Neutral Citation Number: [2019] EWHC 55 (Admin)

Case Nos: CO/4301/2017 and CO/778/2018

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

Civil Justice Centre,
1 Bridge Street West
Manchester M60 9DJ

Judgment handed down at:
The Central Criminal Court
Old Bailey, London EC4M 7EH

Date: 18/01/2019

Before :

MR JUSTICE KERR

- -

Between :

THE QUEEN on the application of LIVERPOOL OPEN AND GREEN SPACES COMMUNITY INTEREST COMPANY	**Claimant**
- and -	
LIVERPOOL CITY COUNCIL	**Defendant**
- and –	
(1) REDROW HOMES LIMITED - and – (2) ARTHUR BROOKS (on behalf of MERSYSIDE LIVE STEAM AND MODEL ENGINEERS)	**Interested Parties**

- -
- -

Ned Westaway and **Charles Streeten** (instructed by **E. Rex Makin & Co**) for the **Claimant**
Paul Tucker QC and **Constanze Bell** (instructed by **Liverpool City Council**) for the **Defendant**
David Manley QC and **Anthony Gill** (instructed by **Redrow Homes Limited**) for the **First Interested Party**
The **Second Interested Party** did not appear and was not represented.

Hearing dates: 5th and 6th November 2018
- -

Approved Judgment

Mr Justice Kerr :

Introduction:

1. This is my judgment in two claims by the applicant community interest company (LOGS) against the grant of planning permissions by the defendant local planning authority (the LPA). The first permits relocation and laying out of a miniature railway with associated buildings and parking. The second permission is for the building of 39 new dwellings and conversion of a historic house and grounds into 12 apartments.

2. The site for these proposed developments is an area of open land at Calderstones Park, Liverpool (the park). LOGS is concerned to prevent the developments which, it says, would unlawfully change the character of the park. The interested parties are the developer of the proposed housing (the developer), and a representative of the body that runs the miniature railway, which it intends to relocate. The latter has taken no part in the case.

3. Readers of this judgment should understand that it is not my function to decide whether these proposed developments should or should not proceed, in the public interest. That is for the democratically accountable LPA, properly applying the law, to decide. My task is only to determine whether, in granting the two planning permissions, it properly applied the law and, if not, whether the decisions should be quashed and the matter reconsidered.

4. There are five wide ranging grounds of challenge. Limited permission was granted by His Honour Judge Davies in separate orders made on 9 January and 10 April 2018 to proceed with only one of the five grounds. The other four have been renewed orally and were argued before me on a "rolled up" basis. The sole ground on which permission was granted in both claims was that the LPA had misinterpreted its policy in its development plan.

5. The LPA and the developer resist the claims and argue that the two planning permissions were lawfully granted, contrary to the arguments advanced by LOGS. And they say that even if that is wrong, I must refuse the remedy sought because it is highly likely that if there was any error of law, the outcome would not have been substantially different had the conduct complained of not occurred (section 31(2A) of the Senior Courts Act 1981).

Facts:

6. The park is a stretch of open ground with grassed areas, plants and trees, created in 1902 by the then Liverpool Corporation. There is an adjacent school with playing fields, allotments, a picnic area, a lake, a woodland trail, a miniature railway, a grade II listed building, Beechley House, with grade II listed riding stables and surrounding grounds. Parts of the park (including part of the application site for the residential development) were purchased by the Liverpool Corporation in 1914 and are now owned by the LPA.

7. In November 2002, the LPA adopted its Unitary Development Plan (the UDP), entitled *A Plan for Liverpool*. A new draft local plan was in the process of being consulted upon with a view to adoption at the time of the hearing before me. It is agreed that when the challenged decisions were made, the operative plan was the UDP. As explained at paragraph 1.1, it was adopted as a requirement under the Local Government Act 1985.

8. The UDP includes a chapter on *Strategic Objectives and Policies* (chapter 5). The policies in that chapter are prefixed "GEN", standing for "general". Chapter 7 is entitled *Heritage and Design in the Built Environment*; the policies in it are prefixed "HD", for "Heritage and Design". Chapter 8 bears the title *Open Environment*; hence the policies in it are prefixed "OE". The meaning and content of policies in those chapters was debated before me.

9. In 2015, the developer was in discussions with the LPA concerning its proposal to build a new residential development in the park. A partnership agreement was entered into between the LPA and the developer on 16 February 2015 to regulate and take forward the latter's proposal for a housing development at Beechley House and the surrounding area.

10. Following a joint site visit to Harthill depot, part of the application site, the developer emailed the LPA in June 2015, expressing concern that the land was not necessarily closed off to the public and was therefore vulnerable to "a town and village green application". The developer suggested that the LPA should erect signs around the site stating that it was "private land".

11. In November 2015 the LPA passed a resolution welcoming the mayor's initiative "to free up the land on Harthill Road currently occupied by Beechley Stables, Calder Kids and the Miniature Railway to support a housing development scheme" and welcoming the mayor's "clarification that [the LPA] is not selling any part of Calderstones Park". The LPA's view was that the application site was not part of the park.

12. That was, as a note explained, because the three sites "sit outside of Calderstones Park and were not available to the public without authorisation". Opponents of the proposal contended that the application sites for the two planning permissions are part of the park and as such held in trust for public use. They pointed to other planning application documents from 2010, which had treated the same land as "within" the park.

13. In July 2016, opponents of the proposed development scheme made an application under the Commons Act 2006 for registration of a paddock on the Harthill Estate and woodland trail as a town or village green. They argued that local inhabitants had used that land as of right since about 1913, continuously and without force, secrecy or permission. That application has not yet been determined.

14. In February 2017, the LPA's interim head of planning produced a report on the developer's application (no 16F/2049) to build the 51 new dwellings (the officer's report or "OR"). It was a detailed document which, it is agreed, may be taken to record the reasons for the planning committee's subsequent decision to grant that application. It began, as is usual, by describing the site and the proposals and summarising the responses of those consulted, including objectors, of which there were many.

15. The OR then set out relevant extracts from the National Planning and Policy Framework (NPPF), in the then current version dated 27 March 2012. This was of particular relevance in relation to the heritage assets forming part of the application site. Reference was made to the applicable statutory provisions and policies in the UDP, to which I will return when considering the parties' submissions and my reasoning and conclusions.

16. There was then an "Officer Assessment" of the proposals, covering 10 numbered issues of which several are relevant to the present challenge. Having considered these, the OR concluded by recommending that planning permission for the proposal should be granted subject to conditions including starting development within three years of the date of permission, and development in phases following relocation of the Beechley Riding Stables, Calder Kids and the miniature railway.

17. The most important conclusions in the OR that are relevant for present purposes were as follows. First, while the site could be called a park, the "elements of the site that constitute the element [sic] of the application site, do not meaningfully function as a 'park' in any meaningful sense of the word". There was no policy impediment, the OR stated, to the development arising from it being a "park".

18. Second, the site was part of the "Green Wedge" land as defined in the UDP, but was "of a different character to other parts of the Green Wedge", its openness was "already somewhat compromised" and the redevelopment proposed "in the main, would not unduly impact on the predominantly open character of the wider Green Wedge". The interim head of planning considered that "the proposal would not conflict with the aims and objectives and part (i) of Saved Policy OE3".

