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Case No: CO/1166/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2019

Before :

SIR DUNCAN OUSELEY
Sitting as a High Court Judge
Between:

SAFE ROTTINGDEAN LTD	**Claimant**
- and -	
BRIGHTON AND HOVE CITY COUNCIL	**Defendant**
-and-	
FAIRFAX ACQUISITIONS LTD **GRANGE MANAGEMENT (SOUTHERN) LTD** **COTHILL TRUST**	**Interested Parties**

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Andrew Parkinson (instructed by **DMH Stallard LLP**) for the **Claimant**
Jacqueline Lean (instructed by **the Solicitor to the City Council**) for the **Defendant**
Christopher Katkowski QC and Richard Turney (instructed by Trowers and Hamlins LLP) for the **First Interested Party**

Hearing dates: 23 July 2019

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Approved Judgment

Sir Duncan Ouseley:

1. On 8 February 2019, Brighton and Hove City Council granted permission for a residential development of 93 houses, and associated facilities, at the site of the former St Aubyn's School, on the east side of the High Street in Rottingdean. The school, which closed in 2013, is located within the Rottingdean Conservation Area, but its 2.5 hectares of playing fields are outside it, lying on the other side of a path known as the Twitten which marks the Conservation Area boundary. The main school building and its adjoining chapel are Grade II listed buildings. The school site also contains a number of other buildings.

2. After an earlier application for permission for a residential development by Linden Homes, Linden, had been refused in April 2016, along with listed building consent applications, a further application for full planning permission was submitted in August 2017, along with a listed building consent application, after consultation with the City Council. On 10 October 2018, the Planning Committee considered the lengthy Officer's Report, OR, which recommended that planning permission be granted. It accepted the recommendation by 9 votes to 1, subject to the Secretary of State not calling in the application, and to the conclusion of an agreement under s106 of the Town and Country Planning Act 1990. The listed building consent application was approved unanimously, and is not directly controversial in these proceedings. The application was not called in. Planning permission was granted following the conclusion of the s106 agreement.

3. Safe Rottingdean Ltd is a vehicle for representing a community group established to protect Rottingdean, and its environs, from development to which it is opposed. The group objected to this proposal.

4. It challenges the grant of permission by way of judicial review, on the grounds that the OR significantly misled the Planning Committee (i) because it failed to advise the Committee that the application breached policies HE3 and HE6 of the Brighton and Hove Local Plan 2005, the LP; (ii) because it failed to consider and inform the Committee of paragraph 193 of the National Planning Policy Framework, the Framework, which deals with the weight to be given to the impact of development on designated heritage assets, or of ss66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, the Listed Buildings Act; and (iii) because it failed to apply s38(6) of the Planning and Compulsory Purchase Act 2004, the 2004 Act, which requires decisions to be made in accordance with the development plan unless material considerations indicate otherwise.

The background to the application

5. The background to the Committee's consideration of the application in October 2018 is important. The closure of the school in 2013 left substantial listed buildings, adjoining the High Street, in the Rottingdean Conservation Area, unused and unmaintained. The City Council approved a development brief in 2015, placing the site at the heart of historic Rottingdean. Most of the school buildings lie on the High Street side of the Twitten; those few outside the Conservation Area on the other side of the Twitten relate to the use of the playing fields, principally the pavilion. The playing fields were however regarded as part of the curtilage of the listed buildings, and all those buildings within the curtilage were treated as "curtilage listed." These

included the pavilion, the flint walls, war memorial and a terrace of cottages. The playing fields in particular, though surrounded by residential development of varying types, formed a significant green space seen as part of the setting of the Conservation Area, and important in strategic views of the village, notably from Beacon Hill.

6. The first development proposed by Fairfax was refused on many grounds covering both the planning application and the listed building application. What was to happen to the site was already locally controversial. There followed extensive discussions between officers and Fairfax, before the submission of the further applications with which this case is concerned. The applications themselves were then the subject of lengthy discussions, and public consultation, before the OR was presented to the Planning Committee.

7. The actual application was far from a simple residential proposal; it was for a package of residential development and measures to restore and reuse most of the listed buildings. There were to be 93 new dwellings including 29 on the main school building site, referred to as the campus, and 52 on the playing field, covering 1.1 of their 2.5 hectares. The rest of the playing field was to be retained as open space. Field House, the principal listed building on the campus, and part of its northern extension, were to be converted to residential use to provide 8 flats. The existing terraced cottages and a dwelling called Rumneys were to be altered to provide 4 dwellings. 40% of the dwellings were to be affordable, (a figure greater than originally proposed in the second application), with a tenure split of 55% social rented and 45% intermediate housing. The existing sports pavilion, war memorial, water fountain and chapel were to be retained, but all the other school buildings were to be demolished. There would be new access points, refuse facilities, alterations to the boundary flint wall along Steyning Road and the Twitten, and other associated works.

The Officer's Report and the Planning Committee meeting

8. The OR described the site, and the listed and "curtilage" listed buildings, i.e. those treated as listed because they were in the curtilage of a listed building. The description included this at [2.6]:

> "The school campus site is located within the Rottingdean Conservation Area, the boundary of which runs along the eastern side of the Twitten and therefore excludes the playing field. Nevertheless the playing field is considered an important part of the setting of the Conservation Area; it provides a reminder of the once rural setting of the village and a distinction between the historic village and surrounding suburban development. The Twitten is identified as an important spatial feature in the Conservation Area; it is bounded by hedge to one side and a flint wall to the other. The flint wall to Steyning Road, as well as being curtilage listed, is an important part of the character of the Conservation Area as it helps to delineate the boundary to the school site as well as differentiate public and private space."

9. The account of the planning history set out the principal grounds on which planning permission and listed building consent had been refused on the previous application;

they included the absence of any affordable housing, the provision of insufficient information for assessing the significance of the listed buildings and alterations proposed to them, harm to the listed buildings and harm to the character and appearance of the Conservation Area and its setting.

10. Subsequently, there had been pre-application discussions, consultation with various bodies including local action groups, and a members' pre-application briefing.

11. After describing the application, the various consultation responses, including from Historic England, and objections, including those in effect from the supporters of the Claimant, were summarised. The City Council's Heritage Officer commented that the principle of bringing the vacant listed building and associated structures back into long-term use was very welcome and that residential use was compatible with their conservation; the main school building had originally been a house. This was a "great heritage benefit." The extent of demolition was justified and would retain most parts of the principal building and curtilage structures of the greatest significance. The internal alterations would restore much of the original plan form and important internal features and fixtures of the principal original building.

12. The new development on the campus site "would provide a very clear enhancement to the appearance and character of the conservation area over the existing ad-hoc collection of poor quality late 20th century buildings, and subject to revised details…is considered to be entirely sympathetic to the Conservation Area."

13. However, he was also of the view that the development of the southern part of the playing field site:

> "would cause clear harm to the setting of the Conservation Area, and to a lesser degree to the setting of the principal listed building. This harm particularly arises from the visible reduction of the 'green lung' between the conservation area and the later suburban development…which is important to the setting of the conservation area is identified in the Character Statement. This harm would be notable but would be less than substantial under the terms of the NPPF. This degree of harm has not been justified in terms of viability."

