Neutral Citation Number: [2019] EWHC 3406 (Admin)

Case No: CO/834/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN on the application of	**Claimant**
FELICITY IRVING	
- and -	
MID SUSSEX DISTRICT COUNCIL	**Defendant**
MID SUSSEX DISTRICT COUNCIL	**Interested Party**

- -
- -

Andrew Sharland QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Paul Brown QC and James Neill (instructed by **Sharpe Pritchard LLP**) for the **Defendant** and **Interested Party**

Hearing date: 19 November 2019

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the decision of the Defendant ("the Council") to grant planning permission to itself, on 18 January 2019, for the erection of a large dwelling house, with an integral garage, on an open greenfield area which it owns at Courtmead Road, Cuckfield, Sussex ("the Site").

2. The Claimant lives in a neighbouring house. For many years, she has objected to the grant of planning permission, on the grounds that the local community wish to continue to use the Site for recreational purposes, which they have done since about 1938. In about 2013, the Council has locked the Site, to prevent local residents from gaining access.

3. Permission was initially refused on the papers, but granted at an oral renewal hearing by Tim Mould QC, sitting as a Deputy Judge of the High Court, on three grounds only.

4. The Claimant contends that the Council's grant of planning permission to itself was unlawful for the following reasons:

   i) Contrary to section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990"), the Council failed to take into account Policy DP12 and Policy DP15 which were relevant development plan policies, as the Site is situated in the countryside for planning purposes. The officer's report was materially misleading as it purported to identify the relevant policies but excluded Policies DP12 and DP15.

   ii) The Council adopted an inconsistent and unlawful approach to the assessment of the "public benefit" of a single dwelling house;

   iii) The Council's conclusion that the very limited public benefit from one house outweighed the substantial weight to be accorded to the harm to the Conservation Area was irrational.

Facts

5. The Site is an open grassed area, on a slope, bounded by hedgerows and post and rail fencing, which is approximately 0.3 ha (0.77 acres) in size.

6. It lies at the western end of Courtmead Road, on the southern edge of the village of Cuckfield. A footpath, which is a public right of way, runs along the north boundary of the site leading to Holy Trinity Church (Grade 1 listed) and the centre of the village, which is located some 110 metres to the west of the Site. Between the Church and the Site, there are allotment gardens, an orchard and the Church graveyard.

7. There is a detached house, set in grounds, to the east of the Site (which belongs to the Claimant), and which is typical of the other large detached houses in Courtmead Road, mainly developed in the 1930s.

8. There is open land to the south of the Site, and from the Site and the public footpath, there are fine views across open countryside, towards the South Downs.

9. The Site was transferred to Cuckfield Urban District Council in 1938, and according to the Claimant, local residents in their 80's and 90's recall that in their youth it was used for maypole dancing, picnics, and other Church-led activities. The Site is known locally as the "Play Meadow" and for decades it has been used as a play area for children, dog walking, and community activities. The Church used it for the outdoor activities of its youth group and Sunday School. The Next Step Nursery School and the local Brownies pack also made regular use of it. In 2013, it was locked by the Council to prevent public access, which has resulted in complaints from the local community.

Earlier grants of planning permission

10. The Council has attempted to develop the Site in the past, but previous grants of planning permission have been found to be unlawful.

11. On 18 December 2013, the Council granted itself outline planning permission for a large detached house and double garage on the Site. By virtue of Regulation 9 of the Town and Country Planning General Regulations 1992, this permission did not run with the land.

12. In September 2014, SDP, a developer applied for planning permission for a large detached house on the Site. In December 2014, the Council granted SDP planning permission. This grant was challenged by the Claimant, and permission to apply for judicial review was granted. On 23 April 2015, the Council accepted that the permission had been granted in error and agreed to the quashing of the permission.

13. A further (identical) application was made by SDP in March 2015. The Council granted planning permission on 1 May 2015. This decision was also challenged by the Claimant, and it was quashed by the High Court on 28 June 2016 (*R (Irving) v Mid-Sussex District Council* [2016] EWHC 1529 (Admin)). The Council did not appeal.

14. Gilbart J. quashed the grant of planning permission on two grounds. He concluded that the Council had adopted an unlawful approach to the assessment of harm to the Conservation Area. In particular, he found that the statement in the officer's report that "...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" was incorrect as a matter of law (at [57]-[58]). Gilbart J. further concluded that the development was contrary to, inter alia, Local Plan Policy B12 and National Planning Policy Framework ("the Framework") (2012) paragraphs 132 to 134.

15. At paragraph 63 of his judgment, Gilbart J. stated:

> "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 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."

16. At the time of both the 2014 and 2015 applications and decisions, the Council could not demonstrate a 5 year housing land supply and so a "tilted balance" was applied under paragraph 14 of the Framework, in favour of development. That position has since changed as the Council can demonstrate a 5 year housing land supply.

