conditions proposed, demarcating uses to discrete areas of the Listed Building. These should be coupled with the (still hazy) set of legal divisions to be set up within the building, and the physical changes that the scheme would impose.

68. At the moment, the Foundry spaces are all part of one use. They flow into one another, with wide open, industrial spaces, shaped and adapted for specific purposes. That is why the site is so evocative even in the absence of some machinery.

69. By contrast, the Raycliff scheme will result in the compartmentalisation of the asset, chopping it up into a series of spaces and uses. Most will have no functional connection with the foundry use or indeed with each other. The café has nothing to do with the B1, or the foundry; its location within the building, and the extremely imposing division between it and the foundry space bears little relation to the layout or legibility of the foundry use. Similarly, the "tuning room" – in truth little more than a large display – is divorced from the foundry, and would appear as a booth on a journey from café to courtyard.

70. The courtyard itself would have five accesses/egresses joining it. It is a small space and would no longer separate the front office/domestic range from the foundry floor – it would simply be an incident within a mixed use building. A stack of (one notes, non-Church) bells would be a sorry substitute for the loss of the sense one gets now of the space.

[24] See eg Ms Ryder's 8.30 "certainly no destruction or even major alterations proposed", and XX.

71. The Georgian front range would be divided up between gift-shop style space and B1, and the sense of the relationship between the residential and industrial components of a single use would be lost.

72. None of this has really been grappled with by Raycliff; Dr Filmer-Sankey neither assessed it in his original Heritage Statement, nor covered it in the proof of evidence. The Inspector will have a note of the cross-examination on this point.

73. Finally, the effect of the scheme in causing a permanent loss of the foundry use and substituting a different and incompatible scheme. This cannot be airbrushed away on the basis that the use has ceased, as I've already said.

74. First, the mix of uses proposed, particularly if they are as segmented and subdivided as apparently proposed, will erode the historic, architectural, and evidential aspects of significance. What will remain will no longer be a cohesive complex of foundry buildings but a former industrial building with at least two major non-foundry uses within it. Mr Dunn had not perhaps himself grasped the essential problem with the very large café space proposed – he said it would be analogous with the former Brewery tea room at Knowle. The contrast could not be clearer, in fact: whereas at Knowle the National Trust has sited the visitor facility in a subordinate building away from the Hall, the Raycliff proposals supplant the majority of the moulding room and open foundry space with the café. This is a very different kind of location, and degree of importance, within the asset than that you will see at Middleport on Friday, too.

75. The café will afford some views of some of the interior. It may allow glimpses of the casting pit (though there is no obligation to do this, and some question remains over the compatibility of the 50 covers proposed and the floorspace required to reveal the casting pit); but these will be sadly de-natured in character. Everything will need signage and interpretation to make sense of it, which is a sure sign that the character and meaning has been lost by the scheme in the first place.

76. As submitted earlier, no reliance ought to be placed on the foundry space in any event, given the failure of Raycliff, ABFA and WG to tie themselves down to an enforceable obligation actually to put in and conduct founding of any kind. But even assuming the foundry space were to be provided, it will not look like the Richard Hamilton-esque

montages in the Raycliff evidence. It will not feature bells of the size (mis)represented there; it will not be readily incorporated in the café visually but markedly cut off and subdivided from it, for safety reasons. The glass partition is a very large structure and would itself change the character of the main moulding room space detrimentally.

77. As one moved around the former foundry in the Raycliff scheme, it will overall be difficult to appreciate the original use of the building, however many interpretation boards there might be. They would be gravestones for the foundry use, not windows onto it.

78. All these effects are bound to happen if you take a Grade II* foundry complex and change the uses as proposed. They go to the heart of the community objections to the Raycliff scheme, which repeatedly stress the loss of the use, and the connection between the community and the historic use. It may be sold as a "living museum", but that will not conserve the special role that the Whitechapel Bell Foundry has in local identity.

79. Nowhere in the Heritage Statement, or the evidence of Dr Filmer-Sankey, Mr Dunn or Mr Froneman is this faced up to. Instead, longer and longer denials of the relative importance of the uses and their interrelationship, and a greater and greater emphasis on the Raycliff substitute.