14. Housing Strategy had said, in response to the application, that it was proposed that only 31% of the housing would be affordable, below the 40% sought by policy. "However, documents state that this reduction in provision is based on a viability report which, if confirmed by an independent assessment, is an acceptable offer." (The OR noted that the level of affordable housing had been increased to 40%.) The tenure split within the affordable housing was welcomed as policy compliant, as was the unit mix; family housing for rent and wheelchair-accessible housing for affordable rent were particularly welcomed.

15. The comments from Planning Policy included that the proposal was not considered strictly to meet any of the criteria permitting exceptions to the City Plan, CP, policies which sought to protect existing open space. 43% of the playing field would be lost. But that loss, bearing in mind that, historically, public access had been restricted, needed to be weighed against the proposal to transfer the remaining 1.4 ha. into public

ownership. This would achieve more effective use of the remaining open space in line with the aims of CP policy. It continued:

> "In addition the applicant makes the case in the Planning Statement that development on part of the playing field is necessary to enable a viable scheme to bring forward the whole site for development. This assertion should be tested by the District Valuer before an exception to the policy to allow the partial redevelopment of the field can be considered."

16. The housing would be a welcome contribution to the target set out in CP policy, residential use was in principle supported by the Planning Brief, the density and quantity was in line with policy, the revised level of affordable housing, 40%, complied with policy. The loss of the school was considered acceptable subject to the retention of a community facility in the chapel to offset the loss of the school. The comments of a considerable array of other officers were noted.

17. Under the heading "Material Considerations", the OR first said this:

> "In accordance with Section 38(6) of the Planning and Compulsory Purchase Act 2004, this decision has been taken having regard to the policies and proposals in the National Planning Policy Framework, the Development Plan, and all other material planning considerations identified in the "Considerations and Assessment" section of the report."

18. The plans which made up the development plan were identified, and the multitude of relevant policies listed. The January 2015 Site Planning Brief, and the Rottingdean Conservation Area Character Statement, were also listed as relevant, but not as development plan policies.

19. There then follows the "Considerations & Assessment" section of the OR, covering 181 paragraphs, concluding with the recommendation that planning permission be granted. This is a substantial and, on the face of it, thorough and careful OR. It begins with the main considerations at [8.1] as follows:

> "The main considerations in the determination of this application related to the principle of the proposed development including the partial loss of the playing field, financial viability and affordable housing provision the impact of the proposed development on the visual amenities of the site and surrounding area, including the Rottingdean Conservation Area and its setting, and the impact upon the special architectural and historic significance of Listed Buildings located within the site and their setting. [Various other impacts had to be assessed, including traffic, air quality and sustainability.]"

20. The 2015 Planning Brief, although not part of the development plan, had been approved by the Council's Economic Development and Culture Committee, in partnership with Rottingdean Parish Council. Its purpose was to provide the planning framework to help bring forward a sensitive redevelopment achieving the following

objectives: i) a viable and deliverable scheme, making efficient use of land, securing the re-use and ongoing maintenance of the Listed Building, ii) preserving the Listed Building, iii) preserving or enhancing the character and appearance of the Rottingdean Conservation Area and their respective settings, and iv) maximising the use of the playing fields for open space and public recreation.

21. A Built Heritage Assessment would be required for the whole site, outlining its historic development and identifying its special interest and significance of the whole and of its constituent parts, so as to inform the development of proposals. In principle, the listed main building and chapel, listed boundary wall and the curtilage listed buildings should be repaired and retained, and strong justification for the loss of any part of any of them would be required. Surviving historic external and internal features to the main building should be retained; subdivision was possible to provide a viable scheme, but it would need strong justification and a proposal sympathetic to the original plan form and circulation routes. Green space adjacent to the chapel and croquet lawn should be retained, and the courtyard character preserved and enhanced. The playing fields should continue to play the role of open green space, as a buffer between the historic village and surrounding suburban development. Any new development had to be sensitively designed, and deferential to the main listed building. Two storeys without it would be an acceptable maximum height for new development.

22. The principle of residential use of the site "within a scheme that acknowledges and respects the significance of the heritage assets present in and around the whole site as well as the presence of the playing field would, therefore be acceptable." The core aspects of such a proposal should be the re-use and retention of the listed school and curtilage listed buildings, sympathetic new development of the remainder of the campus site, and development which takes account of the strategic views across the playing field. The requirements of the Brief had to be realistic and deliverable, but not to the detriment of heritage assets; developers were:

> "required to provide clear and convincing justification for any harm caused to heritage assets as a result of putting forward a viable scheme. In these circumstances, the Local Planning Authority needs to assess whether the benefits arising from the proposed development outweigh the harm caused by the heritage assets and/or the departure from policy."

23. The OR said that the principle of housing on the site was acceptable in the light of the need for housing and of the Planning Brief, and would make a welcome contribution towards the housing target in Policy CP1. An inspector had recently concluded that the City Council did not have a five-year housing land supply; until an updated position was published, increased weight should be given to housing delivery in line with the Framework. The number of units, and the site coverage and their location required careful consideration.

24. Next, the loss of the school was considered under policy HO20. The principle of the loss of the school had been accepted in the Planning Brief, which did not necessarily seek the retention of educational facilities at the site, and had not been a reason for refusal of the earlier application. The listed chapel and pavilion would be retained and refurbished as community facilities, but no agreement had as yet been reached for

Rottingdean Parish Council to take them over. Conditions or a legal agreement were however proposed to achieve the retention and maintenance of these community buildings. Their retention "would be a significant public benefit and would satisfactorily offset the loss of the existing community facilities "in the form of a private school" and justify an exception to Policy HO20."

25. The next topic in the OR was "Viability and Affordable Housing." Viability information had been submitted:

> "which set out that without the level of development proposed, including the development of approximately 1 ha of the playing field, the retention and re-use of the listed Field House, Cottages and Rumneys, the restoration of historic assets is unviable."

26. The District Valuer Service, DVS, had examined the viability assumptions independently to see whether a scheme without the level of development proposed on the southern part of the playing field would be viable, and whether a higher proportion of affordable housing could be delivered as part of a viable scheme. The DVS had concluded, [8.20] that:

> "the proposed scheme of 93 units on the playing field and campus, with policy compliant affordable housing provision of 40% (37 units) could be viably provided. The DVS also concludes that a scheme of 41 units on the campus site only, comprising the conversion of listed buildings and new build development without any redevelopment of the playing field and with policy compliant affordable housing of 40% would not be viable. The DVS does however consider that a campus only development solely for private sale without any redevelopment on the playing field would be viable.
>
> 8.21. The applicant disagrees with the DVS assessment and as such maintains that it would not be viable to provide policy compliant levels of affordable housing over the scheme. Furthermore they do not agree that a solely market housing scheme in relation to the campus site would be viable without redevelopment of the playing field.
>
> 8.22. Notwithstanding the above the applicant has stated that a commercial decision to provide a policy compliant level of 40% affordable housing has been agreed. They set out that whilst this would result in a lower profit margin than was agreed to be appropriate in the viability assessment they are willing to proceed on this basis."

27. So, the conclusion was that the proposal was policy compliant in relation to affordable housing.

28. A crucial topic followed from [8.24] to [8.54]: "Design/Layout/Visual Amenities/Heritage". CP 12 related to urban design, and HE1,2,3,6 and 8, and CP15 were identified as the relevant heritage policies.

