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Queen's Bench Division

Regina (Irving) *v* Mid-Sussex District Council

[2016] EWHC 1529 (Admin)

2016 May 19; June 28

B

Gilbart J

Planning — Development — Conservation area — Application for planning permission for construction of single dwelling within conservation area — Planning officer's report finding some harm likely in one part of conservation area but area overall retaining special character and appearance — Planning permission granted — Whether officer's report erring in approach to conservation areas — Whether planning permission to be quashed — Planning (Listed Buildings and Conservation Areas) Act 1990 (c 9), s 72 (as amended by Leasehold Reform, Housing and Urban Development Act 1993 (c 28), s 187(1), Sch 21, para 30(1)(2)) — National Planning Policy Framework (2012), paras 132, 133, 134

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The local planning authority owned a site, an area of open land, the northern part of which was situated within a conservation area. From parts of the site there were southerly views across the site towards an area of outstanding natural beauty, which views the development plan sought to protect. The authority could not demonstrate a five-year supply of housing land as sought by national policy in the National Planning Policy Framework ("NPPF")[1]. The interested party applied for planning permission for a single dwelling on the site. The officer's report produced for the local authority's planning committee made reference, in the context of the effect of the proposal on the conservation area, to (i) the duty in section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990[2] to pay special attention to the desirability of preserving or enhancing the character or appearance of the area, (ii) paragraph 134 of the NPPF in relation to the treatment of heritage assets and (iii) the policies of the development plan seeking to protect the special character and appearance of the conservation area and the views across the site. The report concluded that the development proposal would lead to some limited harm to one part of the conservation area occasioned by the loss of panoramic views, but that from elsewhere in the southern fringes of the conservation area similar panoramic southerly views would remain so that overall the special character and appearance of the conservation area would be preserved. Having purportedly applied the test in section 72 of the 1990 Act and the relevant paragraphs of the NPPF, and having found the development

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[1] National Planning Policy Framework, paras 132, 134: see post, para 23.

Para 133: "Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:

- the nature of the heritage asset prevents all reasonable uses of the site; and
- no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
- conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
- the harm or loss is outweighed by the benefit of bringing the site back into use."

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[2] Planning (Listed Buildings and Conservation Areas) Act 1990, s 72, as amended: "(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area. (2) The provisions referred to in subsection (1) are the planning Acts and Part I of the Historic Buildings and Ancient Monuments Act 1953 and sections 70 and 73 of the Leasehold Reform, Housing and Urban Development Act 1993."

proposal to be in accordance with the development plan, the report recommended that permission be granted, which recommendation was followed. The claimant sought judicial review of the grant of planning permission on the ground, inter alia, that the report had demonstrated a flawed approach in relation to conservation areas in the context of section 72 of the 1990 Act, the NPPF and the development plan.

On the claim—

Held, allowing the claim, (1) that section 72 of the Planning (Listed Buildings and Conservation Areas) 1990 required the decision-maker to determine whether a proposed development would cause harm to the character or appearance of a conservation area; that where the answer was that harm would be caused that fact was to be given significant weight as a disadvantage of the proposed development; and that it was not open to a decision-maker to find that because harm would be caused only to one part of the conservation area there would be no harm for the purposes of considering the duty under section 72 of the 1990 Act on the ground that, overall, the area retained its special character (post, paras 54, 58).

(2) That, further, the value of the heritage asset and the degree of harm that would be caused fell to be addressed in accordance with the sequential test in paragraphs 132–134 of the NPPF unless reasons were given for not doing so (post, paras 53, 54).

Dicta of Gilbart J in *Pugh v Secretary of State for Communities and Local Government* [2015] EWHC 3 (Admin) at [49]–[50] applied.

(3) That it followed that the officer's report relied on by the local authority in granting planning permission, it having concluded that the special character of the conservation area as a whole would be preserved, was flawed; that that error in approach had impacted upon the consideration of the duty under section 72 of the 1990 Act, the application of paragraphs 132–134 of the NPPF and the conclusion that the proposed development was in accordance with the development plan for the purposes of section 38(6) of the Planning and Compulsory Purchase Act 2004; and that, since it could not be said that the planning committee would have reached the same decision to grant permission had it been properly advised, the grant of planning permission would be quashed (post, paras 59–61, 62–65, 67, 71–72, 80).

The following cases are referred to in the judgment:

Bath Society, The v Secretary of State for the Environment [1991] 1 WLR 1303; [1992] 1 All ER 28; 89 LGR 834, CA

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin)

Cawrey Ltd v Secretary of State for Communities and Local Government [2016] EWHC 1198 (Admin)

Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 694 (Admin)

Dartford Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 649 (Admin)

East Northamptonshire District Council v Secretary of State for Communities and Local Government [2014] EWCA Civ 137; [2015] 1 WLR 45, CA

Edinburgh (City of) Council v Secretary of State for Scotland [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)

Forest of Dean District Council v Secretary of State for Communities and Local Government [2016] EWHC 421 (Admin); [2016] PTSR 1031

Gransden (EC) & Co Ltd v Secretary of State for the Environment (1985) 54 P & CR 86

Heatherington (UK) Ltd v Secretary of State for the Environment (1994) 69 P & CR 374

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2015] EWHC 132 (Admin); [2016] EWCA Civ 168; [2016] PTSR 1315, CA

Horsham District Council v Secretary of State for the Environment (1991) 63 P & CR 219, CA

Mordue v Secretary of State for Communities and Local Government [2015] EWHC 539 (Admin)
Obar Camden Ltd v Camden London Borough Council [2015] EWHC 2475 (Admin); [2015] LLR 782; [2016] JPL 241
Pugh v Secretary of State for Communities and Local Government [2015] EWHC 3 (Admin)
R v Secretary of State for the Home Department, Ex p Hindley [1998] QB 751; [1998] 2 WLR 505, DC
R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government [2011] EWHC 97 (Admin); [2011] 1 P & CR 22
R (Cherkley Campaign Ltd) v Mole Valley District Council [2014] EWCA Civ 567; [2014] PTSR D14; [2014] 2 EGLR 98, CA
R (Hughes) v South Lakeland District Council [2014] EWHC 3979 (Admin)
R (Milne) v Rochdale Metropolitan Borough Council (No 2) [2001] Env LR 22; 81 P & CR 27
R (Newsmith Stainless Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74
R (Trashorfield Ltd) v Bristol City Council [2014] EWHC 757 (Admin)
Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P & CR 306, CA
South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)
South Oxfordshire District Council v Secretary of State for Communities and Local Government [2016] EWHC 1173 (Admin)
Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636; 93 LGR 403, HL(E)
Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin); [2015] JPL 1151

The following additional cases were cited in argument:

Cotswold District Council v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin)
R (Forge Field Society) v Sevenoaks District Council [2014] EWHC 1895 (Admin); [2015] JPL 22
R (Lee Valley Regional Park Authority) v Epping Forest District Council [2016] EWCA Civ 404, CA
Sea & Land Power & Energy Ltd v Secretary of State for Communities and Local Government [2012] EWHC 1419 (Admin)
South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin)
South Northamptonshire Council v Secretary of State for Communities and Local Government [2013] EWHC 4377 (Admin)
Warner v Secretary of State for Communities and Local Government [2014] EWHC 3993 (Admin)
Wenman v Secretary of State for Communities and Local Government [2015] EWHC 925 (Admin)
William Davis Ltd v Secretary of State for Communities and Local [2013] EWHC 3058 (Admin)

The following additional case, although not cited, was referred to in the skeleton arguments:

South Northamptonshire Council v Secretary of State for Communities and Local Government [2013] EWHC 11 (Admin)

CLAIM for judicial review

By a claim form dated 11 June 2015 the claimant, Felicity Irving, sought judicial review of the decision of 1 May 2015 of the defendant local planning authority, Mid-Sussex District Council, to grant planning permission, on an application by the interested party, Mr J Ball (trading as SDP Developers and Building Contractors), for the construction of a single dwelling on land owned by the local authority, part of which was situated within a conservation area. On 27 July 2015 Dove J refused permission to proceed with the claim. On 19 October 2015 Mitting J granted permission on two of the five grounds following an oral renewal hearing. On 26 February 2016 Lewison LJ granted permission on the remaining three grounds.