19. Third, the OR made the point that the proposal would provide much needed housing and the LPA was required to meet the government's target of five years' worth of housing supply. Although the site was greenfield not brownfield and brownfield sites are generally preferable, each site must be considered on its merits.

20. Fourth, the harm to heritage assets would be less than substantial. This had to be balanced against the public benefits of the proposals. The interim head of planning considered that the balance favoured granting permission: "the scheme would provide a public benefit in securing its [Beechley House's] optimum viable use. As such … this part of the scheme is acceptable and accords with both the NPPF and saved policy HD4 of the UDP".

21. The same conclusion applied to the other heritage assets affected by the scheme but not on the site; so that:

> "[o]verall … the proposed conversion and alterations of the designated heritage assets … will sustain and enhance their significance and … any harm to the setting of Beechley Stables and any other heritage assets would be classed as less than substantial, being outweighed by the wider public/regeneration benefits delivered from the proposed development as a whole …."

22. Having considered ecology, archaeology, trees and landscaping, the design, layout and housing mix of the new build elements, residential amenity, access and parking, open space requirements and other matters such as flood risk and drainage and the outstanding village green application (considered irrelevant), the OR concluded that this was "a finely balanced application where any identified harm must be carefully weighed against the wider benefits that the proposal would bring".

23. Nonetheless, for the reasons given earlier in the report, the scheme was "on balance, acceptable having regard to the wider public/regeneration benefits that it would deliver". Impacts on openness, green space, highways, design, ecology, archaeology, trees and the amenity of nearby occupiers were "acceptable"; while "[a]ny impacts on Heritage are considered to be outweighed by the public benefits identified within the report".

24. The recommendation was accepted and planning permission granted on 14 February 2017. The minutes suggest the debate was lively and controversial. Objections were heard and responses to them were provided by planning officers in support of the proposal. A major area of dispute was whether the proposal would run counter to the policies in the UDP, in particular policies OE3 and OE11.

25. On 25 July 2017, the LPA considered an officer's report on a separate planning application (no 17F/0044) to lay out a miniature railway with tracks, station, containers, club house and associated parking, hardstanding, fencing and landscaping. The applicant was Mr Brooks, the second interested party. The application flowed from the need to discontinue the existing miniature railway to make way for the new residential development and to relocate the railway elsewhere within the park.

26. In that report, the interim head of planning acknowledged the concerns raised by objectors but took the view that "the proposal would not unduly impact on the

predominantly open character of the wider Green wedge and therefore the scheme would not conflict with the aims and objectives of part (i) of Saved Policy OE3". Thus, the effect of policy OE3 was viewed in the same light as in the case of the more substantial planning application for the residential development.

27. The miniature railway application (no 17F/0044) was granted on 25 July 2017. The permission was issued on 10 August 2017. A challenge to the issue of that permission was then brought on 19 September 2017. While it was pending, planning permission was issued on the main application of the developer (no 16F/2049) on 9 January 2018. The first challenge was then dealt with by HHJ Davies on the papers who, also on 9 January 2018, granted permission to pursue one of the grounds, as already explained.

28. On 20 February 2018, the second claim was filed, challenging the planning permission issued to the developer on 9 January 2018. When that matter came before HHJ Davies on the papers, he made his second order on 10 April 2018, granting permission on only one ground and giving directions that the two claims be heard together, with any oral renewal of disallowed grounds proceeding at the same time as a rolled up hearing.

Law:

29. I can deal with the applicable law briefly and without lengthy citation, since there was no disagreement in the course of argument about the effect of the statutory provisions or, for the most part, of the case law. The relevant areas are: deciding upon proposals that affect heritage assets; interpretation and application of policies in a development plan; the correct approach to officers' reports; and material mistake of fact.

30. In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority must have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses: section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

31. I was referred to many of the cases customarily cited, dealing with the requirement to undertake a weighted balancing exercise when performing the section 66(1) duty. It is sufficient to refer to very few of the authorities.

32. Where the heritage provisions in the NPPF corresponding to the section 66(1) duty are referred to in an officer's report, the inference is that the officer has properly taken those paragraphs into account. As Lewison LJ put it in *R (Palmer) v. Hertfordshire Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411, at [7]:

> "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. Where the decision-maker refers to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan

there is an inference that he has complied with it, absent some positive indication to the contrary: *Jones v. Mordue* at [28]. In examining the reasons given by a local planning authority for a decision, it is a reasonable inference that, in the absence of contrary evidence, they accepted the reasoning of an officer's report, at all events where they follow the officer's recommendation: *R v Mendip District Council, Ex p Fabre* (2000) 80 P & CR 500, 511 and *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments)) v North Lincolnshire Council* [2012] EWHC 3708 at [15]."

33. However, where section 66(1) applies, the decision maker must avoid the error of equating less than substantial harm with a limited or less than substantial objection (*R (Forge Field Society) v. Sevenoaks DC* [2014] EWHC 1895 (Admin) per Lindblom J, as he then was, at [48]-[49] and [55]). Considerable importance and weight must be given to the policy objective of preserving listed buildings and their settings (*East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 WLR 45, per Sullivan LJ at [22]-[28]).

34. By section 70(2) of the Town and Country Planning Act 1990, in dealing with an application for planning permission the authority must have regard to the provisions of the development plan, so far as material to the application, as well as any other material considerations. By section 38(6) of the Planning and Compulsory Purchase Act 2004, where regard must be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise. The development plan is given primacy by statute and policy.

35. The meaning of its provisions is a question of law, not one for the planning authority to determine within the limits of rationality; but many statements of policy in a development plan require exercise of planning judgment. The weight to be given to a particular material consideration is a matter for the authority and can be challenged only if the exercise of its judgment is irrational or perverse (see Lord Carnwath JSC's speech in *Suffolk Coastal DC v. Hopkins Homes Ltd* [2017] UKSC 37, [2017] 1 WLR 1865 at [21]-[22], citing classic earlier Supreme Court and House of Lords authority).

36. I have borne in mind the seven familiar principles enunciated by Lindblom J in *Bloor Homes East Midlands Ltd v. Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283, at [19], where the foregoing propositions are among those set out. I bear in mind that the meaning and effect of a policy in a development plan is different from a judgment about how, if at all, it should be applied in the context of a particular decision.

37. The correct interpretation of policies in a development plan should not be the subject of extensive "forensic archaeology", since the public should be able to rely on it as it stands without having to investigate its provenance and evolution; see the discussion at [56] in Lindblom J's judgment in *Phides Estates (Overseas) Ltd v. Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin).

38. However, it is sometimes necessary to look at the forerunners of a particular provision to determine the meaning of a policy; cf. the approach of Richards LJ in *R*

(Timmins) v. Gedling BC [2015] EWCA Civ 10, [2015] 2 P&CR 12 at [24], [29]-[29] and [33]; see also *R (Hayes) v. City of York Council* [2017] EWHC 1374 (Admin), [2017] PTSR 1587, at [11]. Thus, objection was not taken to the court being referred to historic policy documents, subject to the caveat that they may be of limited or no assistance.

39. I bear in mind that officers' reports should be read with a benevolent eye, without undue rigour and avoiding the danger of excessive legalism. They are written for councillors with local knowledge. The question is always 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 is made. Minor or inconsequential errors are excused (*Mansell v. Tonbridge and Malling BC* [2017] EWCA Civ 1314 per Lindblom LJ at [41]-[42]).