80. Against that background, it is not surprising that someone with Dr Barker-Mills HE background finds that the damage would amount to substantial harm. On the basis of *Bedford*, the significance of the asset would be "very much reduced". There is no point in attacking Dr Barker-Mills on the basis that most of the structure will be retained; in addition to substantial fabric damage, the coherence and meaning of the complex will be lost. It is an entirely supportable view that this crosses the boundary between 'less than substantial' and 'substantial'. No case has been mounted by Raycliff that the para 195 tests would be met.

81. But even if the harm lies in the less than substantial category, it is much higher than Dr Filmer-Sankey's assessment has indicated.

82. Re-Form would respectfully ask the Secretary of State to find that the harm would be either substantial or at the top end of less than substantial. The fact that it is a unique

II* building of the highest significance makes the presumption against granting permission an enormous challenge. And rightly so, given that the emphasis should be on conservation, not harm.

BENEFITS

Heritage benefits other than OVU

83. The Raycliff scheme would lead to repair and making good to fabric in the Listed Building. This would clearly be a benefit to which significant weight should be given, and Re-Form can see that one likely deliverable aspect of the s.106 obligation is a certain degree of repair and refurbishment in the construction/re-development phase of the scheme. Repair of this kind would be consistent with conservation and benefit the asset in the medium to long term.

84. It is fair in addition to note that there has no evidence advanced by Raycliff to say that there is any particular urgency about the repair work. We know that, by agreement with the Council, some urgent repairs have been undertaken on site since Raycliff purchased it – Mr Fryer acknowledged that a system exists which would allow specific items to be undertaken in that way without the need for an overall planning permission or LBC. This is not to detract from the accepted benefit of undertaking the identified work in the future, but just to caution against giving any additional weight due to a perceived need to undertake that work urgently.

85. The point is relevant of course to the question of whether permission for the Raycliff scheme is justified in part by an urgent need to carry out repairs. Mr Fryer spoke in terms of 12 months to 2 years for urgent works, but the point was very generalised and urgent authorisation could always be sought. It was a perfectly reasonable choice for Raycliff to make in the context of a scheme like theirs – all at once and to a particular specification. That does not make it a failing of Re-Form's alternative that it might take

several years to reach the same point. Nothing fatal will happen to the building in that timescale, and urgent repairs can be undertaken along the way.

86. Next, the question of increased public access is a little more nuanced. It is true that permitting the community to see and experience an asset like the Bell Foundry – and potentially thereby revealing more greatly the significance of the asset – is a recognised heritage benefit. In very general terms, therefore, the weight to this benefit ought to be commensurate with the importance of the asset being revealed.

87. However, in this case one cannot ask the question in the abstract. What would be revealed by public access, and would the significance of the asset be 'better revealed' by the public access? In answering that question, one must bear in mind it is not the asset as it currently stands that would be open, but the site as altered by the Raycliff scheme. Access to the café would give one the experience of sitting in a café within part of a former bell foundry, and one could glean certain things about the significance from interpretation (and some things if the foundry space were to be operational). But for the reasons I've set out, it would be an attenuated and much changed significance that would thereby be revealed. This diminishes the weight that ought to be placed on the idea of public access in this case, and on the interpretation strategy.

88. The other major heritage benefit relied on is the foundry space. Very little weight should be given to this because the evidence casts serious doubt as to whether any operator would take a lease on the foundry space. Indeed, the s.106 saga is an unmistakeable contra-indication.

89. Even if one assumes it to be put in place, the Raycliff foundry space would be of very little heritage benefit. Yes, it would occupy part of the moulding room area of the original foundry; and yes, it might involve casting of small bells amongst other artistic projects. A sense of the kind of activity once undertaken might be gained. The Inspector will be able to reach his own view about how tokenistic and deracinated the activity would be.

90. If one assumes (as we say the Secretary of State should not) that it comes into being, some limited weight should be given to it. In this case the Hughes family, Raycliff, and

the Council have been asked to consider a proper foundry on the site in the alternative, and for their various reasons they have not.

OVU - principles

91. Establishing that a scheme applied for represents the OVU requires the demonstration of viability of the scheme, and the ruling out of alternatives that are both better in heritage terms and viable. That is because one cannot say that heritage significance is conserved, if harm is caused, unless one also shows that there is no better way to deal with the asset.