29. The listed school building, once a house, was described, together with its contribution to the character and appearance of the Conservation Area, from its size, scale, style and set back from the High Street. All the buildings within the campus site were part of the designated asset. The enclosed courtyard character was important. The Conservation Area Character Statement placed it within the High Street distinct character area.

30. The playing field, whilst not within the Conservation Area, was considered to be of particular importance as part of its setting, as an important reminder of Rottingdean's once rural setting, and as a distinction between the historic village and the surrounding development. "Although the current form and shape of the green space is not historic, it is the open, green character which is of particular importance." This was evident in two strategic views set out in the Character Statement. The whole of it was part of the green buffer, surrounding the Conservation Area.

31. The proposed extent of demolition was considered justified and would retain most parts of the principal listed building and curtilage structures of greatest significance. The sensitive conversion of Field House to residential as part of an acceptable wider scheme would ensure the long-term use of the current vacant historic building, which would be a great heritage benefit. The proposed approach to external alterations and extensions was considered to retain the informal character of the rear elevation and the infill was suitably low-key and an appropriate reflection of the historic building form; this was also an improvement over the existing rear elevation. The internal works were acceptable and better revealed the plan form. The principle of bringing the vacant cottages and Rumneys back into long-term use for residential purposes was also welcome, and was compatible with their conservation. The retention of the chapel was welcomed and, whilst the loss of later links structures was acceptable, it was regrettable that no use had been found to secure its long-term future, but a refusal on the grounds that no such user had been identified could not be sustained. The proposal would restore the chapel to a good state of external repair so that it could be confidently mothballed if necessary while a long-term end-user was sought.

32. The retention and refurbishment of the sports pavilion, War Memorial and drinking fountain on the retained playing fields was welcome, although there was no specific proposal for the future use for the pavilion.

33. At [8.47], the OR said that the development on the school campus was:

> "entirely appropriate to the urban grain and general character and appearance of the Rottingdean Conservation Area and to the setting of the principal listed building. This aspect of the proposed development would provide a very significant enhancement to the appearance and character of the Conservation Area over the existing ad-hoc collection of poor quality late 20th century buildings on this part of the site."

34. The proposed development on the playing field was discussed at [8.48-8.54]. The application encroached further north on to it than the previously refused scheme and so there was less retention of green space. This had a particular impact on the setting of the Conservation Area, notably from those key views identified in the Character Statement, which were then specified. The OR elaborated as follows in [8.49-8.50]:

> "The submitted verified views show that from Newlands Road, the proposed development would have no significant impact on this view and, in particular, would not impact on the view towards Beacon Hill and the Windmill. From Park Crescent/Park Road, where the listed building of Field House closes the Vista with the playing field and downland behind, the proposed development would reduce the amount of open playing field behind the listed building and would mean that the roof of the listed building would no longer be silhouetted against the green space. It is acknowledged however that this would change as the viewer descends the hill.
>
> 8.50. Nevertheless, the impact in this view would cause some harm to the setting of the Conservation Area and to the setting of the listed building. The most notable impact would be the viewpoint from Beacon Hill from where the playing field currently provides a clear 'green lung' or vista between the Conservation Area and the later suburban development east of Newlands Road. This is important to the setting of the Rottingdean Conservation Area, as identified in the Character Statement, and the proposed development would significantly reduce the extent of this green vista, thereby harming the setting of the Conservation Area."

35. The layout, form and massing of the proposed development were notably more sympathetic to the grain of the adjacent Conservation Area than the previously refused application. "Notwithstanding the harm created by the extent of development, the proposed development would successfully mediate between the Conservation Area and the later suburban development to the east."

36. The OR continued at [8.52-8.54]:

> "The applicant's submission sets out that the degree of encroachment on to the playing field is required to achieve a viable and deliverable scheme. Whilst the independent viability appraisal by the DVS does not agree with all of the applicant's assumptions it does set out that a policy compliant scheme solely on the campus would not be viable. In the context of the proposed enhancements to the campus site and the importance of achieving a viable and deliverable scheme which accords with planning objectives weight must be given to allowing a certain quantum of development on the playing field.
>
> 8.53. Overall, the principle of bringing the vacant principal listed building and associated curtilage structures back into use

> is supported by Officers. Residential use is considered to be compatible with the conservation of the historic buildings, particularly the main school building that was originally a house. This is considered to be a significant heritage benefit. The proposed extent of demolition is considered to be justified and would retain most parts of the principal listed building and curtilage structures of greatest significance. The proposed new development on the campus part of the development would provide a very clear enhancement to the appearance and character of the Conservation Area over the existing ad-hoc collection of poor quality late 20th century buildings on this part of the site and the overall approach to landscaping is considered to be sympathetic to the Conservation Area.
>
> 8.54. The proposed development on the southern part of the playing field would cause clear harm to the setting of the Rottingdean Conservation Area and to a lesser extent, the setting of the principal listed building - Field House. This part would arise from the visible reduction of the green vista or 'lung' between the Rottingdean Conservation Area and the later suburban development east of Newlands Road, which is important to the setting of the Conservation Area as identified in the Character Statement. This harm would be notable but less than substantial under the terms of the National Planning Policy Framework. Whilst the loss of part of the playing field is regrettable in conservation terms, when weighed against the need to provide a viable and deliverable scheme and the enhancement to the Conservation Area of the campus development, notwithstanding other public benefits of the scheme the heritage harm identified is not considered to be so significant as to warrant refusal of the application."

37. I deal with the other topics covered in the OR because of the submissions about s38(6). The density and quantity of development on both the campus and playing field were in line with policy CP14. The proposed mix was broadly in line with policy CP19. The adaptability of the housing for people with disabilities in line with policy HO13.

38. The loss of open space was contrary to policy CP16, unless one of four criteria was met. The proposal strictly did not meet any of them: however the overall aim of the policy included seeking better, more effective and appropriate use of all existing open space. This land was not formally usable or accessible by the public. One objective of the Planning Brief was to encourage public use of existing open space. The proposal would secure the retained playing field for public access in perpetuity. Sport England had objected to the application because no part of the retained playing field in fact would be retained as a playing field for sport. The developer proposed to provide funds for the improvement of existing facilities at other schools, and had also produced a sports pitch plan showing how the retained field could accommodate new pitches. A local play area would be provided as well. Officers considered that the package went a significant way to improving the quality and accessibility of open

space and sports provision in the vicinity of the site; the City Council Sports Facilities and City Parks Team supported the application. The partial loss had to be considered in the context of the other significant public benefits of the scheme including heritage benefits and the provision of additional housing including affordable housing. While the proposal was technically contrary to CP16, and 17 (on sports facilities), "it is considered that the proposal does accord with the overall thrust of these policies and this, in addition with the other significant public benefits of the scheme, are such that the scheme would not warrant refusal on these grounds."

39. The objection from Sport England meant that the City Council would have to notify the Secretary of State, if it were minded to approve the application, who would have 21 days to call it in. He did not in fact do so.

40. The OR thought it disappointing that some of the smaller 1 and 2 bed units lacked private external amenity space, although the OR is not clear that that would involve a breach of policy HO5. However, those were not family sized units and "this deficiency will be adequately compensated for by the provision of a large open area of public open space in the form of the retained playing field." That retained area was a significant public benefit of the proposed scheme, and Officers did not consider there to be sufficient grounds for refusal based on a lack of private amenity space.