The facts and grounds for review are stated in the judgment, post, paras 5–17, 25–35 and 38.

Andrew Sharland (instructed by *Thomas Eggar, Crawley*) for the claimant.

Robert Walton (instructed by *Head of Legal Services, Mid-Sussex District Council, Haywards Heath*) for the local planning authority.

The court took time for consideration.

28 June 2016. **GILBART J** handed down the following judgment.

1 In this matter Mrs Irving challenges the grant on 1 May 2015 by Mid-Sussex District Council ("MSDC") of a planning permission, on the application of the interested party, to erect a new detached house on land to the west of Newbury, Courtmead Road, Cuckfield, West Sussex.

2 I shall deal with the matter under the following heads: (a) the application site and surroundings; (b) planning and procedural history; (c) the development plan and the housing land supply position; (d) National Planning Policy Framework ("NPPF") guidance; (e) the officer's report; (f) Mr Sharland's submissions for the claimant; (g) Mr Walton's submissions for the defendant MSDC; (h) discussion and conclusions.

3 I shall start by saying that, in what is a very straightforward case, the court was presented with bundles containing no fewer than 490 pages of documentary material. The vast majority was quite irrelevant, and included, for example, all the pages in a development plan or planning policy document rather than just those which were relevant. My estimate is that no more than a total of 50 pages were actually relevant, even if the matter had been heard by a judge unfamiliar with planning law and practice.

4 But that said, the arguments deployed require my setting out relevant development plan policy, and the officer's report to committee, in a little detail.

(a) The application site and surroundings

5 The site is an area of open land adjacent to the end of Courtmead Road, which is a private road. Until comparatively recently it was a play area for children. Photographs show a flat grassed area of land bounded by hedges, and with a gated access. It is rectangular, with its longer sides being to east and west. The eastern boundary is the boundary of a house called "Newbury" which is a detached house sitting at the western end of a row of such houses on the southern side of Courtmead Road. It has a long garden to

A the rear. The northern side is bounded by Courtmead Road. North of the road lie a pond and the old vicarage. To the west are allotments on an open area of land beyond which sits the church.

6 To the south the land is open. The site has views to the south towards the South Downs Area of Outstanding Natural Beauty ("AONB"). The northern part of the site lies within the Cuckfield conservation area which includes all the areas to the north and east along Courtmead Road, B and the area to the west beyond the allotments. There are significant views across the site. In the neighbourhood plan it states:

> "one of the distinctive features of Cuckfield Village is the visual connectivity with the surrounding countryside from public places. Map 5 shows the locations at the edge of the village where there is direct visual connectivity with the countryside . . . these distinctive views combine C shorter uncluttered views of the more immediate setting of the village with views across the Low Weald to the South Downs National Park to the south . . ."

Map 5 shows this site in the foreground of view 10 from the area near the church. Having seen the photographs, it is obvious (and Mr Robert Walton did not seek to argue otherwise) that the views across it from the north are of D an open grassed area leading on to the view of the countryside beyond. Those views have policy protection under policy CNP5, to which I shall make reference below.

7 It follows that this undeveloped grassed area, formerly used as a play area, lies on the edge of Cuckfield, with undeveloped land on $2\frac{1}{2}$ sides (west, south and the southern end of the eastern side), in the conservation area, and E in an area identified by part of the development plan (the neighbourhood plan) as forming part of the direct visual connectivity between the village and the countryside beyond.

(b) Planning and procedural history

8 The site is owned by MSDC. It had been used as a play area for F children. In 1994, a planning inspector, appointed to consider objections to the Haywards Heath local plan, reported on an objection to the drawing of the built-up area boundary at this point so as to exclude the application site. The inspector commented:

> "The land is not readily seen looking along Courtmead Road but, along the footpath at the end of the road, it forms a significant part of the open break between the line of houses and the parish church to the west G giving long views to the countryside to the south. If development were to take place, it would reduce the value of the open gap and bring development closer to the church which is an important building in the conservation area. Whilst 'Newbury' stands out at the end of the line of houses, a further dwelling would not improve this situation and I am not convinced that a landscaped screen on the western boundary would be H guaranteed. The site, together with the allotments and the church grounds, presently blends into the countryside towards the bypass and should be protected by Policy HH2/1."

Accordingly, the proposal map was modified to show the built-up area boundary to run along the western boundary of "Newbury".

9 In December 2013 MSDC granted itself outline planning permission for residential development, but by virtue of regulation 9 of the Town and Country Planning General Regulations 1992 (SI 1992/1492) that did not run with the land. In September 2014 an application was made by the interested party to develop the land for residential development consisting of one house. That permission was granted in December 2014, but after the committee had been advised that it was not necessary to consider its value as open space as the grant of the previous permission meant that the loss of open space had been accepted. That permission was challenged by the claimant way of an application for judicial review, and after Patterson J had granted permission for the claimant to make the application, MSDC accepted that it had been granted unlawfully (on the basis that the advice concerning open space was in error) and agreed to pay the claimant's costs pursuant to a consent order.

10 A further application was made in March 2015, which was granted on 1 May 2015. Proceedings were issued by the claimant on 11 June 2015. Dove J refused leave on 27 July 2015. Permission was subsequently granted on grounds 1 and 2 at an oral renewal hearing. On 23 February 2016 Lewison LJ granted permission to apply under grounds 3–5 as well.

(c) The development plan and the housing land supply position

11 The development plan has three elements: (i) the Mid-Sussex Local Plan (2004) ("the MSLP"); (ii) small scale housing allocations to 2016 (October 2008); and (iii) Cuckfield neighbourhood plan (October 2014) ("the CNP").

12 The process has started which will lead to the adoption of a district plan. It has reached the stage of a pre-submission draft.

13 In the MSLP the following policies should be noted: (a) Policy B6 states:

> "proposals for development which would result in the loss of areas of public or private open space of particular importance to the locality by virtue of recreational . . . conservation . . . or amenity value will not be permitted. Where such open space is to be lost to development, for whatever reason, appropriate alternative provision may be sought elsewhere."

(b) Policy B12 states:

> "The protection of the special character and appearance of each conservation area will receive high priority. When determining planning applications for development within or abutting the designated conservation areas, special attention will be given to the desirability of preserving or enhancing the character or appearance of the area and to safeguard the setting of any listed building. Circumstances may arise where the importance of open space, including private gardens, is such that development upon it will be resisted in the overall interest of the conservation area . . ."

(c) Policy B15 states:

> "Development affecting the setting of a conservation area should be sympathetic to, and should not adversely affect, its character and

A appearance. In particular attention will be paid to the protection or enhancement of views into and out of a conservation area, including where appropriate the retention of open spaces and trees."

(d) Policy R2 states:

"proposals which would result in the loss of existing formal or informal open space with recreational or amenity value whether privately or publicly owned, will only be permitted where the applicant can demonstrate that a replacement site has been identified and will be developed to provide facilities of an equivalent or improved standard . . ."

(e) Policy C1 applies to development proposals on land outside the built-up area boundary, which this site is. It states:

"Outside built-up area boundaries . . . the remainder of the plan area is classified as a countryside area of development restraint where the countryside will be protected for its own sake. Proposals for development in the countryside, particularly that which would extend the built-up area boundaries beyond those shown will be firmly resisted and restricted to: (a)–(g) . . ."

(Headings (a) to (g) consist of excepted types of development which do not include the development of a house as proposed in this application.) I shall refer to its policies on housing in due course.