17. In December 2016, the Claimant brought a challenge to, *inter alia*, the 2013 planning permission. She also challenged the Council's failure to consider whether to quash the 2013 planning permission in light of Gilbart J.'s judgment. In June 2017, the High Court dismissed the claim on the grounds of delay. However, Cranston J. did not doubt the correctness of Gilbart J.'s substantive findings.

The current grant of planning permission

18. On 13 July 2018, the Council applied to itself for planning permission to construct a large house with an integral garage at the Site. Unlike the Council's 2013 application, the benefit of the permission was not limited to the Council. The Claimant, the Parish Council and many other local residents objected to the application.

19. The application was considered by the Council's Planning Committee on 17 January 2019. The Officer's Report ("OR") recommended the grant of planning permission. The summary stated:

> "In summary, this is a case where it is considered that the proposal complies with some policies within the development plan but conflicts with others. It is considered the proposal complies with policies DP6, DP21, DP26, DP34 and DP38 of the DP whereas there is a conflict with policy DP35 of the DP. It is considered the proposal complies with parts d), e), f) and g) of policy CNP1. Given your officers view that there would be less than substantial harm to the conservation area it is considered there would be some conflict with parts a) and b) of policy CNP1 in the CNP. It is also considered there would be some conflict with parts a), b), c) and d) of policy CNP5 in the CNP.
>
> It is your Planning Officer's view that there is less than substantial harm caused to the setting of the conservation area from the proposal (within the scale of "less than substantial harm" it is considered that the harm is at the lower end of the scale) and that given the statutory presumption in favour of preservation, this harm must be given significant importance and weight.
>
> Overall given the degree of compliance with the policies in the development plan that have been identified it is your officer's view that the proposed dwelling is an acceptable development on the site. The public benefits of providing a well-designed dwelling on the site are felt to outweigh the less than substantial harm to the CCA (which has been afforded significant importance and weight) that has been identified in this report.

> To conclude it is your Officer's view that whilst there is conflict with some policies in the development plan as set out above, overall the planning application complies with the development plan when read as a whole. The scheme is for a dwelling in a sustainable location that accords with policy DP6 of the DP, which is the policy that sets out the settlement hierarchy for the District. As such the principle of the dwelling is supported by DP6. There are not considered to be any other material considerations that would indicate that the application should be refused.
>
> In light of all the above it is recommended that the application is approved."

20. The Planning Committee unanimously decided to grant the application for planning permission, subject to various conditions, and planning permission was granted on 18 January 2019.

Statutory and policy framework

21. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

22. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters……
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is helpful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission….. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell J observed in *Loup v Secretary of State for the Environment* (1995) 71 P & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and

> determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

23. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, per Lord Reed at [17].

Planning officers' reports

24. The principles to be applied when reviewing an officer's report were summarised by the Court of Appeal in *R (Mansell) v Tonbridge & Malling BC* [2019] PTSR 1452, per Lindblom LJ, at [42]:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the

> error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
>
> (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

25. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in the report in order to avoid burdening a busy committee with excessive and unnecessary detail: *R v Mendip DC ex parte Fabre (2000) 80 P & CR 500*, per Sullivan J. at 509.

26. In *R (Maxwell) v Wiltshire Council* [2011] EWHC 1840 (Admin), Sales J. (as he then was) stated, at [43]:

> "The Court should focus on the substance of a report of officers given in the present sort of context, to see whether it has sufficiently drawn councillors' attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials."

Conservation areas

27. Section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:

> "(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."

28. The correct approach to applications for planning permission in a conservation area was set out in *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137 [2015] 1 WLR 45, per Sullivan LJ at [19]-[21]:

> "19 When summarising his conclusions in Bath 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 (p. 1318 F-H). Glidewell LJ continued:
>
> > "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 South Lakeland 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 at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:
>
> > "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 Heatherington, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of *(PCPA 2004)* However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the *Bath* case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383)."

The Framework

29. The Framework is a material consideration to be taken into account when applying section 38(6) PCPA 2004 in planning decision-making, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, per Lord Carnwath at [21].

30. Paragraph 12 of the Framework provides:

> "12. The presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making. Where a planning application conflicts with an up-to-date development plan (including any neighbourhood plans that form part of the development plan), permission should not usually be granted. Local planning authorities may take decisions that depart from an up-to-date development plan, but only if material considerations in a particular case indicate that the plan should not be followed."

31. Chapter 16 is entitled "Conserving and enhancing the historic environment". Paragraph 192 provides:

> "In determining applications, local planning authorities should take account of:
>
> a) the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;

> b) the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
>
> c) the desirability of new development making a positive contribution to local character and distinctiveness."