41. The impact on amenity under policy QD27 of the LP came next. There were no significant adverse effects identified in the detailed analysis. The detailed policies on sustainable transport were considered, and no breaches were identified. No arboriculture objection was raised; the archaeology policy had been complied with. There were no breaches of the policies on ecology, biodiversity, or nature conservation. There would be no significant adverse impact on Special Areas of Conservation or Special Protection Areas. The proposal complied with policies on sustainability. There were no objections on waste management, and no breaches of policy on flood risk, water drainage, air quality or land contamination. Infrastructure contributions and other developer contributions complied with policy.

42. The conclusion begins at [8.172], under the heading "Proposal Public Benefits versus Development Harm Assessment/policy conflict". Determining the acceptability of the principal of development on the playing field was a key consideration. At [8.174-176], the OR said:

> "8.174. Weighing against the proposal is the partial loss of the playing field where there is a conflict in policy terms (including an objection from Sport England) and the heritage harm associated with the re-development of the playing field which would erode the visible separation between the development associated with the historic Rottingdean village and the suburban development to the east.
>
> [8.175 noted that a significant proportion of the playing field would become public open space; its gradient did not provide an ideal surface for turf sports; an off-site contribution would be made; transfer of the playing field to the Parish Council, or a like body, would achieve a more effective use of it; this aspect of the open space had not previously been a reason for refusal.]

> 8.176. It has been further acknowledged above that the loss of part of the playing field would enable a viable policy compliant re-development of the campus site, including the existing vacant Listed Buildings, to be achieved, as confirmed by the DVS. The proposed scheme would secure the re-use and conversion of the principal Grade II listed building, Field House, and associated curtilage listed cottages/Rumneys that are currently vacant and subject to ongoing dereliction and decay, being brought back into use, thereby ensuring their future conservation. The removal and replacement of the modern buildings in conjunction with the conversions and new builds would also overall represent a significant improvement to the campus site in heritage terms. The proposal retains the Chapel and Sports Pavilion. Whilst the proposal fails to secure a future use of these retained buildings, conditions are recommended regarding the repairs to the retained structures in addition to a conservation management plan in order to ensure that they are restored and preserved."

43. There would be no severe impact on the road network; air quality impacts were acceptable. It also had been noted that the public benefits included 93 residential units towards the target of 13,200 new homes over the plan period of which 40%, a policy compliant proportion, would be affordable. The City Council could not demonstrate a five-year housing land supply. It had previously acknowledged that the Framework contained a presumption of sustainable development. The housing would make a valuable contribution to the shortfall, which weighed in favour of the scheme. The overall design approach on both the campus and playing field was appropriate and integrated satisfactorily into its surroundings. Other factors were acceptable, including impacts relating to amenity, standard of accommodation, ecology, archaeology, sustainability and land contamination.

44. In recommending approval, it concluded at [8.180]:

> "overall it is considered that the public benefits of the scheme as a whole are such that they outweigh any harm that would occur due to the partial loss of the playing field and the proposed redevelopment."

45. I have considered, in reaching my judgment, the not inconsiderable and sadly necessary jurisprudence on how to read, and more particularly on how not to read, an Officer's Report.

46. The Committee meeting had been preceded by a site visit. An array of officers attended the meeting to assist. The Principal Planning Officer gave a detailed presentation, with photographs and drawings, including views across the site from various aspects. A representative of local objectors spoke, followed by a number of councillors, and questions of officers. The debate then followed, with the outcome I have already described. But there is nothing which assists expressly in relation to the issues in this case, beyond a reference by one councillor to the fact that the listed buildings would be saved and maintained and, she knew, the Council had to give a considerable amount of weight to the importance of preserving listed buildings so that

had to be taken into account. Ms Lean for the City Council drew my attention to this, but of itself, it is not of real weight.

Ground 1: breach of policies HE3 and HE6 of the LP

47. Those two policies need to be understood in their context as policies in the LP. Relevant LP policies from the 2005 LP were retained on adoption of the Brighton and Hove City Plan in 2016, the CP. HE 1 of the LP deals with listed buildings: proposals for their alteration, extension or change of use would only be permitted where they had no adverse effect on the architectural and historic character or appearance of the building or its setting. There are nearly 3,400 listed buildings in Brighton and Hove, and a wide range of other heritage assets, including those locally listed.

48. HE3 itself deals with development affecting the setting of a listed building:

> "Development will not be permitted where it would have an adverse effect on the setting of a listed building, through factors such as its siting, height, bulk, scale, materials, layout, design or use."

49. The supporting text comments that setting is often an essential part of the character of a listed building, especially where grounds had been laid out to complement its function. Development in the grounds would rarely be appropriate if the remaining grounds appeared "mean or undersized relative to the size and status of the listed building….The visual effect of so-called "enabling development" within the curtilage of a listed building, which is intended to assist in the restoration of a listed building, will be critically examined."

50. There are 34 conservation areas in Brighton and Hove. The supporting text to policy HE6 sets out the duty as found in s72 of the Listed Building Act, without identifying its source. HE6 provides that development proposals within or affecting the setting of a conservation area should preserve or enhance the character or appearance of the area and should show [each of six design criteria being met]. One of those, d, is "the retention and protection of spaces between buildings, and other open areas which contribute to the character or appearance of the area." HE6 ends: "Proposals that are likely to have an adverse impact on the character or appearance of a conservation area will not be permitted."

51. From the CP, I refer to CP15 "Heritage", which states, so far as material:

> "The city's historic environment will be conserved and enhanced in accordance with its identified significance, giving the greatest weight to designated heritage assets and their settings and prioritising positive action for those assets at risk through neglect, decay, vacancy or other threats."

52. Mr Parkinson submitted that the OR in 8.50 and 8.54 had concluded that the development proposed on the playing field would harm the setting of the Conservation Area, and to a lesser extent the setting of the principal listed building, Field House. That is correct.

53. Mr Parkinson then submitted that that meant that policies HE3 and HE6 had been breached. That is not correct. As Ms Lean for the City Council and Mr Katkowski submitted on behalf of the developer, it is important to consider the extent of the setting issues, in respect of the listed buildings and of the Conservation Area as a whole. I take the listed building policy first. It is confined to the setting of the listed building, unlike policy HE6. But it is not confined to any aspect of a change to the setting which is adverse. Mr Parkinson only cites what the OR said about the adverse effect on the setting of the listed building from the new development on the playing field. But the OR said much else about the benefit to the setting of the main listed building from the campus development, and other works on the campus site and works to the curtilage listed buildings.

54. In 8.47, the OR concluded that the development on the campus site would be:

> "entirely appropriate to the urban grain and general character and appearance of the Rottingdean Conservation Area and to the setting of the listed building. This aspect of the proposed development would provide a very significant enhancement to the appearance and character of the Conservation Area over the existing ad-hoc collection of poor quality late 20th century buildings on this part of the site."