14 In the CNP the following appear. (a) Policy CNP1 reads:

"Design of New Development and Conservation. New development in accordance with the neighbourhood plan will be permitted where it: (a) is designed to a high quality which responds to the heritage and distinctive character and reflects the identity of the local context of Cuckfield as defined on map 3—conservation areas and character areas, by way of (i) height, scale, layout, orientation, design and materials of buildings; (ii) the scale, design, and materials of the public realm (highways, footways, open space and landscape), and (b) is sympathetic to the setting of any heritage asset . . ."

(b) Policy CNP2 deals with the protection of "areas of important open space" within the Cuckfield built-up area boundary. The site is shown on map 4 of the plan as falling outside that boundary, which abuts it to the east (the curtilage of "Newbury"), and north (Courtmead). (c) Policy CNP5 reads:

"CNP5—Protect and Enhance the Countryside—Outside of the built-up area boundary, priority will be given to protecting and enhancing the countryside from inappropriate development. A proposal for development will only be permitted where: (a) it is allocated for development in policy CNP6(a) and (b) or would be in accordance with policies CNP10, CNP14 and CNP17 in the neighbourhood plan or other relevant planning policies applying to the area, and (b) it would not have a detrimental impact on, and would enhance, areas identified in the Cuckfield landscape character assessment (summarised in Table 1) as having major or substantial landscape value or sensitivity, and (c) it would not have an adverse impact on the landscape setting of Cuckfield, and (d) it would maintain the distinctive views of the surrounding countryside from public vantage

points within, and adjacent to, the built-up area, in particular those defined on map 5, and (e) within the High Weald Area of Outstanding Natural Beauty it would conserve and enhance landscape and scenic beauty and would have regard to the High Weald AONB management plan."

15 As already noted, map 5 in the CNP identifies what it refers to as "external views". View 10 is shown under the reference "church" and consists of views from location running west along Courtmead from the developed area east of the site, and from the areas around the church. That and other views are referred to as having "direct visual connectivity with the countryside". The landscape character assessment carried out for the purposes of informing the plan's preparation, and which is referred to within its supporting text (see p 31), identifies the site as falling within Area 26 (see p 80, map 12), which is described on p 31 as "substantial value, substantial sensitivity".

16 There are no policies in either the MSLP or the CNP which seek to restrict the amount of housing. Policy H1 in the MSLP required that provision be made for approximately 2,740 dwellings between mid-2002 and mid-2006. It also contained specific allocations. Policy H3 is a criteria based policy enabling sites to come forward within the built-up area. In fact, it is an agreed matter that, when measured against the policy requirements of the NPPF, there is a shortfall in the five-year housing land supply, which is a subject to which I shall return. The CNP, which has a plan period running from 2011 to 2031 quantifies a housing need totalling 60 dwellings for the Cuckfield area of which 28 fall within two years from 2012, 15 within a period of two to five years thereafter, and 17 after that. It contains (policy CNP6) allocations on four sites, but it also contains a policy which is permissive of house building within the built-up area (CNP7).

17 As to housing land supply, the officer's report advised the committee that the defendant council could not demonstrate a five-year supply of deliverable sites.

(d) The National Planning Policy Framework

18 It is necessary to refer to some parts of the NPPF, published in 2012, which sets out the Government's planning policies for England. I must refer to its policies on housing, and on heritage assets. However, their terms are well known, and for the most part I shall simply refer to the relevant paragraphs without quotation. The one exception which I shall make is when I come to deal with the terms of the NPPF on the issue of the effect on heritage assets.

19 Paragraphs 6–10 deal with the achievement of sustainable development, which includes widening the choice of high quality homes: see paragraph 9. Applications must be determined in accordance with the development plan unless material considerations indicate otherwise: paragraph 11. However, while proposals which accord with the development plan must be approved without delay, where the development plan is absent, silent or relevant policies are out of date, planning permission should be granted unless either the adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the policies in the

A NPPF taken as a whole, or specific policies in the NPPF indicate that development should be restricted: see paragraph 14.

20 Paragraph 17 sets out a set of underpinning "core planning principles". They include the recognition of the intrinsic character and beauty of the countryside, and the conservation of heritage assets in a manner appropriate to their significance.

B **21** Section 6 ("Delivering a wide choice of high quality homes") informs local planning authorities that local plans should meet the full objectively assessed housing needs of the areas as far as is consistent with the policies in paragraph 47 of the NPPF. It seeks an identified five-year supply of specific deliverable sites and a supply of specific developable sites or broad locations for growth for years six to ten, and where possible for years 11 to 15: paragraph 47. Housing proposals should be considered in the context of C "the presumption in favour of sustainable development". Relevant polices for the supply of housing should not be considered up to date in the absence of an identified five-year supply: paragraph 49.

22 Paragraph 74 states that existing open space should not be built on unless an assessment shows that the open space is surplus to requirements, or the loss would be replaced by equivalent or better provision, or the D development is for sports and recreational provision the need for which clearly outweighed the loss.

23 Chapter 12 (paragraphs 126–141) deals with "Conserving and enhancing the historic environment". A conservation area is a heritage asset for the purposes of the policy. It is necessary to set out paragraphs 131–134, which set out the sequential test to be applied to development which is being E considered in the context of a heritage asset, and paragraph 138. I do so mindful of the fact that the policy cannot displace the statutory test in section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the PLBCAA 1990"), to which I shall turn in due course. The relevant paragraphs read:

> "131. In determining planning applications, local planning authorities F should take account of: the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation; the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and the desirability of new development making a positive contribution to local character and distinctiveness.
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> "132. When considering the impact of a proposed development on the G significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a Grade II H listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, Grade I and II* listed buildings, Grade I and II* registered parks and gardens, and world heritage sites, should be wholly exceptional."

"134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

"138. Not all elements of a world heritage site or conservation area will necessarily contribute to its significance. Loss of a building (or other element) which makes a positive contribution to the significance of the conservation area or world heritage site should be treated either as substantial harm under paragraph 133 or less than substantial harm under paragraph 134, as appropriate, taking into account the relative significance of the element affected and its contribution to the significance of the conservation area or world heritage site as a whole."

24 The sequential test in paragraphs 132–134 and its nature were considered in my judgment in *Pugh v Secretary of State for Communities and Local Government* [2015] EWHC 3 (Admin) at [49]–[50], where I followed the judgment of Judge Waksman QC sitting as a judge of the Queen's Bench Division in *R (Hughes) v South Lakeland District Council* [2014] EWHC 3979 (Admin). Since *Pugh's* case that approach has been followed in *Mordue v Secretary of State for Communities and Local Government* [2015] EWHC 539 (Admin), per John Howell QC sitting as a deputy judge of the Queen's Bench Division, and by Coulson J in *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2016] PTSR 1031.

(e) The planning officer's report

25 The officer put a substantial report before the committee. I shall seek to summarise it, although some passages will have to be set out verbatim.

26 It started with an executive summary. Having recited the relevance of the development plan in section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the PCPA 2004") it addressed the NPPF and referred to the passage in paragraph 14 referred to above. In that context it treated policy C1 of the local plan, and CNP5 of the neighbourhood plan as not up to date in so far as either relates to the provision of housing. In the context of paragraph 49 of the NPPF he said:

"as set out later in the report in relation to open space, this is not a situation where specific policies in [the] NPPF indicate that development should be restricted. The application therefore falls to be determined in accordance with the presumption in favour of development set out in paragraph 14 of [the] NPPF."

It then addressed the three dimensions of sustainable development in the NPPF. It concluded that the proposal would contribute to the economic role of sustainable development. There would be an economic benefit from the construction phase, and a modest economic benefit from the additional residential unit and the spending of the occupier, plus new homes bonus funding, and council tax receipts. It concluded that the site was in a sustainable location, being close to the village centre and its amenities. It regarded the addition of one dwelling to the district's land supply as "a small but useful contribution to the district's housing supply" which would help meet the identified need for housing.