32. Paragraphs 193 to 202 give guidance on "Considering potential impacts" on a conservation area, as follows:

> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 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….
>
> ….
>
> 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.
>
> ….
>
> 200. Local planning authorities should look for opportunities for new development within Conservation Areas and World Heritage Sites, and within the setting of heritage assets, to enhance or better reveal their significance. Proposals that preserve those elements of the setting that make a positive contribution to the asset (or which better reveal its significance) should be treated favourably."

33. The term "designated heritage asset", as defined in Annex 2, includes conservations areas.

Planning policies

34. The Development Plan comprises the Mid Sussex District Plan 2014-2013 (adopted March 2018) and the Cuckfield Neighbourhood Plan (2011-2031) (adopted May 2014).

35. The Site lies outside the built-up area boundary of Cuckfield, the boundary of which abuts the northern and eastern boundaries of the Site. The northern half of the Site,

including the location of the proposed dwelling-house, lies within the Cuckfield Conservation Area which is considered to be of high heritage value.

36. Policy DP6 in the District Plan is headed "Settlement Hierarchy". The explanatory text explains that Mid-Sussex has a settlement hierarchy of five categories of settlement, evidenced in the Settlement Sustainability Review. There are three main towns and a large number and wide variety of villages. Cuckfield is a 'Category 2' settlement which is identified as:

> "Larger villages acting as Local Service Centres providing key services in the rural area of mid Sussex. These settlements serve the wider hinterland and benefit from a good range of services and facilities, including employment opportunities and access to public transport."

37. The Policy provides:

> "Development will be permitted within towns and villages with defined built-up area boundaries. Any infilling and redevelopment will be required to demonstrate that it is of an appropriate nature and scale (with particular regard to DP26: Character and Design), and not cause harm to the character and function of the settlement.
>
> The growth of settlements will be supported where this meets identified local housing, employment and community needs. Outside defined built-up area boundaries, the expansion of settlements will be supported where:
>
> 1. The site is allocated in the District Plan, a Neighbourhood Plan or subsequent Development Plan Document or where the proposed development is for fewer than 10 dwellings; and
>
> 2. The site is contiguous with an existing built up area of the settlement; and
>
> 3. The development is demonstrated to be sustainable, including by reference to the settlement hierarchy.
>
> The developer will need to satisfy the Council that:
>
> • The proposal does not represent an underdevelopment of the site with regard to Policy DP26: Character and Design; or
>
> • A large site is not brought forward in phases that individually meet the threshold but cumulatively does not."

38. Policy DP12 of the District Plan is headed "Protection and Enhancement of Countryside". Its strategic objectives include the protection of "valued landscapes for their visual, historical and biodiversity qualities". It provides:

> "The countryside will be protected in recognition of its intrinsic character and beauty. Development will be permitted in the countryside, defined as the area outside of built-up area boundaries on the Policies Map, provided it maintains or where possible enhances the quality of the rural and landscape character of the District, and:
>
> • it is necessary for the purposes of agriculture; or
>
> • it is supported by a specific policy reference either elsewhere in the Plan, a Development Plan Document or relevant Neighbourhood Plan.
>
> Agricultural land of Grade 3a and above will be protected from non-agricultural development proposals. Where significant development of agricultural land is demonstrated to be necessary, detailed field surveys should be undertaken and proposals should seek to use areas of poorer quality land in preference to that of higher quality.
>
> The Mid Sussex Landscape Character Assessment, the West Sussex County Council Strategy for the West Sussex Landscape, the Capacity of Mid Sussex District to Accommodate Development Study and other available landscape evidence (including that gathered to support Neighbourhood Plans) will be used to assess the impact of development proposals on the quality of rural and landscape character.
>
> …"

39. Policy DP15 in the District Plan is headed "New Homes in the Countryside". Its strategic objectives are to protect valued landscapes for their visual, historical and biodiversity qualities and to provide the amount and type of housing that meets the needs of all sectors of the community. It provides:

> "Provided that they would not be in conflict with Policy DP12: Protection and Enhancement of the Countryside, new homes in the countryside will be permitted where special justification exists. Special justification is defined as:
>
> • Where accommodation is essential to enable agricultural, forestry and certain other full time rural workers to live at, or in the immediate vicinity of, their place of work; or
>
> • In the case of new isolated homes in the countryside, where the design of the dwelling is of exceptional quality and it enhances its immediate setting and is sensitive to the character of the area; or
>
> • Affordable housing in accordance with Policy DP32: Rural Exception Sites; or

> • The proposed development meets the requirements of Policy DP6: Settlement Hierarchy.
>
> …."