40. Where it is said that a planning authority has made a decision on the basis of a material error of fact, the question is whether there was a mistake as to an existing fact (including a mistake as to availability of evidence on a particular matter); the fact must be objectively verifiable; the claimant must not have been responsible for the mistake; and it must have played a material, though not necessarily decisive, part in the decision: *R (Watt) v. Hackney LBC* [2016] EWHC 1978 (Admin) per Gilbart J at [49]-[53], citing from the judgment of Carnwath LJ (as he then was) in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044.

Issues, Reasoning and Conclusions:

41. The grounds of challenge in the two claims have been formulated in various ways and not always in the same order. I will address the five grounds in a different order to that in which the parties dealt with them in their written and oral submissions. In numbering the grounds as 1-5, below, I follow the order in which they appear in the skeleton argument on behalf of LOGS, though I do not address them in that order.

Ground 1: heritage assets and the weighted balancing exercise

42. The first ground of complaint is that the LPA failed to apply the statutory presumption against harmful development in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 or to apply policy HD5 of the UDP and gave no explanation of how it applied the presumption and policy. The OR also failed to inform the planning committee about the objection of the LPA's own urban design and heritage conservation team.

43. In support of that contention, Mr Westaway made the following main points. He submitted that the committee fell into the error of treating the harm to heritage assets that would result from granting permission as a mere material consideration to be balanced against the planning benefits of the proposal in an unweighted balancing exercise. He relied on the following points from the evidence.

44. The minutes of planning committee meeting on 14 February 2017 include a summary by planning officers stating that the development would "deliver benefits

through the restoration of the Listed 'Ha Ha' landscape feature and of Beechley House itself". It was accepted that "some harm" would be caused to the setting of Beechley House, the level was:

> "not such as to be considered significant" and "on balance the level of benefits … outweighed this in terms of the relocation of and provision of new enhanced facilities for Beechley Riding Stables and the Model Railway".

45. I should explain that the grade II listings extended to Beechley House itself, its entrance gateway, Beechley Stables and the "Ha Ha" feature about 30 metres south east of Beechley House. It emerged during the hearing that a Ha Ha is, according to a definition from Wikipedia:

> "a recessed landscape design element that creates a vertical barrier while preserving an uninterrupted view of the landscape beyond. The design includes a turfed incline which slopes downward to a sharply vertical face, typically a masonry retaining wall".

46. Mr Westaway submitted that the committee was led into the error of equating the less than substantial harm to the listed buildings and their setting, with a less than substantial objection which failed to accord the required considerable weight to the harm that would be caused. He contended that the OR compounded rather than correcting the error. He accepts that the provisions were referred to early in the OR, but says that when applied to the facts later in the OR, the test was watered down.

47. He submitted that the more prominent formulations omitted any reference to the balancing exercise being weighted, when referring to what the OR called the "tiered system for considering the impact of a proposed development on the significance of a designated heritage asset", provided for in the NPPF. While it included the proposition that "[t]he more important the asset, the greater weight should be given to the asset's conservation" and referred to the "clear and convincing justification" test, the OR ended by downplaying the identified harm as less than substantial and concluded:

> "Therefore any such impact, no matter how limited they, [sic] are not necessarily such that they would be unacceptable. It is for the decision maker to weigh the balance of the scale of any harm against the public benefits of any proposals."

48. Mr Westaway submitted that the OR proceeded to formulate and apply the same unweighted balancing exercise to each element of the identified harm found to be less than substantial. The elements were: harm to Beechley House caused by alterations to the internal layout and arrangement of accommodation to form eight new apartments; harm to the entrance gates caused by widening them; harm to Beechley Stables caused by converting them into three new properties; and harm to the setting of Beechley House by erecting three dwellings in its historic grounds.

49. The same error, argued Mr Westaway, occurred when the OR was considering harm to the setting of other designated heritage assets outside the application site, namely another building called Harthill Lodge and certain listed buildings within the curtilage of Calderstones School. Again the same unweighted test was applied, he

submitted, to support the interim head of planning's view that the proposal was "acceptable".

50. Mr Westaway submitted that the failure to apply the presumption in section 66(1) was made worse by failing to inform the committee that the LPA's own urban design and heritage conservation team had produced a document (the conservation team response or "CTR") raising "strong conservation objections to the proposal to erect 3 of the houses within the grounds and setting of Beechley".

51. The OR listed "Internal Consultee Responses" and referred to three such responses from, respectively, environmental health, highways and the drainage engineer. None raised any serious issue. The OR omitted from the list any mention of the response of the conservation team. Mr Westaway said this was misleading and wrong. He pointed out that the CTR explained that the proposal involved the following:

> "Modern fencing, erected in connection with equestrian centre, across lower section of private grounds to SE of main house and terrace, will be removed. 3 detached houses erected in a row in front of shelter belt of mature trees which enclose whole grounds. New houses linked to development to N by access road through the shelter belt to NE. Fence separating development land from main grounds … would be on line of existing paddock fence nearest to footprint of pavilion demolished by end of C20 visible in NE corner…
>
> Level of harm would be less than substantial but alteration not acceptable due to impact on setting of main house and Ha Ha. Grounds have remained substantially in tact [sic] and in single ownership. Only built structure in area now proposed for 3 houses was mid-C20 pavilion for use in connection for use in connection with recreation facilities, footprint of which was located next to shelter belt trees."

52. Other detailed observations were made in the CTR about other aspects of the proposal, with less concern. The setting was "still an undeveloped planned Victorian buffer between the house and the wider environment"; the adverse effect on the setting of the three new houses within the grounds means the building of the three new houses "is not supported from a conservation point of view"; furthermore:

> "… the future of the [sic] all the land within the historic curtilage of Beechley, which forms the principle [sic] setting of all its listed buildings, should be ensured by appropriate management of the whole landscape, not just the areas close to the main house and entrance."

53. The recommendation was that while the listed building applications were acceptable from a conservation point of view:

> "the proposed planning application would not be supported from a conservation point of view at present because of the adverse impact which one aspect of it would have on the setting of the Grade II listed house. As stated in NPPF paragraph 134, it is for the decision-maker to consider the public benefits of the scheme against the identified harm to the significance of the listed buildings and structures at the Beechley site."

54. The committee was not told about this important objection, Mr Westaway argued. The identity of the objector, within the LPA itself, and the nature of the objection, gave it a particular status which made it unjustifiable and misleading to omit it from the list of otherwise positive or neutral comments from within the LPA. The summaries of grounds of objection elsewhere in the report did not make up the deficit. The concerns expressed in the CTR about the Ha Ha were nowhere reflected in the OR; nor were other, less substantial concerns about deterioration of the "shelter belt" (belt for planting of trees) and the trees in the paddock.

55. Mr Westaway also criticised as untenable the conclusion in the same passages of the OR that the proposal would be, in effect, compliant with policy HD5. That policy begins with the words:

> "Planning permission will only be granted for development affecting the setting of a listed building, which preserves the setting and important views of the building…."

56. The policy then refers to the statutory duty to have "special regard to the desirability of preserving the setting of listed buildings when considering development proposals which affect a listed building or its setting". Mr Westaway argued that the committee should have been advised that the proposal was in clear conflict with policy HD5, instead of being advised that the proposal complied with that policy.