55. The comments about the Conservation Area obviously apply as well to the effect on the setting of the listed building within the Conservation Area. The listed building, and its setting, is a vital part of the Conservation Area. It would not be possible for those comments to be made if the same development on the campus site that so benefited the Conservation Area itself were merely neutral to the setting of the listed building. The earlier discussion of the details on the campus site showed that other vacant buildings, the cottages and Rumneys, part of the setting of the listed building, were to be brought back into use, a modern unsympathetic extension would be removed and a courtyard or garden space created. The chapel would be restored. This was all part of the thinking behind the conclusion in 8.47, which covers benefits to the Conservation Area from development on the campus site and necessarily therefore to the setting of Field House. The pavilion, although part of the curtilage and setting of the listed building, was not within the Conservation Area. The OR returned to the point in 8.176:

> "The proposed scheme would secure the re-use and conversion of…associated curtilage listed cottages/Rumneys that are currently vacant and subject to ongoing dereliction and decay, being brought back into use, thereby ensuring their future conservation. The removal and replacement of the modern buildings in conjunction with the conversions and new build would also overall represent a significant improvement to the campus site in Heritage terms. The proposal retains the Chapel and Sports Pavilion."

56. I have omitted the reference to the benefits to the listed building other than to its setting, as they come under a different policy HE1, while HE3 is concerned only with setting. But the text of 8.176 shows that the OR concluded that there was in effect a

significant improvement to the setting of the listed building, through the other improvements to the Conservation Area on the campus site.

57. The harm to the setting of the listed building to which Mr Parkinson refers to arises exclusively from the section of the OR which deals with the effect of development on the playing field, though there would be a benefit to the setting of the main listed building from the restoration of the pavilion. Policy HE3 cannot sensibly be interpreted as requiring a view to be taken on the harm to the setting of a listed building by ignoring benefits to the setting which arise from the same development. That would introduce a lacuna into the policy and LP since no policy would then deal with benefits to the setting of a listed building. On that basis, Mr Parkinson cannot contend that policy HE3 was breached overall, and that therefore the OR significantly misled the Planning Committee. This is not really an issue of policy interpretation, but an issue of understanding the approach adopted to the impact on the setting of the listed building, as a matter of overall planning judgment.

58. Mr Parkinson can say that there is no explicit finding in the OR as to whether policy HE3 was complied with or not, although it is referred to in 8.24. I regard it as sufficiently clear, from reading the careful and thorough OR as a whole, that it would have been understood as it was meant to be understood, that there was no breach of policy HE3 overall, because there was no harm overall. Rather, the significant benefits to the setting of the listed building, from the development on the campus site, clearly outweighed the less than substantial harm from the development on the playing fields. The very language of the report dealing with the benefit to the setting of the listed building from the campus development shows that the benefit was significant, to be set against the harm to its setting from the playing field development, which itself was regarded as less than substantial; see 8.54. (It is not entirely clear where the benefit to the pavilion was placed, reducing the harm from development on the playing field, or as a benefit from a curtilage listed building, but it would be on the positive side.) The OR is scrupulous in identifying those policies which it considers are not complied with, even if the breach is considered technical, or justified having regard to the aims of those particular policies. I note the way in which affordable housing was considered before the proportion was raised to 40%, and the loss of the playing fields. There was no such identification of a breach of HE3, to be outweighed by other benefits.

59. There was an aspect of harm within it which still needed to be weighed in the balance overall. The OR did not treat the harm to the setting of the listed building from development on the playing field as ceasing to have relevance once, as a matter of the overall impact of the development on its setting, the effect overall was concluded not to be harmful. That is very different from a conclusion that policy HE3 was breached.

60. I turn now to HE6. The issue over this policy is not concerned with proposals within a conservation area. Their benefit was clear and not at issue. The issue was with the development outside the Conservation Area, on the playing field, but affecting its setting. As I have said, Mr Parkinson is correct that OR 8.50 and 8.54 identify harm to the setting of the Conservation Area.

61. But he is wrong to say that that demonstrated that HE6 was breached, when the policy is understood as a whole and the OR read as a whole. He is repeating what I regard as an error of the same nature as the error I consider he made over HE3. Taking the first

part of HE6 first, the preservation or enhancement of the Rottingdean Conservation Area, from development within or affecting it: this proposal was both within and affecting the Conservation Area. The part within the Conservation Area enhanced it. That much is clear from the passages in the OR which I have already set out in relation to the setting of the listed building. I emphasise the conclusion that the development on the campus site would provide a very significant enhancement to the character and appearance of the Conservation Area; 8.47. Indeed, the enhancement, unlike the effect on the setting of the listed building, can include the repair and re-use of the principal listed building itself. The conclusion in 8.53 is also in point. The degree of harm is set out in 8.50, but there is some mitigation in 8.51, in the way in which the development would mediate between the Conservation Area and the later suburban development. The harm is not substantial in the phraseology of the Framework. It was not disputed by Mr Parkinson that an overall view of preservation or enhancement was required. On those facts, it is simply not possible to conclude that the first part of HE6 was breached.

62. Indeed, I regard it as obvious that the OR concluded that there was a very significant enhancement to the Conservation Area, from within, which could not rationally have been understood as being outweighed by the insubstantial harm to its setting from outside. It was not a possible conclusion from the OR, understood as a whole, that it meant other than that the first part of HE6 was complied with: viewed as a whole, the character and appearance of the Conservation Area, including its setting, were preserved or enhanced.

63. I turn to the concluding part of HE6, which deals with harm. It is plain, in the light of what I have concluded, that read as a whole, the OR concluded that the proposal overall did not harm the Conservation Area. Taken as a whole, the OR must be read as concluding that HE6 was complied with. I accept that there is no explicit conclusion to that effect. But the points I have made about HE3 apply here as well.

64. The OR also did not mislead the Planning Committee about any aspect of these policies. If there had been an error of interpretation of the policies, it would have been a different error. Not all errors in an OR are properly fitted under the "misleading" hat. Here, the OR informed the Planning Committee of the benefits and harm to the setting of the listed building and Conservation Area. Once it is recognised that the policies incorporate a balance between harm and benefits to the setting of the listed building, HE3, or Conservation Area, HE6, respectively, the issue under those policies is one of planning judgment as to where the balance lay in respect of those considerations, taken separately, I accept. The highest that Mr Parkinson could put his case was that no or no discernible judgment was reached. Whether that is so, is then a matter of inference from the content of the OR read as a whole. I have no real doubt that a judgment was reached or about what that judgment was.

65. I accept Ms Lean's submission that the Committee was likely to be very familiar with the HE policies, in view of the number of listed buildings and conservation areas in the City Council's area, and they would have been familiar with the site through their long dealings with the Brief, the earlier application and their site view here.

66. Mr Parkinson disputed submissions, from Ms Lean and Mr Katkowski, to the effect that the overall conclusions in relation to the setting of the listed building and the

character and appearance of the Conservation Area including its setting, were favourable to the development. He relied on OR 8.54 to say that the OR had undertaken a balancing exercise under the Framework which would only have been required if the OR had indeed concluded that overall harm was found. Paragraph 196 of the Framework states that:

> "196. 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, where appropriate, securing its optimum viable use."

67. He referred to OR 8.54 in the last two sentences. The use of "notwithstanding" is curious, but it plainly means "ignoring" or "putting to one side" the public benefits, other than the need for a viable and deliverable scheme, and the enhancement to the Conservation Area of the campus development. So the public benefits of the housing and affordable housing were not included, in that overall assessment. The harm to the setting of the Conservation Area was weighed against the enhancement to the Conservation Area and the need for a viable scheme to bring them about. The "overall" approach in the OR is not the basis for the conclusion that there would be less than substantial harm.