40. Policy DP35 in the District Plan is headed "Conservation Areas". It provides:

> "Development in a conservation area will be required to conserve or enhance its special character appearance and the range of activities which contribute to it. This will be achieved by ensuring that:
>
> - New buildings and extensions are sensitively designed to reflect the special characteristics of the area in terms of their scale, density, design and through the use of complementary materials;
> - Open spaces, gardens, landscaping and boundary features that contribute to the special character of the area are protected. Any new landscaping or boundary features are designed to reflect that character;
>
> …..
>
> - Existing buildings that contribute to the character of the conservation area are protected. Where demolition is permitted, the replacement buildings are of a design that reflects the special characteristics of the area;
>
> …..
>
> - Development will also protect the setting of the conservation area and in particular views into and out of the area."

41. The Cuckfield Neighbourhood Plan includes maps of the boundary of the built up area, and the conservation areas. The explanatory text explains that the "Neighbourhood Plan allows only limited development within the countryside", and gives examples. It "attaches great importance to preserving and enhancing the character and appearance of the two Conservation Areas and their setting; …and the surrounding landscape".

42. Policy CNP1 of the Cuckfield Neighbourhood Plan is entitled "Design of New Development and Conservation" and provides:

> "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, spacing, 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 and
>
> c) Follows guidance in the Conservation Area Appraisals and Management Plans, the High Weald AONB Management Plan, and
>
> d) Respects the natural contours of a site and protects and sensitively incorporates natural features such as trees, hedges and ponds within the site, and
>
> e) Creates safe, accessible and well-connected environments that meet the needs of users, and
>
> f) Will not result in unacceptable levels of light, noise, air or water pollution, and
>
> g) Makes best use of the site to accommodate development."

43. Policy CNP5 of the Cuckfield Neighbourhood Plan is headed "Protect and Enhance the Countryside" and provides:

> "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 CNP 6 (a) and (b) or would be in accordance with Policies CNP 10, CNP 14 and CNP 17 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."

44. As part of the preparation of the Cuckfield Neighbourhood Plan, a Landscape Character Assessment was prepared which "classifies the countryside around the village…into distinctive landscape character areas". The characteristics of the various areas were assessed in accordance with the Countryside Agency's Landscape Character Assessment Guidance. The assessment included designations and policy (listed buildings and conservation area); historic landscape characterisation, and a landscape analysis. This Site falls within Area 26 known as "Newbury Lane". The capacity for development in Area 26 was summarised as follows:

> "Small parcels of land with cultural and recreational value. Includes part of Conservation Area and has extensive views of the South Downs from parts of the character area.
>
> **SUBSTANTIAL value**
>
> **SUBSTANTIAL sensitivity**
>
> **NEGLIBLE/LOW capacity**."

<u>Ground 1: Failure to take into account relevant development plan policies</u>

45. The Claimant submitted that, contrary to its duty under section 70(2) TCPA 1990, the Council failed to take into account Policy DP12 and Policy DP15 which were relevant development plan policies, as the Site is situated in the countryside for planning purposes. The OR was materially misleading as it purported to identify the relevant policies but excluded Policies DP12 and DP15.

46. The Council's response was that neither the Planning Committee nor the officer were required to consider Policies DP12 and DP15 because:

    i) DP12 is a general policy concerning the countryside, whereas DP6 is the policy which specifically applies to development contiguous to defined built up areas;

    ii) Policy CNP5 criteria (b) and (c) address the real issue posed by Policy DP12, namely, whether or not the proposal maintains or enhances the rural and landscape character of the District, and the OR concluded that there was no conflict with criteria (b) and (c);

    iii) It followed that there was no conflict with DP12;

    iv) In those circumstances, the OR dealt with the substance of the matters in Policies DP12 and DP15, and was not required to refer to them.

47. In my judgment, Policies DP12 and DP15 both applied to this Site and were directly relevant to the question of whether or not the application to build a new house at the Site should be granted. The site falls within the definition of "countryside" as set out in Policy DP12; it is in "the area outside of built-up area boundaries on the Policies Map".

48. In such circumstances, the Council was required, under section 70(2) TCPA 1990, to consider whether the proposed development conflicted with Policy DP6 (which concerns settlement hierarchy), Policy DP12 (protection and enhancement of countryside) and Policy DP15 (new homes in the countryside). These three District Plan policies are interrelated and must be considered together where, as here, the proposed development is a house in the countryside. This is clear from the text of Policy DP15 which provides, *inter alia*, that development (i.e. a new home in the countryside) will be permitted where such a development does not conflict with Policy DP12 and, *inter alia*, there is special justification (in this case, the proposed development meets the requirements of Policy DP6 (settlement hierarchy)). DP12 also refers to support for development by specific policy references elsewhere in the District Plan, which includes Policy DP6.