A **27** So far as the effect on the conservation area is concerned, it concluded:

> "some limited harm may arise from this proposal as a result of the loss of panoramic views out of and across the site to the south. However, the views into/across the site are only one component of the conservation area as a whole. Whilst there will be some impact on the character of the conservation are through the development of this site it is considered that
B the overall character and appearance of the conservation area will be preserved."

Having considered that the loss of open space would be acceptable, it considered that the

> "limited impact generated by this proposal by the loss of the panoramic
C views across the site to the south is significantly outweighed by the benefits of the proposal. For these reasons, taking into account the advice set out within the NPPF it is felt that this application should be granted"

and went on to recommend that the application be granted.

28 I do not propose to do more than summarise the main report, save for the passages dealing with the issue of the effect of the proposed
D development on the conservation area.

29 Having identified the site, described the application and summarised the representations received, the report then set out a list of relevant development plan policies. It also referred to the NPPF, including its advice at paragraph 185 that the neighbourhood plan took precedence over non-strategic local plan policies for the neighbourhood concerned, should there be a conflict. It referred also to the test in section 38(6) of the PCPA
E 2004, and to section 70(2) of the Town and Country Planning Act 1990 ("the TCPA 1990").

30 It advised the committee that the scheme would conflict with the countryside policies of the MSLP (policy C10) and with the CNP (policy CNP5) because it proposed a new house outside the built-up area. It was therefore contrary to the development plan. It identified the NPPF as a
F material consideration. Having referred to paragraph 49 (summarised above) it went on to advise the committee that the council could not demonstrate a five-year supply, because there was no agreed requirement against which the supply could be considered. It said that in numerous appeals policy C1 of the MSLP had been held to be out of date so far as it related to the provision of housing, and that the same reasoning should apply to policy CNP5 of the CNP.

G **31** It then addressed paragraph 14 of the NPPF. It advised that as policy C1 was not up to date, the council should grant planning permission

> "unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the polices in the framework taken as a whole or specific policies in the framework indicate development should be restricted".
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That is of course the test in paragraph 14 of the NPPF if the development plan policies are out of date. However the report went on in these words:

> "As set out later in the report in relation to open space, this is not a situation where specific NPPF policies indicate that development should

be restricted. The approach that should be taken is that the development is assessed against the policy criterion set out in paragraph 14 to see whether any adverse impacts the scheme would have would significantly and demonstrably outweigh the benefits."

It then reiterated the officer's advice that MSP policy C1 and CNP policy CNP5 should be given diminished weight on the basis that they were out of date for the purposes of paragraph 49 of the NPPF.

32 Having referred to a decision letter from Buckinghamshire, it concluded that, given the fact that the proposal was for one house, it would not be reasonable to argue that a conflict with CNP5 amounted to a substantial adverse impact in this instance. It then sought support from the fact that a planning permission for a house already existed on the site. It then assessed the proposal against the three dimensions of sustainable development in the NPPF. In the case of the first two dimensions (the economic role and the social role) it concluded: (a) The local planning authority ("the LPA") would receive a "new homes bonus" for a new dwelling. (b) It would make a positive but marginal contribution to the building industry in the area. (c) It would add to the council's housing stock, albeit only marginally. (d) The land had been bought for allotments in 1938. Permission to appropriate the land to housing was obtained in 1987 from the Secretary of State and remained extant. The council did so in December 2013 (i e 26 years later). The site was then padlocked to prevent any public access to it. It was therefore considered that it was no longer open space so that policy R2 and paragraph 74 of the NPPF were not engaged. (e) It considered what the case was if even if the land were to be regarded as open space and the appropriation had not taken place. It said that because the council had granted permission for housing development in December 2013, albeit for a scheme only it could implement, the loss of open space had been accepted. An open space assessment had shown that there was adequate provision of open space in Cuckfield, and that alternative sites were well distributed in and around the village. The test in paragraph 74 of the NPPF had therefore been met. There was also no conflict with MSLP policies B6 and R2, nor with policy DP22 of the emerging district plan.

33 The report then turned to the third dimension, the environmental role. In doing so, it also addressed the effect of the proposal on the street scene, the character of the conservation area, its effect on the nearby Grade 1 listed building (the church), views into and out of the village, access and parking, neighbour amenity, and ecology. It is necessary to refer to what it said directly in the case of some parts of that assessment. It includes the following passages:

"*Impact on the character of the conservation area*

"As noted above, the northern part of the application site falls within the Cuckfield conservation area. This conservation area excludes the allotments to the immediate west of the application site, and the southern half of the application site, but extends along the entire length of Courtmead Road, and encompasses the Holy Trinity Church and yard to the west of the allotments along with an extensive area of the village centre and surrounds.

"Policy B12 of the Mid-Sussex Local Plan and policy CNP1 of the neighbourhood plan seeks [sic] to protect the special character and

A appearance of each conservation area with special attention given to the desirability of preserving or enhancing the character and appearance of the area and to safeguard the setting of any listed buildings.

"Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 states that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area by the decision-maker.

B

"Cuckfield conservation area appraisal published in 2006 subdivides the designated conservation area into 'character areas' and the Courtmead Road area is noted for its detached dwellings set in spacious grounds, with the road and building line dictating the placement of the houses. It is noted that at the western end of Courtmead Road the properties are predominantly designed by Turner following the traditional form and detailing of historic Wealden vernacular.

C

"The comments of the council's conservation officer are summarised at the start of the committee report and set out in full in the appendix (she refers to her previous comments on application 14/03388/FUL). The conservation officer states: 'The proposed development is thus not typical of Courtmead Road and it will result in some degree of harm to the existing spatial characteristics at the western end of the street. However, the area in which the damage will be experienced is limited to the western end of Courtmead Road. While affecting this particular component of the conservation area, the new development will not result in substantial harm to the special character of the designated heritage asset as a whole.'

D

"Paragraph 134 of the NPPF states that 'Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use'.

E

"These comments have been taken into account by your officer. Your officer agrees with the conservation officer that any impacts will be limited to the western end of Courtmead Road and certainly amounts to less than substantial harm. The public benefits of the proposal (such as providing an attractive family dwelling in a sustainable location and the economic benefits of constructing a new dwelling in this sustainable location) clearly outweigh the less than substantial harm to a small component of the heritage asset.

F

"Overall it is your officer's view that whilst there will be some impact on the character of the conservation area through the development of this site it is considered that the overall character and appearance of the conservation area will be preserved. The application therefore complies with policy B12 of the MSLP and policy DP33 of the emerging district plan and policy CNP1 of the neighbourhood plan.

G

"The rear (southern) part of the application site is outside of the conservation area boundary. Para 4.54 of the preamble to policy B15 which relates to the setting of conservation areas states: 'Particular attention will also be given to the impact of development located outside but adjacent to a conservation area. Such development, if constructed unsympathetically, could have a seriously detrimental impact on the character and appearance of a conservation area by affecting its setting and thus views into and out of the area.' As the proposed house, driveway

H

and access are within the conservation area the correct approach is to assess this application against policy B12 of the MSLP.

"With regards to policy B15, as the southern part of the site is a grassed area of land and this would become part of the rear garden of the proposed house, there would be little material change to the appearance of this area. As such the setting of the conservation area would be preserved.

"*Impact on the setting of the listed building*

"As outlined above, the Holy Trinity Church, a Grade I listed building is located some 110 metres to the direct west of the application site. The proposed dwelling would appear in views to the east from this listed building. The intervening shrubbery will provide some screening to the new dwelling and it will of course be seen against the existing backdrop of trees, shrubbery and occasional buildings.