92. That is why this area of policy and practice is different from the general rule that one does not usually look at alternatives. In the first *Gibson* case[25] the Court said this (my underlining):

> "35. … This was not a situation where so long as the decision maker took all the relevant considerations into account it was for it to weigh them in the balance. Nor was it a matter of the Committee simply adapting what [was] characterised as a realistic and achievable plan to preserve Undershaw. In broad terms the statutory mandate is to pay special regard to the preservation of heritage assets.…HE9.4 then requires weighing the public benefit of a proposal in securing the optimum viable use of a heritage asset against any significantly harmful impact…
>
> 36. The guidance suggests in paragraph 88 that viability is measured not just in terms of viability for the owner but for the conservation of the asset. Crucially it explains that if there are alternatives which would secure a viable use, the optimum viable use is that which has the least harmful impact on the significance of the asset, a use which may not be the most profitable. <u>In my view, the result is that if one of the alternatives would secure the optimum viable use and another only a viable use not only does that have to be taken into account in determining an application but it provides a compelling basis for refusing permission for the non-optimum viable proposal.</u> The principle in *Trusthouse Forte…* cannot be applied full blown in the context of heritage assets: although there may be alternative viable uses, for heritage assets the law elevates the optimum viable use when a proposal is being considered."

I have cited above the view of the court both that a decision maker is entitled to have regard to such a possibility not only in cases where a specific alternative development has been put forward in some detail or even in outline.

[25] *Gibson v Waverley **BC*** [2012] EWHC 1472

93. If the Court is right that the Secretary of State is able to have regard to a range of different types of alternative proposals, some rather more detailed than others, then the criticism of Re-Form's position at the inquiry is misplaced. It is not incumbent upon a party seeking to show that there is a better way forward on a site like this to make a planning application for their alternative; nor is the decision maker disentitled from reaching judgements about whether that alternative would be better or worse, viable or not.

94. Re-Form's approach has been to submit a proportionate level of detail. It is obvious that a bell foundry use such as that it proposes would be preferable in heritage terms; equally clear that it has a very strong track record of being able to raise funds for the restoration and re-use of historic structures; and its business plan is sensible and realistic.

Heritage

95. Re-Form's proposal for the site is to re-use it all for bell founding and related artistic production. It would be strong where the Raycliff proposals are at their weakest:

(1) It would maintain the B2 foundry use throughout the entire building, with ancillary makers spaces forming an integral part of the overall use;

(2) there would be no need to mangle the plan form and layout by compartmentalisation, and no need for such extensive fabric intrusions for instance the rebuilding of the hayloft/stables in a different typology; there would be no need for the insertion of the hotel entrance or the (still uncertain) operational interface between the hotel and café areas. There is nothing to suggestion[26] that the Re-Form scheme will change the character of the asset detrimentally or lead to overall harm (indeed such a proposition is inconsistent with the main point Raycliff makes that there is insufficient detail to tell).

[26] Ms Ryder paragraph 7.27f and XX

(3) In particular, the actual business of founding relatively large bells (as large as 1.5 t) could be carried out alongside the founding of medium sized and small bells, and bell-related activity (tuning, hanging and so on). The character of the spaces within the building would therefore not change, avoiding the harm which all expert heritage witnesses to the inquiry associate with the loss of bell founding in the asset.

96. Raycliff and the Council point to the fact that the Re-Form proposals are not further advanced, but the Secretary of State is more than able to reach a view about whether the *use* proposed for the asset (ie foundry) is preferable in heritage terms for the Whitechapel Bell Foundry site.

97. The main questions raised as to the nature of the Re-Form and Factum use, the London Bell Foundry can be dealt with in a straightforward way:

(1) There is no doubt that Re-Form's track record, and the expertise they have already brought to bear on the site, would be adequate and fit for designing and carrying out the work necessary to re-open the site as a foundry in an appropriate way for the building. For instance the combination of Mr Harris' expertise, that of Purcell and Dr Barker-Mills and indeed the technical expertise of Mr Taylor, should leave no doubt on that score.

(2) Of course, at this stage there are things that need to be finalised: for instance whether the existing consented sub-station outside the site will be able to be used, or whether a new sub-station will need to be incorporated; precisely where in the main spaces of the foundry different pieces of equipment will be located. But Raycliff have not pointed to anything which would be insuperable.