68. Mr Parkinson's argument has to start from the false premise that the Framework was being applied because the OR concluded that *overall*, under each of the HE3 and 6 policies, there was some but less than substantial harm. Mr Parkinson, in my judgment, confuses two distinct issues: what view was formed about compliance with HE3 and HE6? What does the Framework require with its differently worded policy? I have dealt with the former. I now deal with the latter. Paragraph 196 contemplates the position where there is some but less than substantial harm to a heritage asset, whether listed building or conservation area. It does not look at the overall balance of advantage or disadvantage to the heritage asset at that stage. The weighing exercise then includes the advantage of "securing its optimum viable use" as a factor against which the less than substantial harm has to be weighed. That is a clear reference to the public policy advantage of bringing a listed building or part of a conservation area into a viable long-term use. Such public heritage benefits are clearly among those to be weighed against the less than substantial harm. So the Framework adopts its own approach but emphatically is not dependant on a view that the less than substantial harm is a net overall less than substantial harm. That necessarily means that it had to be approached differently from the way in which the HE policies were approached.

69. That reading of the Framework is the reading adopted in the OR to paragraph 196. It does not turn on any conclusion under the HE policies. The way it is dealt with turns on the application of that reading. The OR, as I have said, continues to recognise the less than substantial harm to the setting of the Conservation Area, and the harm to the setting of the listed building. It did not simply adopt the approach of saying that that harm ceased to be relevant because overall there were setting benefits. As I understand the implication of Mr Parkinson's approach, once the conclusion had been reached that there was no overall harm to the settings of the listed building or Conservation Area, that less than substantial harm should have fallen out of account as a matter of the interpretation of the Framework. That seems likely to yield a rather artificial approach to the balancing exercise.

70. For those reasons, ground 1 is dismissed.

Ground 2: failure to consider ss66 and 72 of the Listed Building Act and paragraph 193 of the Framework.

71. There are particular provisions in the Listed Buildings Act which deal with how development affecting listed buildings and conservation areas is to be considered. S66(1) provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of a special architectural or historic interest which it possesses."

72. S72(1) is in broadly similar language, dealing with conservation areas:

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that conservation area."

73. These provisions have been the subject of considerable judicial analysis, but I need go no further back than *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council and others* [2014] EWCA Civ 137, a case concerning s66 principally. Sullivan LJ with whom Rafferty and Maurice Kay LJs agreed, accepted that the nature of the duty was the same under both enactments, "preserving" in both meant doing no harm, in the light of *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141, Lord Bridge. However, he had continued, at p146E-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."

74. Sullivan LJ, at [23], found Lord Bridge's explanation of the statutory purpose:

> "highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in *Bath*. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight".
>
> 24…[There is no doubt about] the proposition that emerges from the *Bath* and *South Lakeland* cases: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purposes of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise."

75. He added, at [28-29] that even if the harm to heritage assets was less than substantial, the strong presumption against the grant of planning permission would not be entirely removed; it would still be a substantial objection.

76. A more recent decision is *R (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411 concerning development which affected the setting of a listed building. Lewison LJ summarised the position at [5]. "Preserving" the building or setting meant doing no harm to it. The degree of harm was a matter of judgment for the decision-maker, but if there was harm, he was not entitled to give it such weight as he thought fit, but instead had to give it considerable weight. But that weight was not uniform and could vary with the degree of harm to the value of the asset. That was consistent with the policy in the Framework.

77. At [29], Lewison LJ accepted a submission, incidentally in line with my conclusions about HE3 and 6 under ground 1, that:

> "…where proposed development would affect a listed building or its settings in different ways, some positive and some negative, but the decision-maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting."

78. If compliance with a policy necessarily involves the conclusion that there is also no adverse effect on the setting of a listed building, compliance with the policy was likewise compliance with the statutory duty.

79. I refer back to the LP and CP policies set out earlier, which for these purposes include HE1 and CP15.

80. Mr Parkinson contended that the effect of OR 8.54 and 8.174 was that harm to the setting of Field House and of the Conservation Area had been found to arise from the development on the playing field, albeit that it was less than substantial. He submitted that the question was whether the Claimant could show that there was a substantial doubt, which is equivalent to a genuine rather than forensic doubt, as to whether the duties in ss66 and 72 had been considered and applied, and whether paragraph 193 of the Framework had been considered and applied.

81. He pointed out that neither of those sections was referred to or analysed, nor was paragraph 193 of the Framework dealt with. Nothing in the OR suggested that significant importance and weight was being given to the harm he identified. It was merely "regrettable", a strong indication that it had been downplayed. The balancing exercises in OR 8.54, 8.174 and finally 8.180, were all couched in conventional balancing language, and not in the language of a strong presumption against the grant of permission or a need for considerable weight to be given to the harm. That was a strong supportive indicator that the duties had not been fulfilled and paragraph 193 ignored. It was not enough, as was plainly the case, that considerable attention had been paid to heritage issues, which were considered at length in the OR.

82. Ms Lean submitted that, on a fair reading of the OR as a whole, the Planning Committee was made fully aware of the need to give considerable importance and weight to the desirability of preserving the listed building, and its setting, and of preserving and enhancing the character and appearance of the Conservation Area. The identified harm was considered as a matter of degree, and appropriately weighed. The LP policies and CP15 embodied the statutory duties, and compliance with the former amounted to compliance with the latter. It also followed that the policy in the Framework had been applied. There was no need for explicit reference to them. Mr Katkowski's submissions were to the like effect.

83. Before turning to the substance of the submissions, I wish to enter a note of reservation about an approach which all counsel seemed to adopt. They referred to part of a passage in *Palmer* at [7] where Lewison LJ said this:

> "The existence of the statutory duty under section 66(1) does not alter the approach that the court takes to an examination of the reasons for the decision given by the decision-maker: *Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682. It is not for the decision-maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has."

84. The parties appeared agreed that the second sentence was a test to be applied to the question of whether the City Council had complied with its statutory duties, or whether, in adopting the OR, as it is clear the Planning Committee did, it had failed to do so. That is a misreading of the point. It is the Claimant which alleges that the OR did not advise the Planning Committee correctly about what the statutory duties, or the Framework, required. It is for the Claimant to demonstrate that that is so, on the balance of probabilities, and on a fair reading of the OR as a whole, and correctly interpreting the various policies. It is not sufficient for the Claimant to demonstrate that there is a substantial doubt about that, falling short of a probability that that was

so. The first part of what Lewison LJ was saying shows that this is related to the duty to give reasons on an appeal decision, the nature of which had been at issue in relation to these statutory duties in a decision discussed in *Mordue*. It demonstrates that reasons may not satisfy the legal duty to give reasons for a decision, where they leave a substantial doubt as to what the conclusion was on a principal point of controversy, or whether it was itself legally flawed. But he does not say, and I would have been surprised if he had, that the same applied to the demonstration of the sort of legal error alleged here: that the relevant statutory duties were not performed, and that the Framework was misinterpreted or ignored.