"Section 66 of the [PLBCAA 1990] states that in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

"It is considered that the new dwelling will be unlikely to stand out as an individually intrusive element and due to the distance between the site and the Holy Trinity Church (some 110 metres) it is not considered that the proposal affects the setting of the designated heritage asset i e the listed church will be preserved.

"English Heritage has not objected to the application, confirming that the decision should be made in accordance with national and local policy guidance, and on the basis of the LPA's specialist conservation advice.

"The application therefore complies with policy B10 of the MSLP and policy DP32 of the emerging district plan.

"*Impact on the views into/out of the village*

"When the earlier outline application was considered it was highlighted that the main impact of the proposed development would be on the character of the immediate vicinity through the loss of panoramic views to the south. Construction of the dwelling will obstruct long views from the western end of Courtmead Road, from the public footpath abutting the northern boundary and from within the site itself. The views across open countryside to the distant South Downs are a distinctive feature of the southern edges of the Cuckfield conservation area and they engender a particularly strong sense of place. Loss of these views will diminish an important quality of this part of the designated area and as a result this weighs against the favourable recommendation of the application proposals.

"However, the area in which the diminution will be experienced is limited to the western end of Courtmead Road, the public footpath and from within the site itself. From elsewhere in the southern fringes of the conservation area, similar panoramic southerly views will remain. Thus, while there is damage to a component of the heritage asset i e the conservation area, the special character of the conservation area as a whole will be preserved. As such there is no conflict with policy B12 of the MSLP."

34 It then passed to its conclusions:

"*Conclusions*

"Planning applications must be determined in accordance with the development plan unless other material considerations indicate otherwise. The site lies outside the built-up area boundary of Cuckfield as defined in the MSLP and the CNP. As such the scheme would conflict with policy C1 of the MSLP and policy CNP5 of the CNP, both of which indicate that development should be restricted in this location.

"It has however been established in numerous appeals that policy C1 in the MSLP is not up to date in so far as it relates to the provision of housing. It is considered that the same reasoning applies to policy CNP5 of the now made CNP as this is also a policy that restricts the supply of housing on land that is not within the built-up area of the CNP.

"In light of the council's lack of a five-year supply of housing, paragraphs 47–49 of the NPPF are engaged and as such the application needs to be considered in the context of paragraph 14 of the NPPF. This paragraph sets a presumption in favour of sustainable development. Therefore the development should only be refused if any adverse impacts would significantly and demonstrably outweigh the benefits of the development, when assessed against the NPPF as a whole, or specific NPPF policies indicate development should be restricted.

"The application site, whilst falling outside of the built-up area as defined by the CNP and MSLP, lies immediately adjacent the built-up area boundary and is within close walking distance of the village centre and all its amenities. It is therefore deemed to be in a sustainable location. It is considered that the development constitutes sustainable development.

"The proposed dwelling is considered to be suitably designed to reflect the character of the surrounding area, and will not appear as an overdevelopment of this generous plot. Whilst it is accepted that the dwelling is substantial in size, it is considered that the character and appearance of the conservation area will be preserved and the setting of the Holy Trinity Church will not be affected. Whilst there is some limited harm to a small component of the conservation area this certainly amounts to less than substantial harm. Overall it is your officer's view that taken as a whole character and appearance of the conservation area will be preserved.

"The loss of the open space has been considered in relation to policy R2 of the MSLP, policy DP22 of the emerging district plan and paragraph 74 of the NPPF. It is considered that it has been demonstrated that there is not a need for the site to be retained as open space nor is there a need for its replacement elsewhere.

"It is considered that the limited harm generated by this proposal is not sufficient to outweigh its benefits. It is also material that planning permission has already been granted for a residential development on this site. For these reasons, taking into account all relevant development plan policies as well as the advice set out within the NPPF it is felt that this application should be approved."

35 Conditions were also recommended. It is not necessary to refer to them here.

(f) Mr Andrew Sharland's submissions for the claimant

36 Before turning to Mr Sharland's legal submissions, I should say something about the evidence filed by the claimant. It was thought appropriate for evidence to be filed that (a) suggested that a relative of the leader of the council was connected with the interested party, and that there was some significance in the interested party having been referred to by its initials only; (b) that the committee considered the planning application in haste, which "gives rise to a clear expectation that the council's planning committee (would) approve the . . . application, whatever the objections". Neither allegation went to any ground argued in the grounds, or in the case put before me by counsel for the claimant. The evidence should not have been included, and those conducting the case for the claimant should have ensured its removal.

37 However, just as I shall ignore that evidence as supporting the arguments of the claimant, so shall I set aside any prejudice against her case because of the unwise decision to include it.

38 Mr Sharland's case for the claimant had five grounds:

(1) The officer's report had misinterpreted paragraph 14 of the NPPF; (a) misinterpretation of a policy (the NPPF) was an error of law; (b) the development plan had to be considered as a whole, including policies B6 and R2 (which related to open space), B12 and B15, which related to development within a conservation area or affecting its setting. The proposal was in breach of all of those policies; (c) if policies CNP5 and C1 were out of date, that did not mean that the other polices were. The council has wrongly interpreted paragraph 14 of the NPPF as meaning that if one or more relevant policies were out of date, then they all were; (d) although a version of the argument had been advanced and rejected by Patterson J in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 694 (Admin) at [45]–[67] it had not been put as now argued; (e) the policies in paragraph 74 of the NPPF on open space, and those at paragraph 17 (protection of countryside and heritage assets), paragraph 134 (heritage assets), paragraph 185 (neighbourhood plans) and paragraph 198 (neighbourhood plans) were all specific policies for the purposes of paragraph 14. The council had acted unlawfully in failing to have regard to them: see *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2016] PTSR 1031, per Coulson J.

(2) MSDC has misinterpreted paragraph 49 of the NPPF; (a) the original grounds at paras 31–37 argued that the officer's report was wrong to treat policy CNP5 as out of date. Since the grounds were served, the Court of Appeal had given judgment in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2016] PTSR 1315 ("the *Suffolk Coastal District Council* case"). This ground was not therefore advanced before me, but the right to advance it on appeal was reserved; (b) alternatively, the council had failed to apply the advice in paragraph 198 of the NPPF about the status of neighbourhood plans, that where there was a conflict, planning permission should not normally be granted. The approach of Holgate J in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1151 that paragraph 198 gave no status different to that of any development plan policy under section 38(6) of PCPA 2004 was noted, but only reflected a concession.

A (3) The approach to the effect of the proposal on the conservation area was flawed: (a) section 72 of the PLBCAA 1990 had not been applied. It was not enough to conclude that the harm was limited to one part of the conservation area, or that the fact that harm would not be done to it overall met the test in section 72. (b) The policy on the effect of development on heritage assets in paragraphs 129–134 of the NPPF had not been applied, nor reasons given not to apply it. The test to be applied in paragraphs B 132–134 of NPPF is now well settled: see *R (Hughes) v South Lakeland District Council* [2014] EWHC 3979, per Judge Waksman QC, *Pugh v Secretary of State for Communities and Local Government* [2015] EWHC 3, per myself, *Mordue v Secretary of State for Communities and Local Government* [2015] EWHC 539, per John Howell QC and *Forest of Dean District Council v Secretary of State for Communities and Local* C *Government* [2016] PTSR 1031, per Coulson J. Weight still has to be given to the effect on the heritage asset at the stage of the balancing exercise in paragraph 134 of the NPPF; (c) given the conclusions reached on the fact of harm to the conservation area in the vicinity of the site, the conclusion that there is no conflict with policy B15 was not open to the committee.

(4) The report failed to consider the fact that allocations for the construction of 155 dwellings were made in the CNP, which exceeded D known levels of need; (a) the identified contribution by Cuckfield to housing needs in the district was expressed as 130 dwellings in the plan period; (b) the identified local housing needs were for 60 dwellings (20 market housing and 40 affordable dwellings);

(5) The report's approach to the loss of open space was unlawful: (a) the application described it as amenity open space land; (b) MSDC had E previously accepted in the officer's report of November 2014 that the development of the site would amount to a loss of open space in breach of policy R2, and nothing had changed since they had done so; (c) it was common ground that no replacement site had been provided. It follows that there was a breach of policy R2.