49. Policies DP12 and DP15 were adopted as recently as March 2018, so it cannot be suggested that they have been superseded by Policy DP6, and Policy CNP5. Policy DP6's strategic objective is to give effect to the settlement hierarchy. Amongst other matters, it sets criteria for development outside defined built up areas, which are met in this instance as the proposed development is for fewer than 10 dwellings and the Site is contiguous with an existing built up area. However, the District Plan provides additional criteria which need to be met, in Policies DP12 and DP15. These policies have a different strategic objective to Policy DP6, namely, the protection of the countryside, particularly relevant in a rural district such as Mid Sussex. One can readily see why a permissive settlement policy in respect of small developments of under 10 houses also requires the additional layer of policy protection for the quality of rural and landscape character, which even small developments could harm, depending upon their location.

50. Policy DP12 provides that "The countryside will be protected in recognition of its intrinsic character and beauty". Under the policy, development will be permitted in the countryside, defined as the area outside of built up area boundaries on the Policies Map, provided "it maintains or where possible enhances the quality of the rural and landscape character of the District". The Policy then goes on to specify the evidence which will be used "to assess the impact of development proposals on the quality of rural and landscape character" together with other available landscape evidence, including evidence gathered to support Neighbourhood Plans. In considering this application, the Council should have considered whether this proposed development would "maintain or enhance the quality of the rural and landscape character of the District" by reference to the evidence listed. If this criterion was met, the Council then had to go on to consider whether it was necessary for the purposes of agriculture or supported by a specific policy reference elsewhere. In this instance, the proposed development was supported by a specific policy reference in Policy DP6.

51. Under Policy DP15, new homes in the countryside will only be permitted if (1) they are not in conflict with DP12; and (2) there is special justification. The first limb imports into Policy DP15 the criterion in DP12 that the proposed development "maintains or where possible enhances the quality of the rural and landscape character of the District", assessed in accordance with the evidence specified in the policy. Under the second limb, alternative justifications are listed, one of which is that the proposed development meets the requirements of Policy DP6.

52. As the Claimant rightly recognised, there is a considerable overlap between Policy CNP5 and Policy DP12, in that both share the objective of protecting and enhancing the countryside. However, the terms of the policies are not identical. For example, the criterion in Policy CNP5 paragraph (b) that the proposed development would not have "a detrimental impact on, and would enhance" the area only applies to those areas which have been identified in the Cuckfield Landscape Character Assessment as having major or substantial landscape value or sensitivity, as is the case with this Site. There is no such restriction in Policy DP12.

53. It is of particular importance to this application that Policy DP12 requires the decision-maker to consider whether the proposed development "maintains or where possible enhances the quality of" the <u>rural</u> character of the District, as well as its landscape character. The Site is a green field area of open space which the Claimant contends contributes to the rural character of the Conservation Area, and the built up area which is adjacent to it. In contrast, Policy CNP5 only requires consideration of landscape (together with views, which are a sub-set of landscape). Furthermore, Policy DP12 requires consideration of a wide range of assessments, whereas CNP5 only refers to the Cuckfield Landscape Character Assessment prepared for the Neighbourhood Plan. The Mid Sussex Landscape Character Assessment, the West Sussex County Council Strategy for the West Sussex Landscape, and the Capacity of Mid Sussex District to Accommodate Development Study are different in range and scope to the Cuckfield Assessment. In that regard, it is relevant to note that the Capacity Development Study assesses the "Contribution to the rurality of surrounding landscape" as a distinct factor, unlike the Cuckfield Assessment.

54. As Members of the Planning Committee granted planning permission in accordance with the recommendation in the OR, and without giving any separate reasons, it can be assumed that they did so on the basis of the advice given by the planning officer in the OR.

55. The OR set out a list of relevant policies for Members to consider when determining the application:

> "**LIST OF POLICIES**
>
> **Mid Sussex District Plan (DP)**
>
> The District Plan was adopted at Full Council on 28th March 2018
>
> <u>Relevant policies</u> *(emphasis added)*:
>
> DP6 Settlement Hierarchy
>
> DP21 Transport
>
> DP24 Leisure and Cultural Facilities and Activities
>
> DP26 Character and Design
>
> DP34 Listed Building and Other Heritage Assets

> DP35 Conservation Areas
>
> DO38 Biodiversity
>
> **Cuckfield Neighbourhood Plan (CNP)**
>
> The CNP was formally made on 1 October 2014. As such the CNP is now a part of the adopted development plan …..The following policies are relevant to the determination of this application. *(emphasis added)*
>
> CNP1 – Design of New Development and Conservation
>
> CNP5 – Protect and Enhance the Countryside."