85. However, be all that as it may, it is clear that the statutory duties do not need to be referred to for them to be performed. S66 first. The OR plainly gave special regard to the desirability of preserving the listed building, its setting and its features of interest. The achievement of the desirable object of its preservation- building, features and setting- was one of the chief issues at the heart of the decision to grant permission for this development as a whole. Considerable importance and weight was given to that, in favour of granting permission. It is impossible to read the OR in a different sense. I add that it was the strong presumption in favour of the development for that purpose, and for the overall enhancement to the Conservation Area, which led to the acceptance of the need for development on the playing field in order to produce a viable, policy compliant development.

86. Mr Parkinson's argument focuses on but one part of one aspect of s66: the less than substantial harm to the setting of the listed building from the development on the playing field. The section is different in scope from HE3 and brings in HE1, as well. Lewison LJ in *Palmer* at [29] made the point that the section requires an overall view of the effect on the listed building itself, its features and its setting. I do not think that giving considerable weight to the desirability of achieving the statutory duty requires separate views to be reached on each part, and then the beneficial parts to be put to one side where there is some harm, however relatively unimportant. It would be an irrational thought process, not sanctioned by statutory wording, to require significant weight to be given to the benefit, and significant weight to the harm, without the two being brought into a single balance under the statute, and then requiring only significant weight to be given to the harm. It is difficult, however, to avoid concluding that that is what Mr Parkinson's argument amounts to. There was in reality no overall harm to which the strong presumption could apply or to which considerable weight could be given as a matter of statutory duty.

87. That is not to say that the harm becomes irrelevant; it is simply that the statutory duty can be complied with, in line with the jurisprudence, even if there is some harm to a setting, if it is not as significant as the benefit to the building and its setting, as was obviously the case here. Quite the reverse; considerable weight has to be given to the overall benefits.

88. The same points apply to s72. I note in passing however that nothing in the *Bath* case, (*The Bath Society v SSE* [1991] 1WLR 1303 CoA), or *Barnwell Manor* alters the scope of s72 which is concerned with development in a conservation area. The former concerned development within the conservation area, the latter listed buildings. The setting of a listed building is part of the statutory scope of s66. Development outside a conservation area but affecting its setting is not covered by s72, although the harm to the setting of a conservation area would nonetheless be a material consideration. This

is because s72 applies "with respect to any buildings or other land in a conservation area". This, however, is one aspect where the Framework goes further than the legislation: it makes the setting of a conservation area part of what may make it significant. This makes it significant to planning decisions. It appears to make harm to the setting of a conservation area of equivalent importance, in terms of the justification required, to the setting of a listed building; see [194-5]. But it does so as a matter of policy rather than of statutory duty, which does have different legal consequences.

89. Taking s72 on its own terms, it is plain that special attention was paid to the desirability of preserving or enhancing the character and appearance of the Conservation Area. The language confines it to the effect of development within the Conservation Area. Considerable weight was given to it, telling in favour of the development. There was no harm. S72 on its terms was irrelevant.

90. If s72 does look beyond the boundaries of the Conservation Area, the same points about the striking of a balance within s72, between the benefits to the Conservation Area and the harm to its setting, apply as they do to s66. It is perfectly clear from the OR that it was concluded that there was an overall and significant benefit to the Conservation Area, allowing for the harm to its setting from the playing field development.

91. These conclusions in relation to both s66 and s72 are consistent with the conclusions I reached in relation to the application of HE3 and 6, and the other LP and CP heritage policies. These conclusions are clear, notwithstanding the absence of reference to those provisions. It is plain from the OR as a whole that the significance of the listed building, its setting and the Conservation Area, and the effect of the development upon them, was given the necessary considerable weight in the decision. In any event, the OR plainly gave weight to the harm to the setting of the listed building and Conservation Area from the playing field development. It was considered at length, and treated as an important issue, throughout the OR.

92. I did not find persuasive Mr Parkinson's comment that the word "regrettable" showed that the harm from development on the playing field was downplayed. The harm was less than substantial to the setting of the Conservation Area, and lower still to the setting of the listed building. As OR 8.54 showed, it had to be weighed against the enhancement to the Conservation Area, and by necessary implication to the setting of the listed building, and the need for a viable and deliverable scheme, all else apart, to provide the benefits to the listed building and to the Conservation Area. Without that regrettable but less than substantial harm, the greater overall heritage benefits, to which greater significant weight should be given applying the statutory provisions, would not be achieved.

93. I do not accept either, for the same reason, Mr Parkinson's submission that the OR carried out a conventional balancing exercise. The heritage benefits were considered separately, and found to outweigh the effect of the playing field development; this is further explained in OR 8.174 and 176. The harm would not justify refusal in those circumstances.

94. At 8.180, the OR concluded that the totality of the benefits meant that permission should not be refused: there were listed building benefits which on their own sufficed,

there were Conservation Area benefits overall, there was housing development for a Council which had no 5 year housing land supply, and it provided 40%, policy compliant affordable dwellings. This was not a decision which was or, on the OR's analysis, could be described as marginal or finely balanced such that giving greater weight to the harm from the playing field development was remotely likely to lead to a different outcome.

95. I turn to the February 2019 version of the Framework, which I understand for these purposes is not materially different from the 2018 version. Paragraph 192 states that, in determining applications for proposals affecting heritage assets, local planning authorities should take account of whether the desirability of sustaining and enhancing the significance of heritage assets, and putting them to viable use, is consistent with their conservation. Paragraph 193 is the paragraph relied on by Mr Parkinson, but the rest are relevant too. Paragraph 193 states:

> "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less then substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of a) grade II listed buildings… should be exceptional….
>
> 195. Where a proposed development will lead to substantial harm to… a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits than outweigh that harm or loss [unless certain stringent conditions (not relied on here) are all met].
>
> 196. 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, where appropriate, securing its optimum viable use."

96. Sales J, in *R (Lady Hart of Chiltern) v Babergh District Council* [2014] EWHC 3261 (Admin) commented at [14] on the 2012 Framework, which was not materially different for this point, that it created a strong presumption against the grant of planning permission for development which would harm heritage assets, requiring particularly strong countervailing factors to be identified before it can be treated as overridden.

97. The Framework Glossary in Annex 2, defines a heritage asset in broad terms, going somewhat beyond statutorily listed buildings or designated conservation areas. They include a building, site, place, area or landscape identified as having "a degree of significance meriting consideration in planning decisions, because of its heritage interest." It includes locally listed assets, and others designated by authority. The setting is defined as: "The surroundings in which a heritage asset is experienced." This may change; elements of the setting may make a positive or negative contribution to the significance of the asset. The Glossary also defined "Significance (for heritage policy)" as "The value of a heritage asset to this and future generations because of its heritage interest… Significance derives not only from the heritage asset's physical presence, but also from its setting…."

98. In *Mordue v SSCLG* [2015] EWCA Civ 1243, [2016]1WLR 2682, Sales LJ with whom Floyd and Richards LJJ agreed, said at [28] that generally a decision-maker, who worked through the like paragraphs in the 2012 Framework in accordance with their terms, would have complied with the duty in s66, because their approach corresponded with that duty. A similar point was made at [5] in *Palmer* above. It is also clear that "less than substantial harm" is not the same as a "less than substantial objection."