(g) Mr Walton's submissions for MSDC

F

39 He made the following submissions on the grounds argued by the claimant:

(1) Where there is no five-year supply shown, the policies relating to housing are to be regarded as out of date (paragraph 49 of the NPPF) and the policy in paragraph 14 of the NPPF therefore applies. Relevant policies are not thereby disapplied. The purpose of paragraphs 14 and 49 of the NPPF is G to increase the supply of housing. As to the argument that specific policies in the NPPF applied here to disapply the presumption in paragraph 14: (a) as to paragraph 17 of the NPPF MSDC lawfully concluded that the site did not consist of open space; (b) as to paragraph 134 of the NPPF MSDC lawfully concluded that the character, setting and appearance of the conservation area would be preserved; (c) as to paragraph 185 of the NPPF (precedence of neighbourhood plan) nothing in paragraph 185 suggests that development is H to be restricted; (d) as to paragraph 198, it cannot be read as disapplying paragraph 14 of the NPPF where the relevant CNP policies are out of date; (e) as to paragraph 17 of the NPPF (core principles), they cannot be read as disapplying paragraph 14 as otherwise the policy in paragraph 14 of the NPPF could never apply.

(2) The first element must fail in the light of the judgment in the *Suffolk Coastal District Council* case [2016] PTSR 1315. The second must also fail, given what is said in the *Woodcock Holdings Ltd* case [2015] JPL 1151. Given that the fact that CNP5 is out of date for the purposes of paragraph 14 of the NPPF one cannot read paragraph 198 as then restoring weight to it despite what is said in paragraph 14.

(3) MSDC concluded that there would be no harm caused to the conservation area. Thus, this is an argument by the claimant that the conclusion was irrational. The hurdle is a high one, and has not been overcome here. Reference was made to *R (Newsmith Stainless Ltd) v Secretary of State for Environment Transport and the Regions* [2001] EWHC Admin 74, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann, *R v Secretary of State for Home Department, Ex p Hindley* [1998] QB 751 and *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] PTSR D14; [2014] 2 EGLR 98, para 48, per Richards LJ.

(4) As to the CNP, the claimant's case that MSDC took no account of it is misconceived. It did so in terms.

(5) As to the issue of open space: (a) the applicant's description of the land cannot determine its proper description; (b) given the fact that the land had since been closed, and appropriated, circumstances had changed since the previous decision; (c) MSDC was lawfully entitled to conclude that R2 was not engaged, but in any event specifically held that if R2 applied, there would be no conflict, given the findings of the open space assessment.

(h) Discussion and conclusions

40 I shall set out the legal principles to be applied, and then turn to the individual grounds.

41 It was common ground between the parties that it was appropriate to look to the officer's report as the way in which MSDC had approached the determination of the application. The law is helpfully summarised by Hickinbottom J in *R (Trashorfield Ltd) v Bristol City Council* [2014] EWHC 757 (Admin) at [13] and by Stewart J in *Obar Camden Ltd v Camden London Borough Council* [2015] LLR 782, para 6. However, given the fact that MSDC accepts that one may look to the report, it is unnecessary in this case to take that discussion further.

42 In determining a planning application, a local planning authority must: (a) have regard to the statutory development plan (section 70(2) of the TCPA 1990); (b) have regard to material considerations (section 70(2) of the TCPA 1990); (c) determine the proposal in accordance with the development plan unless material considerations indicate otherwise (section 38(6) of the PCPA 2004); (d) consider the nature and extent of any conflict with the development plan (see *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, para 22, per Lord Reed JSC); (e) consider whether the development accords with the development plan, looking at it as a whole (see *R (Milne) v Rochdale Metropolitan Borough Council (No 2)* [2001] Env LR 22, paras 46–48, per Sullivan J); there may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction; it must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it (see *City of Edinburgh Council*

v Secretary of State for Scotland [1997] 1 WLR 1447, 1459, per Lord Clyde, cited by Sullivan J in *Milne's* case, at para 48); (f) apply national policy unless it gives reasons for not doing so (see *Horsham District Council v Secretary of State for the Environment* (1991) 63 P & CR 219, per Nolan LJ following Woolf J in *EC Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86; and see Lindblom J in *R (Cala Homes (South) Ltd) v Secretary of State for Communities & Local Government* [2011] 1 P & CR 22, para 50); (g) if the proposal lies within a conservation area, pay special attention to the desirability of preserving or enhancing the character or appearance of that area (section 72(1) of the PLBCAA 1990).

43 The last principle was the subject of some discussion in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* ("the *Barnwell* case") [2015] 1 WLR 45, paras 19–21, per Sullivan LJ, where he was considering the authorities of *The Bath Society v Secretary of State for the Environment* [1991] 1 WLR 1303, *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 and *Heatherington (UK) Ltd v Secretary of State for the Environment* (1994) 69 P & CR 374:

> "19. When summarising his conclusions in the *Bath Society* case about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay 'special attention' should be the first consideration for the decision-maker [1991] 1 WLR 1303, 1818F–H. Glidewell LJ continued, at p 1319: 'Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight . . . As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that.'
>
> "20. In the *South Lakeland* case [1992] 2 AC 141 the issue was whether the concept of 'preserving' in what is now section 72(1) meant 'positively preserving' or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but in his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms, at p 146E–G: 'There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is

desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria.'

"21. In the *Heatherington* case 69 P & CR 374, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of [the TCPA 1990] (since repealed and replaced by the duty under section 38(6) of [the PCPA 2004] However, Mr David Keene QC, at p 383, when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the *Bath Society* case . . . and said that the statutory objective 'remains one to which considerable weight should be attached'."

I shall in due course consider also the effect of the section of the NPPF which deals with heritage assets.

44 If it is shown that the decision-maker had regard to an immaterial consideration, or failed to have regard to a material one, the decision will be quashed unless the court is satisfied that the decision would necessarily have been the same: see *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306.

45 Given the arguments in this case it is necessary also to consider authorities on the proper application and interpretation of the NPPF. In doing so, I start with some observations on the effect of the judgment of Lindblom LJ in the *Suffolk Coastal District Council* case [2016] PTSR 1315. I will also refer to his judgment at first instance as Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin).

46 The NPPF was very relevant to the determination of this application. But it was so because, as a statement of government policy, it was a material consideration; no more and no less. While the arguments there were directed towards paragraph 49 of the NPPF, it is important to note what Lindblom LJ said in the *Suffolk Coastal District Council* case [2016] PTSR 1315, paras 42–43 about the NPPF generally:

"42. The NPPF is a policy document. It ought not to be treated as if it had the force of statute. It does not, and could not, displace the statutory 'presumption in favour of the development plan', as Lord Hope [of Craighead] described it in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1450B–G. Under section 70(2) of the [TCPA 1990] and section 38(6) of the [PCPA 2004], government policy in the NPPF is a material consideration external to the development plan. Policies in the NPPF, including those relating to the 'presumption in favour of sustainable development', do not modify the statutory framework for the making of decisions on applications for planning permission. They operate within that framework—as the NPPF itself acknowledges, for example, in paragraph 12 . . . It is for the decision-maker to decide what weight should be given to NPPF policies in so far as they are relevant to the proposal. Because this is government policy, it is likely always to merit significant weight. But the court will not intervene unless the weight given to it by the decision-maker can be said to be

unreasonable in the *Wednesbury* sense: *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

"43. When determining an application for planning permission for housing development the decision-maker will have to consider, in the usual way, whether or not the proposal accords with the relevant provisions of the development plan. If it does, the question will be whether other material considerations, including relevant policies in the NPPF, indicate that planning permission should not be granted. If the proposal does not accord with the relevant provisions of the plan, it will be necessary to consider whether other material considerations, including relevant policies in the NPPF, nevertheless indicate that planning permission should be granted."