57. Mr Paul Tucker QC, for the LPA, made the following main points in response. He said that although the section 66(1) duty requires the decision maker to give a finding of harm considerable importance and weight, the statute did not create any "statutorily prescribed amount of weight to which the decision maker must give a consideration under s.66". The assessment of the degree of harm was "a matter of pure unfettered planning judgment".

58. He reminded me of the inference that where a decision maker is referred to the statutory duty, the relevant parts of the NPPF and the relevant development plan policies and works through them, there is an inference that the section 66(1) duty is properly performed. He reminded me that it was for LOGS to show that the inference is rebutted by contrary indications.

59. Mr Tucker submitted that the necessary exercise was performed here and that the OR is what he called "*Palmer* compliant". He suggested that when confronted with the test set out in the later parts of the report, which do not mention (he accepted) the weighting needed as part of the balancing exercise, the committee would not have forgotten the mention of the weighting requirement some 14 pages earlier in the OR. LOGS' case relied on pedantry and excessive legalism.

60. He also reminded me that any conflict with a policy in the UDP would have to amount to a conflict with the UDP read as a whole. It was not necessary for the decision maker to be referred to every policy: *Tiviot Way Investments Ltd v. Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) per Patterson J at [27]-[33]. It did not assist LOGS that the OR asserted compliance with policy HD5; any non-compliance would not mean non-compliance with the UDP read as a whole.

61. Mr Tucker disputed LOGS' proposition that the OR failed to advise the committee of the conservation team's objection. He pointed me to passages in the OR which, he said, closely mirrored the views expressed in the CTR. It was for the committee, not the conservation team, to carry out the balancing exercise in accordance with paragraph 134 of the NPPF and the conservation team had rightly refrained from doing so itself.

62. Mr Tucker accepted that the OR had not credited the conservation team with authorship of the views expressed in the CTR. In a footnote in the LPA's statement of facts and grounds, he contended that there was "absolutely no reason to credit the Conservation Team with authorship of an identical form of analysis" to that found in the OR. Even if the points in the CTR were not set out in full or should have been attributed to the conservation team, that was a minor matter that did not significantly mislead the committee.

63. For the developer, Mr David Manley QC made submissions to the same effect. He emphasised that the OR repeatedly invited the committee to perform the weighing exercise required in accordance with paragraph 134 of the NPPF and that the committee did so having been reminded earlier in the OR of their obligation to give "great weight" to the designated asset's conservation.

64. He echoed Mr Tucker's submission that the OR adequately reflected the content of the CTR produced by the conservation team; that the latter's objection was limited to the erection of three new houses within the grounds of Beechley House; and that objection on conservation grounds to this part of the proposal was noted in the report, albeit without attribution to the conservation team or inclusion of the team among the list of internal consultees.

65. As to the assertion that the OR should have pointed to a conflict with policy HD5, Mr Manley pointed out that the OR included reference to that policy, explaining that it "seeks to ensure that the setting and important views of a listed building are preserved by controlling the design and siting of new development; controlling the use of adjacent land and preserving trees and landscape features". That accurately reflected the safeguards within policy HD5 where development affecting a listed building or its setting is allowed.

66. The author of the OR, said Mr Manley, had correctly conceded that the three new detached houses in the grounds of Beechley House, even with additional tree and hedge planting, "for the purposes of part (i) of Policy HD5, would still be somewhat visible through the retained landscaping". The committee was therefore alive to that tension with HD5, which states that planning permission affecting the setting of a listed building would only be granted if it "preserves the setting and important views of the building".

67. In my judgment, this ground of challenge is clearly arguable. I grant permission and proceed to consider it on its merits. I start by reminding myself that the OR must be read with a benevolent eye, without undue rigour and avoiding excessive legalism. It was addressed to members who were familiar with the site and well

aware of the nature of the strongly pressed objections to the development, including on conservation grounds.

68. The OR did, as the LPA and the developer submit, include mention of section 66(1) and did paraphrase, with reasonable accuracy, the effect of the corresponding paragraphs (129-134) in the NPPF, including the proposition that "[g]reat weight is given to the designated asset's conservation". The passage that followed stated, unobjectionably, that:

> "… where harm is identified, the application should be refused however where there would be less than substantial harm, this must be weighed against the public benefits."

69. I accept also that 12 pages later, in the section dealing with the character and setting of the listed buildings, the NPPF paragraphs 129-134 were again mentioned, including the reference to the test of "clear and convincing justification" for any harm or loss, albeit this time without the reference in paragraph 132 to the need to give "great weight" to the conservation of a designated heritage asset.

70. The inference therefore arises that the committee was properly appraised of and properly carried out its section 66(1) duty, unless contra-indications rebutting the inference raise at least a substantial doubt that they did so. I therefore have to consider whether LOGS has demonstrated the existence of such contra-indications. I have come to the conclusion that there are such contra-indications here.

71. The first and important one is the omission to mention or credit the CTR, produced by the conservation team. In my judgment, the LPA and the developer are wrong to dismiss the significance of this omission and LOGS is correct to emphasise that the CTR came from within the LPA itself and that the omission created a false and misleading impression that the LPA as an organisation had no objection to the proposals from a heritage perspective. That had the effect of downplaying the weight to be given to harm to the heritage assets or their setting.

72. It troubles me that the committee was told of only three internal responses to the consultation exercise, at the very start of the section headed "Public Consultation", under the heading "Internal Consultee Responses". Mention is made that there were "9 internal consultees", presumably including the conservation team; and "5 external consultees". Three internal consultee responses are then listed, all neutral to positive in tone and content.

73. Yet, the "strong conservation objections" of the conservation team to the proposal to build three new detached houses within the grounds were not mentioned. The structure and layout of the OR clearly gives the committee the wrong impression that three of the nine internal consultees responded, not four, and that none of the responses was negative. There is, thus, a lack of balance at the very start of the OR.

74. It is not a complete answer to argue that the views of the conservation team were adequately reflected elsewhere in the OR and that it does not matter whether the team is credited with holding those views. It is true that the committee was told that others held the same view as that which, unbeknown to it, was held by the

conservation team. But the OR went out of its way to distinguish between internal and external consultees.

75. That suggests the distinction is significant and that it is of significance to the committee to be told whether a particular consultation response comes from within or outside the LPA. That is not particularly surprising. The LPA's conservation team, like the environmental health and highways officers and the drainage engineer, has expertise in conservation matters and like them is paid by the local taxpayer to express them in the public interest.

76. The same cannot be said of those listed under the generic heading "Opposition" later in the report. Their summarised objections are taken from myriad letters, emails and online comments, often "identically worded", as the OR noted. It is to that class of objectors, not the conservation team, that the heritage based objections are attributed, set out under the sub-heading "Designated Heritage Assets".

77. A balanced report would have summarised the view of the conservation team as a negative internal consultation response counterbalancing the relatively positive ones from highways, environmental health and the drainage engineer. It is then necessary to consider the assessment within the section numbered 4 in the OR headed "Character and Setting of the Listed Buildings", to see whether balance is restored.

78. In this fourth section of the report, the author comments on each aspect of the proposal in so far as it impacts on heritage assets. It is this section that contains what the LPA and the developer say is a fair summary of the conservation team's objection to the three new houses. It does indeed include an acknowledgment that erecting them "in the historic grounds of Beechley would result in some harm to its setting and also the Ha Ha", categorised as less than substantial.