(3) As to whether the London Bell Foundry would be authentic, or a continuation of the historic use, Raycliff is on a sticky wicket given the harmful changes that its scheme proposes. Hence the artificiality of the test they are seeking to apply – the founding of large 'tower' church bells. The Whitechapel Bell Foundry had itself diversified and one would expect a successful 21st century foundry to carry out the range of bell-related activity that Mr Lowe describes in his evidence.

(4) In any event, the evidence shows that large bells, including no doubt some for church use, would be made at the London Bell Foundry, as well as tuning, repair and, very importantly, study and archiving of sound. The virtue of keeping the foundry active across its entire area is that there is much greater flexibility than one finds in the Raycliff foundry room.

(5) There is some ill-founded suggestion in some of the Raycliff evidence about the potential impacts of the Re-Form scheme on the fabric of the building. There is no basis for concerns about the structural effect of furnaces or 3D printing or scanning equipment on the building.

(6) So it is not credible in the end to suggest that the Re-Form foundry use would not be more sensitive to the fabric, to the layout and legibility of the site, or to the historic and evidential significance of the site, due to its continuation of foundry use. The whole point of the Re-Form idea is to save the bell foundry and that it what the alternative use here would do.

98. As to whether it is 'viable', the law and guidance again does not require the Secretary of State to have a fully worked-up business plan and detailed costings in order to judge this issue.

99. Dealing with the basic land ownership platform for the proposals, these are the key points in this case:

(1) The site does not belong to Re-Form, and consequently there can be no *certainty* about the alternative use occurring. However, that position is inherent in the OVU policy in paragraph 196 NPPF and the associated PPG guidance. In the majority of cases, the site or asset in question will be owned or controlled by the party making the planning application which is being tested. They will usually say that there is no prospect of them either doing the alternative use or disposing of the site to a third party.

(2) However, as Mr Froneman's experience with the Hammersmith and Fulham town hall project shows, the parameters change if the application is refused on heritage

grounds. In this case, if the conservation of the Foundry is, as it should be, prioritised, then the Secretary of State's decision will re-set the position and as Mr Clarke said, open the door for further discussions in a changed environment.

(3) It is also clear for the Secretary of State to see that Re-Form are a substantial and experienced body working in this field, with expertise over many years of fund-raising and phasing projects to get sites back on their feet. The fact that the funds for the initial works are not being provided by the venture capital market is not evidence that they are unavailable, and there is a reasonable prospect that they would be found

100. Then there is the approach to the viability of the London Bell Foundry (both the capital expenditure and the business viability). As to costs,

(1) There is a divergence of views about the capital costs. This turns in part on the assumptions made about the specification of the works, which Mr Fryer provided to Aecom (in the context of Raycliff's brief for the site). As the Re-Form rebuttal work shows, there are substantial areas of disagreement as to the specification – for instance the much more expensive hidden servicing runs – which are not necessary here.

(2) Aecom were not called to give evidence, and it is not explained why their costs are so high (beyond the basic point about a different set of specification assumptions). It is said that one cannot rely on 'rates' because each such project is different, but actually proper comparative expertise is important in gauging whether the sums costed are much too high. Arcadis, and Mr Harris in particular, have many years of experience of comparable schemes, including for instance the refurbishment of Wilton's Music Hall. Mr Harris may be a trustee of Re-Form, but that should give the Secretary of State more, not less, confidence in his expertise. His duties as a trustee include giving appropriate advice to the Trust so that it can appropriately decide on disposal of its funds, and there is no evidential basis whatsoever for the suggestion made in cross examination that Mr Harris's view was to be given less weight due to his involvement as an expert trustee.

(3) Mr Dedman was not able to take matters much further forward. He simply reviewed the Fryer specification and made a fairly substantial discount from the Aecom costs. But he provided no evidence of his comparable schemes, applicable rates from any data source, and it was consequently impossible to test whether his view was soundly based.