47 I refer also to paras 46–47 which deal with what must now be seen as the inappropriate application and consideration of the NPPF, including to some extent judicially:

"46. We must emphasise here that the policies in paragraphs 14 and 49 of the NPPF do not make 'out-of-date' policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, p 780F–H. Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is 'out-of-date' should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect.

"47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy—such as the protection of a 'green wedge' or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite there not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment: see Lindblom J's judgment in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [70]–[75]; Lindblom J's judgment in *Phides*

Estates (Overseas) Ltd v Secretary of State for Communities and Local Government [2015] EWHC 827 (Admin) at [71]–[74], and Holgate J's judgment in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1151, paras 87, 105, 108 and 115."

48 I respectfully suggested in *Dartford Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 649 (Admin), *South Oxfordshire District Council v Secretary of State for Communities and Local Government* [2016] EWHC 1173 (Admin) and *Cawrey Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 1198 (Admin) that the *Suffolk Coastal District Council* case has laid to rest several disputes about the interpretation of the NPPF, both as to the paragraphs it addressed, but generally. Before the *Suffolk Coastal District Council* case it had been striking that the NPPF, a policy document, could sometimes have been approached as if it were a statute and, as importantly, as if it did away with the importance of a decision-maker taking a properly nuanced decision in the round, having regard to the development plan (and its statutory significance) and to all material considerations. In particular, I would emphasise the passage in Lindblom LJ's judgment at [2016] PTSR 1315, paras 42–43, which restates the role of a policy document, and just as importantly how it is to be interpreted and applied. The NPPF is not to be used to obstruct sensible decision-making. It is there as policy guidance to be had regard to in that process, not to supplant it.

49 There are three aspects of the NPPF which arise for discussion here: (a) the meaning and effect of paragraphs 14 and 49 in the context of this claim; (b) the meaning and effect of the section on heritage assets; (c) the meaning and effect of the passages relating to neighbourhood plans.

50 As to the interpretation and application of paragraphs 14 and 49 of the NPPF in the officer's report, although a contribution of a single dwelling to the housing land supply is plainly not as substantial as the effect of many permissions, the officer gave reasons why it was important for MSDC to maximise its housing land supply in the context of an admitted shortfall for the purposes of paragraph 49 of the NPPF. The policies C1 and CNP1 were certainly capable of being policies relevant to housing: see the *Suffolk Coastal District Council* case, paras 32–41. If it is the case that MSDC has to find more housing land, it is a matter for it as the decision-maker to consider whether that renders the policies out of date.

51 I am however concerned about the treatment of policy CNP5 of the CNP. That does deal with the principle of building outside the built-up area boundary, but it also deals in terms with the specific locations identified on map 5. While it may follow that the existing built-up area boundary of Cuckfield cannot be maintained on its current line, it does not follow that it is devoid of weight so far as its specifically protective effects at locations identified at CNP5(d) and map 5. It is hard to see how the fact that the plan is not up to date in some respects means that all policies relevant to the site in question are rendered out of date.

52 So far as the policy in the NPPF is concerned, the questions are then whether there are adverse impacts which would significantly and demonstrably outweigh the benefits, or whether specific policies in the NPPF indicate that development should be restricted, as per paragraph 14 of the

NPPF. But two riders must be added. Firstly, as the *Suffolk Coastal District Council* case makes clear, the statutory test in section 38(6) of the PCPA 2004 is not supplanted by the NPPF, although plainly the application of the policy test in the NPPF is a material consideration to which the decision-maker is entitled to give significant weight. But it would be wrong (for example) to set aside development plan policies on heritage assets simply because the NPPF also addresses that topic. Secondly, one cannot use the test in paragraph 14 of the NPPF, or the effect of the policy in paragraph 49 to override or supplant the statutory test in section 72 of the PLBCAA 1990 on the tests to be applied to development in conservation areas.

53 So far as the policy in the NPPF on heritage assets is concerned, there is a sequential approach to consideration of the effects. This passage from my judgment in *Pugh's* case [2015] EWHC 3 at [49]–[50] sought to set it out:

> "49. . . . Thus, the value and significance of the asset, whatever it may be, will still be placed on one side of the balance. The process of determining the degree of harm, which underlies paragraph 132 of [the] NPPF, must itself involve taking into account the value of the heritage asset in question. That is exactly the approach that informed the Addendum Assessment upon which Mr Harwood relies. The later assessment also addressed the value of the asset, and then the effect of the proposal on that value. Not all effects are of the same degree, nor are all heritage assets of comparable significance, and the decision-maker must assess the actual significance of the asset and the actual effects upon it.
>
> "50. But one must not take it too far so that one rewrites [the] NPPF. It provides a sequential approach to this issue. Paragraphs 126–134 are not to be read in isolation from one another. There is a sequential approach in paragraphs 132–134 which addresses the significance in planning terms of the effects of proposals on designated heritage assets. If, having addressed all the relevant considerations about value, significance and the nature of the harm, and one has then reached the point of concluding that the level of harm is less than substantial, then one must use the test in paragraph 134. It is an integral part of the NPPF sequential approach. Following it does not deprive the considerations of the value and significance of the heritage asset of weight: indeed it requires consideration of them at the appropriate stage. But what one is not required to do is to apply some different test at the final stage than that of the balance set out in paragraph 134. How one strikes the balance, or what weight one gives the benefits on the one side and the harm on the other, is a matter for the decision maker. Unless one gives reasons for departing from the policy, one cannot set it aside and prefer using some different test."

54 So the council in this case had to do the following: (a) to comply with section 72 of the PLBCAA 1990, it had to ask whether the development would cause harm to the character or appearance of the conservation area. If the answer was that it would, it had to give significant weight to the fact that harm would be caused. (b) If the NPPF was to be addressed properly, then if it had found that harm would be caused, the value of the asset and the degree of harm must both be addressed. If the level of harm was substantial, then consent should be refused under paragraph 133 unless the harm or loss

was necessary to achieve substantial public benefits that outweigh the harm or loss, or one of the four bullet points apply (none of which were suggested here). If the level of harm was less than substantial, then any benefits must be weighed against the degree of harm: see paragraph 134.

55 If the effect on the heritage asset was such that the tests in paragraphs 132–134 of the NPPF were not met, then the rider in paragraph 14 of the NPPF applied. It would also mean that the development would not be sustainable in terms of the environmental dimension under paragraph 54 of the NPPF.

56 I turn now to the specific grounds. I start with ground 3. Here the officer's report found that there would be a harmful effect on the character and appearance of the conservation area, but sought to look at it in the context of the conservation area as a whole. It is sensible to consider this in the context that the site lies within an area of undeveloped land over which the public get one of the long views which it is development plan policy to retain and protect. That was the view of the 1994 inspector, and is clear from the officer's report:

> "the main impact of the proposed development would be on the character of the immediate vicinity through the loss of panoramic views to the south. Construction of the dwelling will obstruct long views from the western end of Courtmead Road, from the public footpath abutting the northern boundary and from within the site itself. The views across open countryside to the distant South Downs are a distinctive feature of the southern edges of the Cuckfield conservation area and they engender a particularly strong sense of place. Loss of these views will diminish an important quality of this part of the designated area and as a result this weighs against the favourable recommendation of the application proposals."

57 However, the next paragraph states:

> "However, the area in which the diminution will be experienced is limited to the western end of Courtmead Road, the public footpath and from within the site itself. From elsewhere in the southern fringes of the conservation area, similar panoramic southerly views will remain. Thus, while there is damage to a component of the heritage asset i e the conservation area, the special character of the conservation area as a whole will be preserved. As such there is no conflict with policy B12 of the MSLP."