56. On a fair reading of this part of the OR, Members were being advised that the relevant policies were those listed, and by clear inference, policies which were not listed were not relevant. The list appeared detailed and comprehensive, and I do not consider that any Member would have thought it necessary to look beyond it. In my view, it was seriously misleading in that it purported to be listing all the relevant policies and yet did not include Policies DP12 and DP15, concerning development in the countryside.

57. Under the heading "Principles of Development", the OR referred to the statutory requirement to determine a planning application in accordance with the Development Plan, unless material considerations indicate otherwise. Under this heading, the OR then only referred to Policies DP6 and CNP5, which was seriously misleading, as Policies DP12 and DP15 were also relevant to the "Principles of Development" at this Site.

58. In the section headed "Conclusions and Planning Balance", the OR gave the following advice to Members:

> "In summary, this is a case where it is considered that the proposal complies with some policies within the development plan but conflicts with others. It is considered the proposal complies with policies DP6, DP21, DP26, DP34 and DP38 of the DP whereas there is a conflict with policy DP35 of the DP. It is considered the proposal complies with parts d), e), f) and g) of policy CNP1. Given your officer's view that there would be less than substantial harm to the conservation area it is considered that there would be some conflict with parts a) and b) of policy CNP1 in the CNP. It is also considered that there would be some conflict with paras a), b), c), and d) of policy CNP5 in the CNP."

59. The OR then concluded "whilst there is some conflict with some policies in the development plan as set out above, overall the planning application complies with the development plan when read as a whole".

60. In my judgment, the failure to consider whether there was compliance with Policies DP12 and DP15, and then to advise Members that the application complied with the development plan "when read as a whole" was seriously misleading.

61. I am unable to accept the Defendant's submission that the omission of Policies DP12 and DP15 did not mislead, and did not affect the outcome, because the OR addressed the substance of those policies under Policies DP6 and CNP5. As I have described above, Policies DP12 and DP15 would have required Members to consider the strategic objective of protecting the countryside by addressing the question whether the proposed development would maintain or where possible enhance the quality of the rural and the landscape character of the District, by reference to the evidence referred to in Policy DP12. These matters did not arise for consideration under Policies DP6 and CNP5.

62. In light of the findings in the OR on landscape and views, if the OR and the Members had considered and applied Policies DP12 and DP15, it is likely that they would have concluded that the proposed new house, which would occupy most of the open Site and block the fine views of the countryside from the footpath, would not maintain or enhance the quality of the rural and landscape character of the District.

63. At page 217, the OR found that the proposal would result in harm (less than substantial) to the character and appearance of the Conservation Area since:

> "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."

64. At p.218, the OR found:

> "In terms of wider landscape impact, there would be a conflict with part d) of policy CNP5 in the CNP because by definition, the existing view across the site would not be maintained as the site would change from being undeveloped to having a new dwelling on it."

65. At p.229, the OR concluded:

> "As the proposal would impact on some views looking towards the village and looking out from the village it is considered that there would be some conflict with criteria b), c) and d) of Policy CNP5. The reason for this conclusion will be set out later in this report."

66. At p.233, the OR said:

> "The proposed development would lead to the loss of panoramic views to the south. Construction of a two storey dwelling would 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 officers report on the 2015 application stated *"....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.*
>
> It is considered that there are no reasons to depart from this assessment. Map 12 in the CNP shows the landscape character assessment areas around the village. To the south of the site the land is classified as having Moderate value and Substantial Sensitivity. The site itself is shown as having Substantial value and Substantial Sensitivity. The aim of policy CNP5 (d is to maintain landscape views of importance and sensitivity."

67. At page 234, the OR considered the impact of the proposal on the landscape, applying Policy CNP5 paragraphs b), c) and d). It set out the findings of the Landscape Assessment Summary, namely, that Area 26, in which the Site is situated, is of "substantial value" and "substantial sensitivity". It identified the conflict with paragraph d) because of the loss of the current view. It noted the dimensions of the Site, and concluded that "given the modest nature of the development in relation to the scale of Cuckfield village, it is considered that the adverse impact on the landscape setting of Cuckfield is minimal". The Defendant relied upon the fact that the OR did not refer in terms to a conflict with paragraphs b) and c). However, on my reading of this passage, together with the rest of the report, the OR did find that there was an adverse impact on the landscape, in conflict with paragraphs b) and c), albeit a minimal one.

68. The findings on landscape setting and the wider landscape were set out more clearly at page 247 where the OR stated:

> "In terms of the wider landscape impact, there would be a conflict with part d) of policy CNP5 in the CNP because by definition, the existing view across the site would not be maintained as the site would change from being undeveloped to having a new dwelling on it. However given the limited nature of the development it is felt that any adverse impact on the landscape setting of Cuckfield village would be very limited. It is also felt that whilst the site lies within an area defined in the CNP Landscape Character Assessment Summary as having Substantial value, Substantial sensitivity, given the limited scale

> of the development it is considered that the impact on the wider landscape is minimal."