101. Turning to the viability of the Re-Form scheme and the foundry business, the inquiry had Mr Lowe, Mr Clarke, Mr Hodgen and Mr Brierly giving evidence. Only one of them had any experience of raising money and undertaking the kind of phased return to life of an asset like this. Mr Clarke explained why Mr Brierly's approach to an investor Financial Viability Appraisal was inapt to assess the viability of this project. In addition to being based on Aecom's costings, it comprises a different model – an 11% yield over 10 years with assumptions made about cost of finance and expected return over time to give a land value. That might well be the way that Raycliff would approach the issue of scheme viability, but it is alien to the kind of world that gave us the Middleport Pottery re-birth. It tells the Secretary of State literally nothing reliable about whether Re-Form will successfully re-animate foundry use on the site.

102. Mr Hodgen and Mr Brierly critiqued the work presented by Mr Lowe and Mr Clarke on the Re-Form business plan. It was in addition put to Mr Clarke that there was no "business plan" and that things had much changed in some respects from the earlier strategic plan and *Saved by the Bell*. That is true for the reasons Messrs Clarke and Lowe explained – the business plan necessarily evolved over time.

103. However, the Secretary of State will note the detail of the assessment of the market, revenue and costs in the Factum evidence; he will also see the stark contrast between it and the absence of any detail from Raycliff – there is no equivalent assessment of the ABFA/WG 'foundry' business, or an explanation of how the headline figures for hotel or B1 revenue are derived. Re-Form does not allege that the Raycliff scheme is not viable, because as Mr Brierly's evidence made clear, the whole thing is cross-subsidised by the hotel.

104. It is clearly unsafe to rely, as Mr Hodgen had done, on the figures or performance of the failing Hughes business as a guide to whether Factum would succeed, and it is also questionable whether much weight should be given to the views of Mr Westley about the market for Factum's version of the foundry. As for the Hughes business, we know that there was little evidence that they were capable of envisaging the kind of operation that Factum can put into the building. Mr Hughes sold the site to a speculator, and since he is not available for cross examination, precisely what was going on at that time has not been able to be investigated. But clearly, the decision effectively to wind up a long-standing family business turns on a number of factors; the offer of millions of pounds for the site perhaps not the least of them. Whatever the balance of considerations may have been, the Hughes company is not an indication of how successful a proprietor a contemporary art company, with the will and available expertise to re-set the foundry, and connections all over the world, would be.

105. As for the contributions to the inquiry of Mr Westley, these should treated with caution. His firm would be a commercial competitor to any foundry which emerged through the Reform approach and a key aspect of his evidence is his concern that a revived bell foundry on the Whitechapel site would provide a competitive challenge to existing foundries.[27] The Inspector and Secretary of State will of course reach their own view on the merits of competition, but it is clear that Mr Westley's involvement in the Raycliff Scheme and at this inquiry is far from altruistic: he has a personal stake in the outcome, primarily in seeking to stymie a competitor. This reduces the weight which his evidence can be given. Mr Westley's sought to question the viability of the Reform approach but it was clear that an assessment of the Reform approach raises issues which are significantly outside of Mr Westley's expertise. The market strategy outlined by Mr Lowe involves leveraging enthusiasm and contacts within the art world. This falls far from the core busines of the Westley Group: which is high integrity engineering for major defence contractors. While the conglomeration may now undertake some art founding itself, and have worked with other founders such as Pangolin, this is as a contractor rather than an artist led business.

[27] See Rebuttal proof at 2.2 and 2.3, and response to Nigel Taylor submitted to inquiry on 28 October 2020. Accepted in XX

106. Mr Westley also accepted that he is not well placed to assess Re-Form's ability to raise money, and that there are real difficulties in trying to form an overly firm view on the position as it may be in 2-3 years' time. Mr Westley continues to stress the practical limitations of the site (see response to Nigel Taylor dated 28 October 2020) but it is clear that Re-Form has given detailed consideration to these issues, as explored with Mr Lowe, including by consulting Nigel Taylor himself who – whatever Mr Westley may now seek to suggest – has a very deep experience of bell-founding at the site.

107. Returning to the evidence Mr Lowe gives to the inquiry, it was suggested that the business plan was unreliable because it only stretched to 3 or 4 years, rather than 10 years. Again, that's comparing the apples of the institutional investor with the pears of the actual business. As Mr Clarke said, the reality is that businesses plan for the short term in the kind of detail Mr Lowe provides; they have necessarily less choate strategies for the years beyond that because things change and businesses have to adapt. A ten year spreadsheet is largely worthless beyond the first 3 or 4 years.