79. It is, however, striking that the section includes four times a mantra-like formulation of the balancing exercise which contains no reference to any weighting and each time it is repeated, places emphasis on paragraph 134 of the NPPF, dealing with cases of "less than substantial harm", without mentioning paragraph 132 containing the words "great weight" and "clear and convincing justification".

80. The first of the four "unweighted" formulations of the test is found under the heading "Beechley" and deals with the internal layout and arrangement of accommodation within the house itself. The second is under the heading "Widening of Beechley Entrance Gates". The third is at the end of the discussion about "Beechley Stables". The fourth comes near the end of the commentary on "Erection of 3 detached houses within the grounds".

81. The effect is to play down the part of the exercise represented by paragraph 132 and tilt the balance towards emphasising the absence of substantial harm and the public benefits to be weighed on the other side of the balance. It is this fourth time repeated unweighted formulation of the balancing exercise which concludes the discussion: "… in this instance, the less than substantial harm to the setting of the heritage assets is outweighed by the abovementioned public benefits".

82. A fifth and final formulation of the test ends the fourth section, as follows:

> "Overall, the Interim Head of Planning is satisfied that the proposed conversion and alterations of the designated heritage assets of Beechley and Beechley Stables will sustain and enhance their significance and that any harm to the setting of Beechley and other heritage assets would be classed as less than substantial, being outweighed by the wider public/regeneration benefits delivered from the proposed development as a whole, in accordance with paragraph 134 of the NPPF."

83. This adds the wrong notion that *being* outweighed by the public benefits contributes to characterisation of the harm as less than substantial. For completeness, I should record that the overall conclusion in the report, after 45 pages, does nothing to restore the balance:

> "… this is a finely balanced application where any identified harm must be carefully weighed against the wider benefits that the proposal would bring.
>
> For the reasons given earlier in this report, the Interim Head of Planning considers that the scheme is, on balance, acceptable having regard to the wider public/regeneration benefits that it would deliver. He considers that matters relating to any identified impacts on openness/greenspace, highways, design, ecology, archaeology, trees and the amenity of nearby occupiers are acceptable, having regard to the impact on the wider Green Wedge, and having regard to the particular characteristics of this part of the Green Wedge. Any impacts on Heritage are considered to be outweighed by the public benefits identified within the report."

84. That language is similar to the language found in the minutes of the meeting on 14 February 2017, to which my attention was drawn by Mr Westaway, and from which I have already quoted.

85. In the light of all that evidence, I am very far from comforted by the assurances of Mr Tucker and Mr Manley that the committee can be taken to have remembered the isolated reference to "great weight" and "clear and convincing justification" earlier in the OR; nor, reading the OR as I do without legalistic rigour and with a benevolent eye, am I satisfied that the OR avoided watering down the duty under section 66(1). I am left with, at the very least, a substantial doubt on the point.

86. For completeness, I should add that I do not base my conclusion on the treatment of policy HD5 in the OR. That policy directly refers to and seeks to replicate the duty under section 66(1). I think Mr Westaway's reliance on the treatment of policy HD5 adds nothing to his attack on the treatment of the section 66(1) duty. There is nothing in the OR which, independently of the section 66(1) duty, distorts the effect of policy HD5 or advises the committee wrongly on its effect.

87. For those reasons, I uphold this ground of challenge. I will consider later whether that conclusion should nonetheless not lead to any relief being granted, in the light of section 31(2A) of the Senior Courts Act 1981.

Ground 5: misinterpretation of policy OE3

88. Permission was granted to argue this ground in both claims. The complaint, as put in LOGS' skeleton argument, is that the LPA misinterpreted or irrationally applied

policy OE3 of the UDP or that it failed to give adequate reasons for its conclusion in relation to compliance with that policy. LOGS' submissions on this ground were made orally by Mr Streeten.

89. The latter arguments – irrationality and adequate reasons – were, rightly, not strongly pressed and are, I think, an unnecessary distraction. Irrationality and reasons challenges are often unnecessarily tacked on to grounds of substance. If the policy OE3 was correctly interpreted, it seems to me untenable to say it was irrationally applied or the decision inadequately reasoned. But if the policy was misinterpreted, irrationality and inadequate reasoning are not needed and do not improve the case.

90. Policy OE3 states:

> "The City Council will protect and improve the open character, landscape, recreational and ecological quality of the Green Wedges at Calderstones / Woolton and Otterspool by:
>
> i not granting planning permission for proposals for new development that would affect the predominantly open character of the Green Wedges or reduce the physical separation between existing built up areas;
>
> ii requiring that, where new built development is permitted (including conversion or extension) such development:
>
> - has regard to the openness of the Green Wedge and the purposes of including land within it;
> - should be in accordance with the criteria set down in policy HD18 and, in particular, uses materials and built forms sympathetic to the character of the area;
> - retains existing vegetation and special site features where appropriate; and
> - provides and maintains a high standard of landscaping
>
> iii retaining its own land in predominantly open use and supporting proposals which would:
>
> - enhance tree cover by the retention of existing trees and replacement of older trees where necessary;
> - enhance the recreational role of the Green Wedges; or
> - offer uses and activities which accord with their open character, particularly those that secure the continued use of sports grounds surplus to the owner's requirements, for open space purposes."

91. Like other policies in the UDP, policy OE3 is supplemented by supporting commentary, to which I was referred in the course of argument. I was also taken to other parts of the UDP for the purpose of context.

92. In the second section of the "Officer Assessment" part of the OR, the author considered the impact of the proposed development on "Green Wedge" and "Green Space". It is common ground that the application site is land designated as green wedge and green space land, under the UDP. The OR noted that policy OE3 (and OE11) applied and that these "seek to protect the site from inappropriate development".

93. The author of the OR considered that it was therefore "necessary to carefully assess the impacts of the proposed development on the openness of the Green Wedge as a whole"; the application site comprising about 6 per cent of it and "located in a part … characterised by having buildings and physical structures", which were then listed, both on the application site and around the edge of it.

94. The OR reasoned that "this part of the Green Wedge is of a different character to other parts of the Green Wedge". Essentially, it was less green: "the openness of this part of the Green Wedge is already compromised …". Given that "specific characteristic", coupled with "its size in comparison to the wider Green Wedge area", the author:

> "considered that the redevelopment of this portion, with dwellings that have spacious areas around them, in the main, would not unduly impact on the predominantly open character of the wider Green Wedge. In this respect, the Interim Head of Planning considers that the proposal would not conflict with the aims and objectives of part (i) of Saved Policy OE3."

95. The OR went on to say that where development in the green wedge is appropriate, it should have regard to the openness of the green wedge and the purposes of including land within it. A long explanation followed of why, in the author's view, the development would be appropriate although it involved built development.

96. It would, the author said, provide a valuable amenity for many people, diverse recreational facilities and a mature ecological environment for wildlife; it would contain buildings of historic, architectural and educational interest; it would give the appearance of a "parkway" approach along particular transport routes; and, overall, relocation of the proposed uses would "maintain and enhance what are diverse recreational offers…".

97. The author then turned to green space policy, which is the subject of policy OE11; and noted that there was an overlap between green wedge and green space policy. For present purposes, I do not find it necessary to trace what was said in the OR separately about green space, save that the author concluded at the end of the second section of the assessment "that the proposal complies with the aims and objectives of saved policies OE3 and OE11 of the UDP".