99. Mr Parkinson contends that paragraph 193 was ignored. That is simply an impossible contention. Great weight, under the Framework, had to be given to the conservation and enhancement of the listed building, and its setting; and the preservation and enhancement of the Conservation Area, and its setting. It was; the benefits to each were very significant. They were far more significant than the harm. The fallacy permeating all of his submissions is that the policies are only concerned with harm, and ignored benefits.

100. Accordingly, I dismiss ground 2.

Ground 3: s38(6) of the 2004 Act

101. S38(6) of the 2004 Act provides that where regard is to be had to the development plan in the determination of the application, "the determination must be made in accordance with the plan unless material considerations indicate otherwise." There was no debate but that that provision applied here.

102. Mr Parkinson referred me to *R(Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, in which Richards LJ, with whom the Chancellor and Christopher Clarke LJ agreed, said at [33], that decision-makers must "as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan." That is necessary since without reaching a decision on that issue, they cannot give the development plan its statutory priority; and they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.

103. Compliance with the duty, in s38(6) of the 2004 Act, does not require a view to be expressed about whether a development does or does not comply with every relevant policy in the development plan, contrary to Mr Parkinson's submission. *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (Admin), John Howell QC sitting as a

deputy High Court Judge, at [26] was cited to me in support of Mr Parkinson's proposition. I respectfully disagree with it, if that is how it is to be read; such a duty is not part of the duty in s38(6) expressly or by necessary implication.

104. It is not supported by the authority cited in apparent support, notably *Hampton Bishop PC*, above. What Richards LJ said however focuses on the need to reach a decision, rather than how that decision may be evidenced or expressed; it does not identify any manner in which that decision had to be reached. He was not saying at all that each policy has to be considered in sequence and in isolation, and put on to one side or another as breached or complied with. It may be enough for a relevant group of policies to be taken as a whole. A breach may be regarded as technical, or a policy complied with in its objectives but not its wording. One plan may divide an issue into two separate policies which another may combine into one; HE6 is an example of the latter where development within or affecting the setting of a conservation area, the former for which has a statutory background but not the latter, are combined in the one policy. CP15 is a good example of a single overall relevant policy which covers all the aspects of listed buildings and conservation areas, and more besides. I do not think that *R (Butler) v East Dorset District Council* [2016] EWHC 1527 (Admin) is addressing that issue; it is very much dealing with the specific facts of that case. There is no hard and fast rule about how s38(6) is complied with.

105. Mr Parkinson referred me to *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin), Patterson J. At [27] of her judgment on the s288 appeal, she said:

> "It is axiomatic that the decision-maker does not have to deal with each and every policy that has been raised by the parties during an appeal. That is not the claimant's case. Rather, it is submitted a finding of compliance or conflict with the development plan and the basis for it needs to be made so that the decision-maker can proceed to undertake the planning balance in an informed way. I agree. Such a step is not just form. Rather, it is an essential part of the decision making process, so that not only the decision maker but also the reader of the Decision Letter is aware and can understand that the duty imposed under section 38(6) has been discharged properly by the decision maker."

106. Mr Parkinson contended that s38(6) had not been applied, and no decision had been reached as to whether the proposal did or did not accord with the development plan. There was no express finding on that point. Indeed, he went further: the development plan had been disregarded, and had not been referred to in substance or form. Policies had been referred to; some were complied with and some were breached; but no overall view was expressed. A distinction between factors relevant to the development plan and other material considerations was not observed; the contribution to a five-year housing land supply was a material consideration but one which did not derive from the development plan. A straightforward benefit versus harm balancing exercise had been carried out, with no recognition that some considerations should have priority attached to them according to what the development plan said about them. That was not the exercise required by s38(6).

107. He submitted in the alternative that the reasons were inadequate, without identifying the nature of the legal obligation he relied on to provide reasons to whatever standard he contended for.

108. Ms Lean submitted that the OR, read as a whole, reached the conclusion that the proposal accorded overall with the development plan, although not with every policy. Section 8 of the OR appraised each of the principal issues in the case, the relevant policies were applied, and breaches identified where there were breaches. Mr Katkowski made like submissions.

109. I start my conclusion by pointing out that s38(6) requires a decision on whether the proposal accords with the development plan or not, and if not, permission is to be refused unless material considerations indicate otherwise. Those material considerations are different from those covered by the development plan policies. A local authority can show that it has reached the relevant decision without expressly referring to the statutory duty; whether it has reached the relevant decision then becomes a matter of inference, usually from the OR, although a Planning Committees can usually be taken to be aware of that duty. It would avoid a certain amount of litigation if planning officers did indeed couch their reports within the statutory framework, just as it would if those dealing with listed buildings or conservation areas identified the duty in ss66 or 72, and expressed their views within that statutory framework. However, although it provides an opening for submissions such as Mr Parkinson's here, the opening may yet be barred by how the OR is actually reasoned.

110. I am satisfied that on a fair reading of the OR, and with the policies in mind, that the OR did reach the decision or judgment that the proposal was in accordance with the development plan as a whole. Its text conveys that adequately, so that those who adopted the recommendation would also have understood that that was the decision which they were adopting, on whether the proposal accorded with the development plan. First, I am satisfied that the HE policies were properly interpreted as a whole; the submission that the proposal was in breach of them is wrong. HE1 was a crucial policy which wholly favoured the proposal. I accept that HE3 and HE6 are important policies, judged by the OR to have been complied with; HE4 was also complied with and CP15. So, the heritage policies as a group were met. There was no breach of the housing policies, and the development was supportive of them. The affordable housing component was policy compliant. An array of issues was covered in section 8 of the OR in which the plan policies were complied with, including traffic, air quality and nature conservation.

111. The proposal was also seen to comply with SS1 on sustainable development. Policy SS1 is relevant to the argument about s38(6) of the 2004 Act. The Council would take a positive approach reflecting the Framework presumption in favour of sustainable development. It would work with applicants to find solutions to enable proposals to be approved wherever possible and to secure development that improved conditions in the area. Next, it stated that applications that accorded with the policies in the CP would be approved without delay, unless material considerations indicate otherwise. The rest of the text reflected related requirements of the Framework.

112. I repeat what I observed in relation to ground 1: the OR identified where there were breaches of policy. The first identified breach of policy related to the loss of the school, under HO20. (I shall assume that compliance with one of the permitted

exceptions would not avoid a breach.) At OR 8.14-8.16, the proposal was accepted as an exception, because the school had already closed, and there were reasonable proposals for the retention and maintenance of the Chapel and Pavilion as community buildings, as a significant public benefit which would satisfactorily offset the loss of the existing community facility, the private school, and which would justify an exception to HO20.

113. A further breach was identified, in relation to the loss of part of the playing field as open space and as a sports facility, contrary to CP16 and 17. The criteria for accepting their loss were technically not met; 8.73. But the proposal accorded with the overall thrust of those policies in view of the limited previous public use, the future assured public use, and the contributions to other sports facilities; 8.175.

114. It is difficult to discern any other policy which the OR concluded was breached. Having regard to the limited nature of those breaches which were identified, and if I am right that HE3 and 6 were not breached on their true interpretation, as applied to the judgements made in the OR, it is impossible to see how any conclusion could have been reached that the application did not accord generally with the development plan.

115. Ground 3 is dismissed.

Overall conclusion

116. This application for judicial review is dismissed.