108. Mr Lowe was questioned in detail about his firm's detailed 3-4 year plan:

(1) His reliance on UK and global markets for bells can be given weight – as he said to the inquiry, he has contacts in many parts of the world and large commissions as well as smaller bells can reasonably be assumed; he has stepped the profile of these commissions and revenue streams in an appropriate way.

(2) His assumptions about costs, including in the early years outsourcing some of the large work to Pangolin, show the business sense of the plan. Had he assumed on-site founding of very large bell commissions in the first year or so, that would have been questionable.

(3) The rates and revenue assumptions for bells have been worked out with market input and they are reliable.

(4) Some local initiatives would be likely to be subsidized (ie, at a loss), as Mr Lowe said; this would be part of the genuine way that the London Bell Foundry would integrate with the local community and its artistic community.

(5) The business would run at an overall loss over the four years studied, but with the profitability profile clearly indicative of the beginnings of a successful business. While losses in Y1 and Y2 would be significant, reflecting delay in locking in sales, the business would start to deliver a profit in Y3 increasing to a projected £101,000 in Y4[28].

109. In the end, of course Re-Form cannot say that it will *definitely* raise the money needed for Phase 1, or indeed, over time, for further works of repair rising to perhaps £10M. But there is a solid evidential base for judging that this particular Trust, with its track record and the level of commitment and expertise it has, will be able to achieve it. Factum cannot say that it will *definitely* achieve the levels of revenue in its business plan, over the period studied. But there is a solid evidential basis for judging that its dynamism, vision and current success as a business, will mean the London Bell Foundry will succeed.

110. The point goes further. Judgements about the profitability of ventures aimed at securing a preferable use of a heritage asset cannot be tested against the yardstick of certainty. There will always be some doubt and risk. But as long as the basic shape of the alternative use, and its business planning, is realistic, then that should suffice. One bears in mind that the relevance of an alternative does not depend on a scheme coming forward at all. The weight to be given to it should not be discounted simply because there are some unknowns and a degree of risk, at this stage.

111. Hence Re-Form's deep disappointment with the way its approach has been dealt with by important stakeholders in the planning process. It is deeply regrettable that HE took the view at a very early stage that it could not 'second guess' the proposition advanced by Mr Hughes, that bell founding would not occur again on the site for viability reasons. It is also unfortunate that in reviewing the position for this inquiry, HE did not pay attention to the evidence of Mr Clarke and Mr Lowe. The weight to be given their views in this particular case is much diminished as a result.

[28] Lowe, Appx page 35.

112. Similarly, the Council. Mr Westmoreland was strangely reticent to say that the Council asked the Secretary of State to give weight to the fact that the Council supports the Raycliff scheme, but surely that is what the Council says. The trouble is that the members resolved to support the Raycliff scheme having been told in terms that the Re-Form alternative was not a material consideration to which they should have regard at all[29]. The usual approach is to assume that the members agreed with the recommendations of the officers unless there is a contrary indication. There is none here.

113. So whilst there was a degree of friction at the inquiry when Mr Clarke was setting out the Re-Form view about the way the Council had engaged, the point comes down to what was actually taken into account – or not - by the democratically elected members. Perhaps the Council in closing will argue again that the Re-Form alternative is not relevant. That view by the Council is certainly part of the reason we are here.

114. The other aspect to bear in mind here is that the way the Council planning officers consistently wished to deal with the Re-Form approach – for all sorts of reasons it was not appropriate for Re-Form to make a full alternative planning application for some sort of 'beauty parade' with the Raycliff application; that is not called for by the NPPF or PPG. A pre-application process is also not an ideal way to interest the Council in changing its approach to the best way forward on the site – as Mr Clarke candidly put it, that was a matter much better left to discussions with the Mayor and other senior regeneration officers, whose views could be taken into account by their planning colleagues.

115. It is quite clear that planning officers were seeking further information about the Re-Form proposals and no criticism is made of them for that; but the 'one size fits all' approach to planning proposals has plainly contributed to the outcome one finds in the committee report and that undermines the suggestion, should it be made, that the Secretary of State should be guided in his decision by the views of the Tower Hamlets members.

[29] Committee Report paragraph 7.1.41: "not a relevant alternative".