98. It is therefore common ground that the LPA found no conflict between the development proposals and policy OE3. The question is whether the LPA went wrong in law in reaching that conclusion.

99. In support of LOGS' argument that the LPA did misinterpret policy OE3 and was bound in law to find the proposal conflicted with it, Mr Streeten's main submissions can be summarised as follows:

(1) The meaning of a planning policy is a matter of law; planning authorities do not live in the world of Humpty Dumpty and cannot make policies mean what they want them to mean; they must be objectively construed in accordance with the language, read in its proper context (per Lord Reed in *Tesco Stores Ltd v. Dundee City Council* [2012] UKSC 13,[2012] PTSR 983, at [18]-[20]).

(2) Conflict between a development proposal and a development plan policy must be expressly and openly acknowledged; see section 38(6) of the Planning and Compulsory Purchase Act 2004 and *Tiviot Way Investments Ltd* (cited above) per Patterson J at [27] and [36]. If an authority fails to appreciate the existence or extent of such a conflict, the decision may be invalidated (*Tesco Stores Ltd v. Dundee CC*, cited above, per Lord Reed at [23]).

(3) Openness is the abstract noun corresponding to the adjective "open", as in "open character". It means simply absence of built development. The concept is found in both green belt and green wedge policies and bears the same meaning; though in the case of the former the acceptability of built development is subject to an "exceptional circumstances" test, whereas in the latter it is not. Land that is open and protected as such need not be green belt only; it can be green wedge or e.g. "metropolitan open land" as in *R (Lensbury Ltd) v. Richmond-upon-Thames LBC* [2016] EWCA Civ 814, see per Sales LJ at [31].

(4) The authorities support the obvious proposition that openness means the absence of built development; see *R (Heath and Hampstead Society v. Camden LBC* [2007] EWHC 977 (Admin), [2007] 2 P&CR 19, at [21]-[22], [37]-[38]; *R (Lea Valley Regional Park Authority) v. Epping Forest DC* [2016] EWCA Civ 404, per Lindblom LJ at [7]; *R (Sam Smith's Old Brewery (Tadcaster)) v. North Yorkshire County Council* [2018] EWCA Civ 489, per Lindblom LJ at [19].

(5) The concept of openness must bear the same meaning in a green wedge policy as in a green belt policy. Mr Streeten referred me to the supporting text following policy OE3 and to various historic policy papers and documents predating the UDP to make good this submission. The clear principle is that built development is inappropriate in green wedge areas as in green belt areas. It would be strange if it were otherwise. This approach is supported also by policy GEN 2 (and its supporting text) which treats green belt and green wedge land alike as requiring protection against inappropriate development.

(6) Built development that harms openness in a green wedge space necessarily conflicts with policy OE3 i. The LPA conceded in the OR that this proposed development would harm openness in the Calderstones Park green wedge. As such, the development necessarily

is in conflict with OE3 i. Whether it is or not is a matter not of planning judgment but of meaning.

(7) The adverb "predominantly" in the phrase "predominantly open character" in OE3, refers to the character of the land, not the extent of proposed interference with its quality of openness. The policy does not allow an examination of whether a development would "unduly" or "in the main" impact on the predominantly open character of the green wedge. Nor is there room for consideration of whether the harm is to the "wider" green wedge by examining the proportion of green wedge space affected; cf. Gilbart J's rejection of that approach in *R (Irving) v. Mid-Sussex DC* [2016] PTSR 1365, at [56]-[58].

(8) Toleration of built development in green space leads to the "death of a thousand cuts" identified by Sullivan J (as he then was) in *Heath and Hampstead* at [37]. This might be called a "thin end of the green wedge": once you allow any built development in a green space, however minor, openness is compromised and the precedent for further development set; see also Parker J's observations to the same effect in *West Lancashire BC v. Secretary of State for Communities and Local Government* [2009] EWHC 3631 at [22] and Supperstone J's in *R (Boot) v. Elmbridge BC* [2017] EWHC 12 at [40].

(9) The only built development allowed under policy OE3 is development falling outside OE3 i, i.e. development which does not affect the predominantly open character of the green wedges or reduce the physical separation between existing built up areas. Such development (for example, conversions, extensions, sports and recreation facilities, perhaps a cemetery) is not inappropriate and is permitted under OE3 ii, subject to the safeguards in the four bullet points in OE3 ii (use of sympathetic materials, retention of vegetation and so forth).

(10) Mr Streeten also conceded that development may conflict with OE3 i but be permitted under OE3 ii, subject to those same safeguards. In such a case, there is a conflict with policy OE3 but a more limited one. As put in LOGS' skeleton argument: "[i]f development complies with OE3(ii) but not OE3(i), the extent of the conflict with the [UDP] is more limited than if it conflicts with both …." The conflict must be acknowledged but prevention of inappropriate development may, in such a case, more readily be outweighed by public benefits.

100. For the LPA, Mr Tucker's opposing submissions can be summarised as follows:

(1) Policy OE3 applies where development proposals would adversely affect the "predominantly open character" of green wedge spaces or reduce physical separation between existing built up areas (see OE3 i). Open character is a different concept from openness in the policy statements and jurisprudence relating to the green belt. The term "open character" in OE3 i does not import the effect of the case law relied on by LOGS.

(2) Where, as in the present case, a development proposal would adversely affect the predominantly open character of a green wedge space, and thus bring OE3 i into play, built development is nonetheless permitted under OE3 ii provided the safeguards in the four bullet points in OE3 ii are respected. In particular, it must be required by the LPA that such development "has regard to the openness of the Green Wedge and the purposes of including land within it".

(3) Thus, as I understand Mr Tucker's argument, he says OE3 ii is a permissive provision which provides the LPA with an alternative to outright prohibition of development of the kind covered by OE3 i. It is not a provision applying to development that affects green wedge spaces but falling outside OE3 i, i.e. development that does not adversely affect the predominantly open character of the green wedge space or reduce physical separation between existing built up areas.

(4) Mr Tucker submits that LOGS' interpretation would render policy OE3 internally inconsistent: development adversely affecting the open character of a green wedge would, at the same time, be prohibited under i, yet allowed under ii. The inconsistency is avoided, he said, by rejecting the notion that the green belt concept of openness is the same as the "open character" of a green wedge. The former, but not the latter, sets the bar high and prohibits development save in exceptional circumstances.

(5) In the latter case, the open character of a green wedge space is not subject to the same rigorous test. The bar is set lower: regard must be had to the predominantly open character of the green wedge but there is not the strong presumption against development that protects green belt land, as OE3 ii recognises. Planning judgment must be brought to bear to determine whether and if so to what extent a development would affect the predominantly open character of a green wedge.

(6) New built development by its very nature cannot keep land free from development but does not prevent regard being had to its effect on openness. It should be a matter of planning judgment whether and to what extent openness is affected by a proposal; cf. the notion of preserving the openness of the green belt in the sense of keeping it safe from harm, explained in *Sam Smith's Old Brewery (Tadcaster)* (cited above) per Lindblom LJ at [39]. The verb "affect" in OE3 i should be read in the same way.

(7) This interpretation is consistent with policy OE2 dealing with new build development within the green belt, which may only occur in "very special circumstances" other than for specified purposes including essential facilities for "other uses of land which preserve the openness of the Green Belt and do not conflict with the purposes of including land within it". Mr Streeten's invocation of GEN 2 was wrong; rather,

in OE2 the noun "openness" is used, rather than the phrase "open character", applying to green belt rather than green wedge land.