69. Then, in the OR's conclusions, at page 248, it was clearly stated:

> "It is also considered that there would be some conflict with paras a), b), c), and d) of policy CNP5 in the CNP."

70. The same factors which led the OR to conclude that there was conflict with Policy CNP5 would also, in my view, have been likely to result in a finding of conflict with Policies DP12 and DP15. As the criterion in Policy DP12 imposes a higher standard to meet than the Policy CNP5 criteria, and also includes the issue of rurality, the extent of the conflict may well have been greater. Assuming that the OR and the Members concluded that there was conflict with Policies DP12 and DP15, in addition to the conflict which had already been identified with Policy DP35, paragraphs a) and b) of Policy CNP1; and paragraphs a), b), c) and d) of Policy CNP5, this could have altered the planning balance and the OR's conclusion that the application complied with the development plan "read as a whole".

71. Therefore, I conclude that, absent the legal errors, the outcome could have been different, and so ground 1 succeeds and the grant of planning permission has to be quashed.

Ground 2: inconsistent and unlawful approach to the extent of the "public benefit" arising from the construction of a single dwelling-house

72. The Claimant submitted that the Council assessed the extent of the public benefit arising from the construction of the house on this Site inconsistently with its assessment in other comparable applications for planning permission applications to construct a single dwelling house, without any adequate explanation or justification.

73. The Defendant submitted that there was no inconsistency in approach. In this application, the benefit was assessed as a small but useful contribution to the supply of housing. In the other applications relied upon by the Claimant, the benefit was assessed as minor but positive, which is essentially the same assessment expressed in different words. Moreover, the adverse impact of the dwelling proposed at Birch House was significant, unlike the proposed dwelling in this application.

74. Mr Brown QC referred to the following authorities: *North Wiltshire District Council v Secretary of State for the Environment* [1993] 65 P & CR 137, per Mann LJ, at p.145; *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, per Lindblom LJ, at [20] – [58]; *Banks v. Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin), per Ouseley J., at [112] – [114]; *Davison v Elmbridge District Council* [2019] EWHC 1409 (Admin), per Thornton J., at [32].

75. It is now well-established that a local planning authority ought to have regard to its previous similar decisions as material considerations, in the interests of consistency. It may depart from them, if there are rational reasons for doing so, and those reasons should be briefly explained. A local planning authority should take reasonable steps to

acquaint itself with its previous similar decisions, even if they are not brought to its attention by applicants or objectors.

76. In August 2018, the Council refused planning permission for a new single dwelling house in Courtmead Road (Birch House DM/18/2301). The planning officer (Mr A. Watt) stated in the officer's report:

> "On the positive side, the provision of 1 new dwelling on the site will make a minor but positive contribution to the district's housing supply. The New Homes Bonus is a material planning consideration if permitted the Local Planning Authority would receive a New Homes Bonus for the unit proposed. The proposal would also result in construction jobs over the life of the build and the increased population likely to spend in the community. Because, however, of the small scale of the development proposed [i.e. it is for a single house] these benefits would be very limited." (*emphasis added*)

77. In December 2018, the Council refused a similar application for planning permission to construct a new single dwelling house, at Lantern Cottage, Lindfield. The planning officer (Mr J. Swift) included in his officer's report exactly the same paragraph on the limited benefits of a single dwelling, as set out above in the Birch House application.

78. The OR in this application (prepared by planning officer Mr S. King) dealt with the benefits of the proposed new single dwelling house in the following way:

> "The provision of a new dwelling will make a small but useful contribution to the District's housing supply. It should also be noted that the New Homes Bonus is a material planning consideration and if permitted the LPA would receive a New Homes Bonus for the new dwelling proposed. It is important to the note that the five year housing land supply is a floor and not a ceiling. As per the Inspector's report on the District Plan, the position is that the LPA could demonstrate a 5.2 year housing land supply without the Clayton Mills site in Hassocks and a 5.34 year supply with the Clayton Mills site. It is important for the LPA to maintain the 5 year housing land supply so that the polices in the DP continue to command full weight.
>
> The report to Members on 23rd March 2017 stated '*At a wider scale the economic contribution that house building makes to the UK economy has long been recognised by Government and is seen as a crucial driver of economic growth. A defining feature of the house building industry is its significant and complex network of supply chains and contracting relationships - the breadth and depth of these supply chains means that the domestic spin-off benefits from house building activity are far greater than for many other economic sectors. It has been reported (source: HBF Briefing October 2012) that, according to Government figures, housing supply accounts for around 3% of UK GDP and provides between 1 and 1.25 million jobs in the*

> *UK. Every £1 spent on housing puts £3 back into the economy. In this case, it could be estimated that the construction of one house would create 1.5 full-time direct jobs and at least three jobs created in the supply chain.*' It is considered that all of these benefits remain relevant material considerations now.
>
> …
>
> The report has identified the clear economic benefits of the proposal. The report also identifies that there is a public benefit in providing new housing in the context where significantly boosting housing is a clear aim of national policy, even when the LPA can demonstrate a 5 year housing land supply."