116. In conclusion on this point, the Re-Form and Factum alternative approach is (1) a relevant material consideration, (2) has been presented in an appropriate and proportionate way given the issue it goes to, and (3) whilst inevitably subject to some indeterminacy and risk at this stage, is sufficiently credible to found a conclusion that the Raycliff scheme does not represent the OVU for the asset, and therefore (4) this is not a benefit that can legitimately be claimed by the Applicant, and indeed the existence of a far preferable alternative use weighs heavily against the grant of permission.

PLANNING

Most important policies for this application

117. The SCG shows that the application of most of the planning policies that are relevant is agreed. Re-Form submits that given the site is not allocated, the key policies are those relating to employment use and, much more importantly, heritage.

118. The Secretary of State will no doubt consider the relationship between the failure to market the site (a local policy requirement where a scheme would as here lead to diminution of employment floorspace) and the central issue of heritage. There is no doubt that the disposal of the property off-market in 2016/2017 is relevant to the question of whether the Council's policy for thoroughly assessing the potential to retain the foundry use throughout the building was or was not observed. But Re-Form go no further in relation to the question of marketing and the employment policy itself.

119. As Mr Butterworth made clear, Re-Form accepts that the employment aspects of the Raycliff scheme for the heritage asset are benefits that are consistent with policy aims and should attract commensurate weight. They are the most important of the list of planning benefits arising from the scheme as a number of others ought to be seen as aspects of policy compliance rather than true planning benefits.

120. It is more difficult to say the same thing about the majority of the employment benefits claimed, which arise from the hotel. The Secretary of State will bear in mind

that there is an extant hotel permission overlapping with the (non-listed) parts of the application site; it has not been suggested that would not come forward in the absence of the application scheme. So many of the hotel jobs and economic/tourism benefits would, it seems, arise in any event. That affects the weight to be given to them (or, if preferred, introduces another material consideration into the balance, namely the fact that there is an extant hotel scheme which would provide many of the same jobs).

BALANCING EXERCISES AND CONCLUSIONS

121. If the Secretary of State agrees that the degree of harm is such that it would comprise substantial harm, then as we understand it, Raycliff does not claim that the paragraph 195 tests would be met. There is no case to that effect advanced, and at that point the presumption against the grant of permission would not be rebutted and the scheme should be refused.

122. If the view is taken that there would be a less than substantial degree of harm, Re-Form suggests it should be at the upper end of the scale. The benefits of the scheme are palpable, and in some cases (eg the heritage benefit of repair) should be given significant weight. However, the balance is not a straightforward one, and the harm would outweigh the benefits even without reference to the Re-Form alternative. When that alternative is taken into account, there is no question but that permission should be withheld. The strong presumption that the courts identify would not be rebutted.

123. Schemes like this can never really escape their origins or the realities. The project got off on the wrong foot, with an entirely different concept for the hotel-led re-use of the asset. An enormous edifice of argument and evidence has now been constructed on those uncertain foundations, and the scheme and case run to promote it bears all the tell-tale signs of the problem. The Raycliff foundry is a wholly uncertain aspect of the scheme, sold as a "major benefit"[30]: that is because the permanent loss of

[30] See for instance paragraph 4.2.3, CD 3.2 (Heritage Statement)

founding on the site would cause serious harm. The changes to the site to make space for food and beverage use cause real harm, including through the difficulties of integration with a notional foundry space would all be seriously harmful.

124. There is a much better alternative. Mr Taylor said that he wished the Foundry would be given what he called a "second chance". Over the centuries, the Foundry has no doubt met many challenges and adapted. The regulatory power of the 1990 LBCA and the NPPF, with supporting development plan policies, are now in place to prevent damage such as is now proposed from occurring.

125. The balance should therefore be struck under paragraph 196, sections 16 and 66 of the 1990 Act, and s.38(6) of the TCPA 1990, in favour of conservation. In a sense, it is an important up to date test case on the applicability of these provisions. The Secretary of State is requested thereby to make the space for the Re-Form alternative to come forward. They would be a genuinely exciting and valuable new chapter to a long and important story.

RUPERT WARREN QC
MATTHEW DALE-HARRIS

Landmark Chambers
180 Fleet St
London EC4A 2HG

28 October 2020