101. For the developer, Mr Manley supported the LPA's position, also defended the approach in the OR and made some further points which I can summarise as follows:

(1) In the NPPF paragraphs dealing with the green belt, the concept of openness is "open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case": per Sales LJ in *Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466, [2017] 2 P&CR 1, at [14]. Equating openness with simple absence of buildings overlooks this point. Lindblom LJ in the *Sam Smith's Brewery* case at [19] similarly emphasised that visual effects of a development are relevant to planning judgment on openness in green belt cases.

(2) It is "sophistry" on the part of LOGS to accept that the green belt and green wedge are different creatures and the policies governing them not identical, but "then to seek to argue the distinction away to nothing". The purpose of OE3 is not to protect the openness of the green wedges from development. Openness is "a term of art in planning policy" and does not equate "baldly to the ordinary English word 'open'". The emphasis in policy OE3 is not on openness as such, which appears only once, but on open character and open use.

(3) The content of policy OE2, dealing with the green belt, closely mirrors the content of the then extant (pre-NPPF) "PPG2" guidance (which, all agreed, I could properly look at). There was no equivalent guidance dealing with green wedges and no attempt in the UDP to replicate in policy OE3 the green belt policies, including the "very special circumstances" test, imported into OE2 from the PPG2 guidance.

(4) The reference to inappropriate development in policy GEN 2 does not import the green belt policy, separately contained in policy OE2, into policy OE3, dealing with green wedges. The words "inappropriate development" do not appear in OE3. The supporting text to OE3 (where they do appear) does not include any mention of "openness". The supporting text to GEN 2, in particular paragraph 5.20, points to a differentiated approach as between green belt land and green wedge land.

102. I come to my reasoning and conclusions on this ground. In my judgment, Mr Streeten's submissions are to be preferred; there was a clear conflict between the proposals and policy OE3 and the OR was wrong to conclude otherwise. I do not think it is possible to interpret policy OE3 i as being effectively disapplied where planning judgment finds an interference with the open character of a green wedge justified, applying OE3 ii criteria.

103. That interpretation would denude the protection of the green wedge which OE3 is there to ensure. It fits ill with the opening words of OE3 which, notably, govern all, not just some, of the subparagraphs i, ii and iii which follow. If built development were permitted under ii where prohibited under i, I would expect to see clear words making the requirements of i and ii alternative rather than cumulative. I do not think OE3 ii permits planning judgment to allow what is prohibited under i.

104. I therefore accept Mr Streeten's submission that the conflict with OE3 i here had to be openly acknowledged and expressly taken into account. It could not be wished away. It is indisputable and not disputed that these proposals would affect the open character of the green wedge land within and around the application site, whether or not "open character" here is equated to "openness" in green belt cases.

105. I also think Mr Streeten is right to say that the green belt cases on which he relies (and the *Lensbury* case dealing with metropolitan open land with a status equivalent to green belt land) are relevant. I accept that green belt land and green wedge land differ in some respects, as pointed out. But because both are verdant, they share the quality of openness or open character. I reject the proposition that because openness is a term of art in planning law, open character is qualitatively different from openness.

106. Neither the English language nor the natural wording of OE3 support that rigid distinction, which only a legal pedant would draw. Land which is open has an open character and also the quality of openness. Undermining the open character of land undermines its openness. Mr Streeten is also right that GEN2 points to what green belt and green wedges have in common: their greenness, safeguarded by protection against inappropriate development, though not in precisely the same way.

107. In my judgment, the territory of OE3 ii is narrow and it must be read narrowly to avoid diluting the protection of OE3 i. Built development under OE3 ii may sometimes be permitted without violating the protection of OE3 i. Examples of building works that do not, or not necessarily, violate OE3 i are given in OE3 ii itself: conversions and extensions. One can think of other examples: a dilapidated fountain replaced by a new one; a cemetery, perhaps; or a newly built grotto hidden behind trees.

108. I accept that the verb "affect" in OE3 i should be read as "adversely affect"; a proposition from which none of the parties dissented. I do not, however, accept that LOGS' interpretation is internally inconsistent because it means development can be prohibited and permitted at the same time. I do not think that is right. Development may be permitted under ii where it does not conflict with i, as in the examples just given. Development may also, as in the present case, conflict with i but not ii. Where that is so, the conflict with i is not prevented by the absence of a conflict with ii.

109. In such a case, the LPA must, as Mr Streeten says, face up to the conflict and, if it decides to proceed, address itself under section 38(6) of the Planning and Compulsory Purchase Act 2004 to the incongruity between the development proposal and the development plan. If, exceptionally, the authority decides to proceed nonetheless, it must do so for good reason and in full knowledge and

acceptance of the incongruity; since a development plan is there to be followed "unless there is good reason to depart from it" (*Tesco Stores Ltd v. Dundee City Council*, per Lord Hope at [18]).

110. It follows from that analysis that the OR was wrong, without first acknowledging a conflict with OE3 i, to concern itself with the planning judgment as to whether the development would "unduly" or "in the main" adversely affect the green wedge space; and was wrong to assess the extent of the adverse effect, the degree to which the open character of the green wedge land was already compromised and the proportion, expressed as a percentage of the whole, of the green space affected.

111. I therefore uphold this ground of challenge. Again, I will consider later whether that conclusion should nonetheless not lead to any relief being granted, in the light of section 31(2A) of the Senior Courts Act 1981.

Ground 2: material error of fact

112. The second ground of complaint is that the LPA wrongly proceeded on the basis that no part of the application site for the residential development fell within Calderstones Park. That is said to be a material error of fact. In the skeleton argument of LOGS the proposition was also said to be "irrational", but that epithet does not add anything of significance to the complaint of material factual error.

113. Mr Westaway submitted that the description of the site as effectively not a "park" in any real sense, was misleading and that the error was material and fulfilled the requirements identified in *E. v. Secretary of State for the Home Department*, as applied in the planning context by Gilbart J in *Watts*. He also cited as an example of a similar error the decision of the Court of Appeal in *R (Loader) v. Rother DC* [2016] EWCA Civ 795.

114. The objector's appeal in *Loader* was allowed where a heritage related proposal had by mistake not been submitted for comment to the Victorian Society, a consultee that had objected to a previous related proposal. The committee was told no comment had been received from the Society, but not that the Society had, due to an error, remained unaware of the proposal. Lindblom LJ at [57] preferred to base his decision on taking account of an immaterial consideration, though he also observed that the committee "could be said to have proceeded on the basis on an error of fact".

115. Mr Westaway submitted that the status of the land as a public park was an important and material consideration. The OR was wrong to state the view of the interim head of planning that "the application site does not form part of Calderstones Park". He referred me to the detailed history of the park going back to 1914; and to the geography, including the reference "P7" denoting the extent of the park as shown in the UDP (in schedule 8.3). That evidence, he said, was before the committee and not contradicted.

116. He submitted that the formal status of the land as part of a public park was important and might have weighed with the committee. It was wrong for the OR to argue that the site did not form part of a park following a dictionary definition, due

to the lack of public access to large parts of the land in question. He argued that a false denial of park status was an important plank in the political case for the housing development, reflected in, he submitted, the 2015 resolution wrongly denying park status to the site.