79. I agree with Mr Brown QC that the opening sentences of the assessments are similar in effect. A "small but useful contribution" to the District's housing supply is not materially different to a "minor but positive contribution". The assessments then go on to list the benefit of the New Homes Bonus, and the economic benefits from creating construction jobs. But there is a striking difference in the conclusion drawn. In the Birch House and Lindfield assessments, the benefits are found to be "very limited" because of the small scale of the development i.e. a single house. Whereas in this application, the OR refers to "the clear economic benefits of the proposal", and seeks to reinforce the point made in the first sentence regarding the addition to the Council's housing supply.

80. The OR did not provide any explanation for the different approach to the assessment of benefits. The planning officer was clearly aware of the Birch House decision as he referred to it elsewhere in the OR, and even set out the principle of consistency in planning decisions. He explained that the Birch House proposal was an unacceptable back garden development which was harmful to the area, and distinguished it from the proposal in this application. However, he did not address the difference in the assessment of public benefit between the Birch House application and this one. Nor did he refer to the Lindfield application, though that was a recent application for a similar development which he could reasonably have been expected to find out about.

81. Since exactly the same approach had been used in the Birch House and Lindfield assessments, it was all the more important for the OR to explain why it was departing from that approach in this application. As the Claimant points out, the assessment paragraph describing the benefits of a single dwelling house development used in the Birch House and Lindfield reports may have been a standard paragraph which was cut and pasted into other similar applications too.

82. In my judgment, the public benefits of the construction of a single dwelling house should have been directly comparable in each of these three planning applications. The extent of the addition to the Council's housing supply, the New Homes Bonus and the boost to the construction industry would be the same in each case. But in the Birch House and Lindfield reports, the conclusion was that the benefits would be very limited whereas in this application the OR concluded that there were "clear economic benefits" which, in my view, can only be understood to mean benefits which were more than "limited". This is not just a semantic distinction between the words used. The whole tenor of the paragraphs on the assessment of public benefit in this application is

different to the previous applications – it "talks up" the public benefits of development by reference to evidence relating to large developments on a national scale, whereas the approach adopted in the previous assessments is more restrained, and precisely targeted at the benefits of a single dwelling house development.

83. The Claimant observed that the Council appears to have taken a very different approach to the public benefit where the application relates to land that it owns, and from which it will receive a significant financial benefit, if the application for planning permission is granted. I expect the Council does stand to make a profit from selling the land with planning permission, or from selling a newly-built house, but that has not been openly relied upon by the Council as a reason in favour of granting itself planning permission.

84. In my view there is an unexplained inconsistency between the way in which the Council has assessed the benefits of this proposal, and its assessments on previous occasions, which is unjustified and unlawful. This Site is in a Conservation Area, and so the assessment of public benefits was a critical issue. On the facts of this application, I consider that an assessment of public benefits, which took into account the Council's previous decisions, would probably have been different, and therefore could have affected the outcome. Therefore Ground 2 succeeds.

Ground 3: Irrationality

85. The Claimant submitted that the Council's conclusion that the public benefits of granting planning permission outweighed the harm to the Conservation Area was irrational, bearing in mind the considerable importance and weight that must be given to the harm to the Conservation Area and the strong presumption that planning permission should not be given where there is such harm: *Barnwell Manor* per Sullivan LJ. at [22]-[23].

86. The Claimant relied on the *obiter dicta* of Gilbart J. when he quashed the May 2015 decision (see paragraph 15 above). On my reading of his judgment, Gilbart J. expressed his doubt as to whether the Council's balancing exercise was rational, but he did not make a finding of irrationality. I agree that the OR's summary of Gilbart J.'s conclusions had the potential to mislead, but fortunately the relevant passage of the judgment was quoted in the OR and so I do not consider that Members were misled. It is more than likely that they were aware that the Framework's "tilted balance" applied to the May 2015 decision because at that time the Council did not have a 5 year housing land supply. The Members certainly would have been aware that, as at January 2019, the Council did have at least a 5 year housing land supply.

87. On the basis of the material before me, I do not consider that the high threshold required for an irrationality challenge has been reached. This was a planning judgment with which the Court should be slow to interfere on *Wednesbury* grounds. Therefore Ground 3 does not succeed.

Conclusion

88. For the reasons set out above, the claim for judicial review is granted, on grounds 1 and 2.