58 In my judgment that approach cannot be supported. If there is harm to the character and appearance of one part of the conservation area, the fact that the whole will still have a special character does not overcome the fact of that harm. It follows that the character and appearance will be harmed. While I accept that the question of the *extent* of the harm is relevant to consideration of its effects, it cannot be right that harm to one part of a conservation area does not amount to harm for the purposes of considering the duty under section 72 of the PLBCAA 1990.

59 On the facts there set out, it follows that the development would cause harm to the character and appearance of the conservation area. That must attract significant weight as a disadvantage of the development, as a matter of law, as the approach set out in the *Bath Society* case [1991] 1 WLR

A 1303, per Glidewell LJ, the *Heatherington (UK) Ltd* case 69 P & CR 374, per Keene J and the *Barnwell* case [2015] 1 WLR 45, per Sullivan LJ shows. Paragraphs 132–134 and 138 of the NPPF cannot be read as diminishing the effect of that clear line of authority, emanating from three of the most distinguished judges in this field.

60 The conclusion about policy B12 also cannot be sustained. That B policy, it should be recalled, reads:

> "The protection of the special character and appearance of each conservation area will receive high priority. When determining planning applications for development within or abutting the designated conservation areas, special attention will be given to the desirability of preserving or enhancing the character or appearance of the area . . ."

C **61** On the facts and arguments advanced in the report, the development would undoubtedly harm the character and appearance of it. I would take that view whether or not this particular part of the conservation area had the particular importance ascribed to it by the development plan, and set out above. But it must also be taken as conflicting with the specific protection given by the development plan in CNP5(d) and map 5 of the CNP. While it is true that the report identifies a breach of CNP5 it does so on the basis that D the house would be outside the built up area, and not on the basis that it would obstruct landscape views of importance and sensitivity, which the development plan set out to protect.

62 Those breaches of policy also mean that the approach of the report, which failed to identify it as a breach, must be reassessed in the light of section 38(6) of the PLBCAA 2004.

E **63** One then turns to the arguments advanced for the benefits outweighing the harm. It is very hard to understand how it is said that the construction of one house (albeit an attractive one in a location close to facilities) at this location can amount to substantial public benefits of the kind contemplated in paragraph 132 of the NPPF, but even if that is a rational view, it is expressed in the context of an approach where the assessment of harm is flawed, for the reasons already given.

F **64** I therefore find that MSDC failed to apply the tests in either section 72 of the PLBCAA 1990 or paragraphs 132–134 of the NPPF in a proper manner. It follows also that even if one took the test in paragraph 14 of the NPPF, or that in paragraph 49, this proposal was in breach of a policy in paragraphs 132–134 of the NPPF.

65 As to ground 1, I agree that there was a breach of policy B12 of the G local plan, for the reasons given above under ground 3. Given the fact that the officer's report approached the matter on the basis that there was no breach of B12, the report had not considered all relevant breaches when determining the degree of conflict with the development plan for the purposes of section 38(6) of the PCPA 2004. There was also a breach of CNP5(d) which has not been addressed.

H **66** However so far as policy C1 is concerned, and the *generality* of CNP5 it was a matter for the planning judgment of the council whether the policy was out of date.

67 I also agree that there was a breach of the paragraphs 132–134 of the NPPF. I do not consider that there was an additional breach of the core principles in paragraph 17 of the NPPF. As to the passages in the NPPF on

neighbourhood plans in paragraphs 17, 185 and 186, they are actually surplusage, because the effect of section 38(6) of the PCPA 2004 is to the same effect as paragraph 198 of the NPPF, as pointed out by Holgate J in the *Woodcock Holdings Ltd* case [2015] JPL 1151. Similarly, paragraph 185 of the NPPF does no more than state the effect of section 38(5) of the PCPA 2004 whereby the last plan approved takes precedence. Paragraph 17 of the NPPF encourages LPAs to have genuinely plan-led planning, with up-to-date local and neighbourhood plans "setting out a positive vision for the future of the area". While it is noteworthy that the CNP is actually less than two years old, but is still regarded by the local planning authority as out of date, it was matter for its planning judgment whether it is out of date, albeit that it must exercise that judgment logically and with regard to relevant considerations.

68 For the same reason ground 2 is unarguable.

69 As to ground 4, MSDC did take account of the CNP. In the absence of any policy in the CNP restricting the level of housing development to the allocations, it is hard to see how this advances the claimant's case.

70 As to ground 5 I have some sympathy for the claimant. There is little difficulty in understanding that the appropriation and ending of the role of the site as open space was related to the council seeking to maximise the value of its asset. But be that as it may, the council has put forward reasons why it did not regard the loss of open space as significant. The fact is that it is not actually public open space, and the open space assessment has shown that it is not required. In my judgment, the council was entitled to form the planning judgment that the land should not be treated as recreational open space. Accordingly ground 5 fails.

71 Finally, I have considered whether this is a case for the application of section 31(2A) of the Senior Courts Act 1981, as amended by section 84(1) of the Criminal Justice and Courts Act 2015, or whether the test in the *Simplex GE (Holdings) Ltd* case 57 P & CR 306 applies. In other words, would the decision have been the same had the officer approached the conservation area issue properly? I am by no means persuaded that it would have been. For had the council been properly advised, it would have had to approach the case on the basis that: (a) there would be harm caused to this part of the conservation area, to which it should attach significant weight: see the *Barnwell* case [2015] 1 WLR 45 and the *Bath Society* case [1991] 1 WLR 1303; (b) it could not be offset by the lack of harm to the rest of the conservation area; (c) that being so, could the construction of one house, with the financial advantages that brings to the council, as identified in the officer's report, outweigh that harm?

72 That is not the approach it followed. I am not persuaded that, had it done so, it would have been bound to grant permission for a single house at this location given its significance in the development plan. It follows that I uphold grounds 1 and 3, and quash the grant of permission.

Ruling on application for permission to appeal

73 Mr Walton has submitted that I should grant permission to appeal. It is resisted by Mr Sharland. Both put their submissions on the point in writing after my draft judgment was circulated.

74 On ground 3 Mr Walton contends that the court has reached the unsustainable conclusion that harm to one part of the conservation area "must equate as a matter of law/principle to harm to the significance of the

heritage asset, which is an unsustainable conclusion". He also contends that I have made a finding that the scheme would cause harm to the character and appearance of the conservation area.

75 That submission as drafted does not address the effect of the NPPF, which regards harm to the character and appearance of a conservation area as harm to the significance of the heritage asset: see paragraphs 126 and 131. In this case the report expressly held that there would be harm to the appearance and character of the conservation area, without identifying any compensatory change.

76 In any event that submission does not address directly the conclusion of the court about the effect of section 72 of the PLBCAA 1990 on the effect of harm to one part of the conservation area.

77 On ground 1 Mr Walton submits that I have not dealt with the claimant's principal case, and that it was truly an irrationality challenge.

78 In I fact allowed ground 1 but not only in relation to the points about the NPPF. The application for permission nowhere addresses the approach of the council to policy B12.

79 There is one arguable point lying behind Mr Walton's submissions, but obscured by them, and which is the kernel of the case: namely whether, when one is considering if there would be harm to the character and appearance of a conservation area for the purpose of section 72 of the PLBCAA 1990 (or the NPPF or policy B12), one *can* approach the question on the basis that there would not be harm to it overall. If one can do so, then the report approached this fundamental issue in the case properly. If one cannot, it did not do so. As I remarked in argument I am unaware of any reported authority on the matter. I grant permission on that ground alone.

80 Mr Sharland has submitted that I make the permission to appeal subject to the application of the Aarhus costs caps. While I see the force of that, the costs of any appeal are a matter for the Court of Appeal to address.

Claim allowed.
Planning permission quashed.
Permission to appeal granted.

GIOVANNI D'AVOLA, Barrister