117. Mr Westaway referred me to Hickinbottom LJ's judgment in *R (Friends of Finsbury Park) v. Haringey LBC* [2017] EWCA Civ 1831, [2018] PSTR 644, at [16] as authority for the proposition that where a park is created under statutory provisions containing no express trust, the courts have been prepared to construe the provisions relating to public parks as "having a similar effect" and in effect being "held on trust for the purpose of public enjoyment".

118. Mr Tucker, for the LPA, argued that the committee was aware of the site's location and that there was a debate about whether the history of the site and the fact that it was in an area of parkland should count against the development proposal. The committee was not misled in fact. The OR itself stated that objectors had said "[t]he attempt to class the Harthill estate as separate from the park is deliberate gross mis-interpretation of the accepted boundaries".

119. Further, he pointed out that the committee was well aware of the history of the site and had the benefit of an acknowledgement that the site was within the boundary of "P7" on the UDP map. The question was not one of history or geography, but of current land use and public access. There was no evidence that if permission were refused, the public would gain better access to the site. It was for the committee to decide what weight to place on the objection founded on park status and the historic uses of the site.

120. Mr Manley, for the developer, submitted that the issue of park status was fully considered and fairly dealt with in the OR. The author properly referred to part of the application site being within the "P7" boundary, but fairly rejected the proposition that the parts not accessible to the public could not realistically be said to function as a park. He reminded me that the members had undertaken a site visit and could see for themselves that parts of the site did not function as a park.

121. Mr Manley also pointed out that there are no "park specific" policies in the UDP which add anything to the policies dealing with open spaces; thus, the status of the site as park or otherwise was "an arid point". Furthermore, the question of park status played no material part in the decision; therefore, the fourth requirement identified in *E. v. Secretary of State for the Home Department* and by Gilbart J in *Watts*, was not met.

122. In my judgment, Mr Westaway's complaint is arguable and I would grant permission to advance this ground of challenge. I do not accept that the point should be regarded as arid, technical and of minor or no substance. If, on a fair reading of the OR, the committee was told that this was not a park in any sense, i.e. that its status was no different from ordinary private land, that would be misleading.

123. Furthermore, the treatment of the park issue in the OR is unsatisfactory. The relevant heading is: *[d]oes the site constitute part of Calderstones Park?* The question is thus properly and squarely raised. The LPA and the developer are right

to point out that debate on the issue was very much engaged and that the committee was made aware of the competing views, including the objectors' invocation of historic and geographical factors.

124. The OR then stated that while identification of the site as part of "P7" "does not comprise a statement of policy", it was "explanatory material" which "simply has the status of a material consideration". Having described the consideration as "material", the author then dismissed it as a factor meriting no weight. This was because, the author reasoned, it did not function as a park and was not a real park.

125. I do not think that dismissive approach to the issue, including use of a dictionary definition, was an adequate explanation of the status of the site in law. Mr Westaway is right to observe that status as a park carries with it the notion of land held in trust for public use and enjoyment. I therefore disagree with the bald statement "the application site does not form part of Calderstones Park, nor does its reference in schedule 8.3 of the UDP connote any policy status".

126. Having said that, I accept the point then made in the OR that the UDP does not contain any policies specific to parks, beyond those relating to green spaces generally, which include parks. I also accept that, despite the unfortunate presentation of the issue in the OR, the committee were alive to all relevant points in the debate and were able to make up their minds from their own knowledge and experience.

127. So I do not consider that the committee members were materially mislead, even though the OR should have made the point clearly that a park is different from ordinary private land. Even had they been materially misled, I think it is highly likely that the decision would not have been any different in consequence. The members went on a site visit and could see that the site was in the middle of parkland, as they no doubt already knew.

128. For those reasons, I grant permission to advance the second ground of challenge, but I dismiss it, and turn to the remaining grounds.

Grounds 3 and 4: evidence of recreational use and reliance on relocation of facilities

129. The third ground of challenge is that the LPA wrongly excluded from consideration evidence of public recreation in the village green application. The recreational role of the land at the main application site should, it was said, have been taken into account in accordance with Policies OE3 and OE11 in the UDP.

130. LOGS complains that those policies require the LPA to consider and take into account recreational use of the site. The OR, Mr Westaway submitted, wrongly stated that the site was "not publically accessible"; the stables are only available to a "specific user group". The application site, it was said in the OR, "does not currently represent an amenity for a large number of people".

131. Mr Westaway submits that this overlooks the evidence in the village green application to the effect that there has been continuous unimpeded access without force, secrecy or permission for many years, for walking, riding, fruit picking and

children's play. That application was, he complains, dismissed in the OR as "not a material consideration".

132. In ground 4, complaint is made that the LPA wrongly relied on the benefits of recreational facilities – the miniature railway, riding school and children's play facilities - that would be relocated from the application site, while the proposals to relocate those facilities did not form part of the planning application under consideration. Mr Westaway submitted that the OR wrongly assumed that the recreational function provided by those facilities would not be lost because they would be relocated elsewhere.

133. In my judgment, HHJ Davies was right to refuse permission to advance these two closely related grounds. The characterisation of the village green application as immaterial did not matter; it was not before the LPA for determination. What mattered was consideration of public amenity and recreational use of the park and the likelihood of continued recreational use of facilities through relocation.

134. It was a matter for the LPA to judge the likelihood of the facilities being successfully relocated. It was a condition of the planning permission that the developer should enter into an agreement under section 111 of the Town and Country Planning Act 1990 for the provision of sums to provide for the relocation and that the relevant phases of the development would not proceed until that had been done.

Remedy

135. Both the LPA and the developer argue that I must refuse relief because, in the words of section 31(2A) of the Senior Courts Act 1981, it is "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". For that purpose, the "conduct complained of" was, as I have found, misinterpreting policy OE3 and carrying out a flawed, unweighted balancing exercise with respect to the impact of the development on the heritage assets and their setting.

136. The LPA submitted in its written skeleton that even if the "shortcomings" alleged in the drafting of the OR were present, it "placed all relevant matters before the committee" and "this was a contentious application where issues and planning merits were well-ventilated". The difficulty with that submission is that, had I accepted that such was the position, I would probably have found no material error leading to unlawfulness in the decision to grant planning permission; and the argument under section 31(2A) would not have arisen.

137. The developer added in its written skeleton the submission that the site is "part of the first tranche of the [LPA's] Strategic Housing Delivery Programme which is key to the [LPA] meeting its housing obligations for the next decade"; and "[i]n that context the [LPA] would not have made a substantially different decision".

138. I do not accept that submission. I do not know what the outcome would have been if the decision had been lawfully taken. The conduct complained of was not cosmetic or insignificant. Nor was the decision an easy one for the LPA. The

objections were significant and extended to substantial heritage concerns entertained by the LPA's own officers. The OR itself, strongly partisan in favour of the development proposal, described the application in the conclusion section as "finely balanced".

139. For completeness, I should say that if I had found that the only flaw in the decision (i.e. the "conduct complained of") was the description of the application site as not having the character of a "park", I would have accepted the argument that absence of that conduct would have been highly likely to have produced the same result and I would have been obliged to refuse relief.

140. However, that is not the position. I am not satisfied the section 31(2A) test is met. There is no other basis for withholding relief. I will therefore quash the two planning permissions.