Neutral Citation Number: [2020] EWHC 3405 (Admin)

Case No: CO/149/2020

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

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

Date: 18/12/2020

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

R (STEVEN HEWITT) (ACTING ON BEHALF OF SAVE OUR VALLEYS GROUP)	**Claimant**
- and -	
OLDHAM METROPOLITAN BOROUGH COUNCIL	**Defendant**
- and -	
RUSSELL HOMES (UK) LIMITED	**Interested Party**

- -
- -

Philippa Jackson (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Alan Evans (instructed by **Group Solicitor (Environment) Oldham MBC**) for the **Defendant**
Sasha White QC and **Anjoli Foster** (instructed by **Gateley Legal**) for the **Interested Party**

Hearing date: **28 July 2020**

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. In this application for judicial review Steven Hewitt, the Claimant, acts on behalf of an unincorporated association called Save Our Valleys. He challenges the decision of Oldham Metropolitan Borough Council (the Council) dated 5 December 2019 to grant hybrid planning permission for a housing development and other works by Russell Homes (UK) Limited (the Interested Party).

2. The grant of permission comprises:

    a. outline planning permission for the development of up to 265 dwellings, open space and landscaping, with all matters reserved except for access, at Knowls Lane, Oldham; and

    b. full planning permission for the development of a new link road between Knowls Lane and Ashbrook Road and associated works.

3. The grant was made pursuant to planning application PA/343269/19. This was registered on 26 April 2019. In 2018 the Council rejected a virtually identical application.

4. I will refer to the area to be developed as 'the Site'.

5. The Claimant is the councillor for the Council's Saddleworth West and Lees ward, where the Site is situated. He is a former Vice Chairman of the Council's Planning Committee (the Committee). He is the Chairman of Save Our Valleys. This group was formed in 2017 by local people to campaign against the Interested Party's development proposals. They believe that the development will destroy the unspoilt natural environment of Thornley Brook Valley and Ashbrook Valley (areas within the Site) and cause other harm to the Site and its environs.

6. The Interested Party is a well-known housebuilder which has acquired the necessary interests in the Site over the past six years.

7. The grant of permission followed a recommendation in favour of the development by the Council's Officers in their 2019 Report, and a Committee resolution in favour passed on 1 July 2019. Permission was dependent on the completion of an agreement under s 106 of the Town and Country Planning Act 1990 in relation to other requirements, and other conditions. I am not concerned with these latter matters.

Terms and abbreviations

8. In this judgment I will use the following terms and abbreviations:

2018 Report	The Council's Planning Officers' Report to the Committee in 2018
2019 Report	The Officers' Report to the Committee in 2019

Assessment	The Landscape Character Assessment carried out on behalf of the Council in 2009
DPD	*Oldham Development Plan Document – Joint Core Strategy and Development Management Policies 2011*. This largely replaced the UDP
HLS/5YHLS	Housing Land Supply/Five Year Housing Land Supply
LCA	Landscape Character Area. Seven such Areas were identified and described in the Assessment
LPA	Local Planning Authority
NPPF	National Planning Policy Framework
OPOL	Other Protected Open Land
OPOL 12	The eastern part of the Site (Thornley Brook East), which was identified as OPOL by Policy OE1.10 on the Proposals Map of the UDP
PLBCAA	Planning (Listed Buildings and Conservation Areas) Act 1990
PCPA	Planning and Compulsory Purchase Act 2004
SFG	Statement of Facts and Grounds
TCPA	Town and Country Planning Act 1990
UDP	Oldham Unitary Development Plan 2006

The Site

9. The Site is approximately 15.79ha in size and comprises vacant open grassland, with the wooded valley of Thornley Brook to the north. It is comprised of an irregularly shaped area of land on the south eastern edge of Lees that is enclosed by existing development to the north, east and west, with highways infrastructure (Knowls Lane and Thornley Lane) to the south. It is located approximately 2.95km east of the centre of Oldham. Junction 22 of the M60 is approximately 5.35km to the south west of the Site.

10. The Site itself has no buildings on it. There is pedestrian access to the Site but no formal vehicle access, although such access can be achieved via gates at Manor Farm and from Thornley Lane. Several public rights of way cross through or run close to the Site.

11. St Agnes' Church of England Primary School and its playing field and St Agnes' Church and grounds are located along the north of Knowls Lane/Thornley Lane, to the south of the Site. The Grade II listed buildings of Knowls Lane Farm, Knowls Lane Farmhouse, Manor House (and attached cottage) and Flash Cottage are located west to east respectively along Knowls Lane/Thornley Lane.

12. The Site is not located within, or adjacent to, a conservation area (although, as I will discuss later, the Lydgate Conversation Area is between 1km and 1.5km away) and contains no listed buildings or other designated heritage assets. It does not form part of any statutory or non-statutory, ecological or wildlife designated area. The Site lies adjacent to the Spade Mill Biological Heritage Site. It does not lie in any area of nationally or locally protected landscape.

13. On 9 November 2011 the Council adopted the DPD. This superseded the majority of the Council's UDP 2006 policies. However, a number of UDP policies were 'saved' by direction of the Secretary of State in May 2009 under the relevant legislation.

14. The western part of the Site is identified on the proposals map of the UDP as a Phase II housing allocation capable of accommodating up to 232 new homes (Saved UDP Policy H1.2.10). The proposed link road was identified in UDP Policy H1.2.10 as a requirement if this housing allocation were to be brought forward. The land for the link road is safeguarded under Policy 17(g) of the DPD.

15. The eastern part of the Site (ie, OPOL 12) was originally identified and protected as OPOL in UDP OE1.10 (where it is referred to as Thornley Brook East, Lees) on the UDP's Proposals Map. UDP Policy OE1.10 has since been replaced by Policy 22 of the DPD.

16. Paragraph 6.142 of the DPD states:

> "6.142 OPOL is open land which, while not serving the purposes of the Green Belt, is locally important because it helps preserve the distinctiveness of an area. As well as providing attractive settings, they provide other benefits, such as informal recreation and habitats for biodiversity, therefore helping to provide sustainable communities and help mitigate climate change. The main aim is to protect OPOL from development, however there may be instances where limited small scale or ancillary development will be permitted, such as visitor facilities or development that is ancillary to existing uses. This allows limited small scale development over and above that permitted in the Green Belt. The council will consider the visual impact that development has on the openness and distinctiveness of the OPOL, taking into account the cumulative impact."

17. This definition was echoed in [7.8] of the 2019 Report.

18. Policy 22 provides in relation to OPOL:

> "The majority of the borough's open land is designated Green Belt. The main purpose of the Green Belt is to keep land permanently open. Pressure for development in the Green Belt is generally small-scale developments such as the re-use of agricultural buildings. The borough also has locally protected

> open countryside called `Other Protected Open Land` (OPOL) which aims to preserve the distinctiveness of an area …
>
> ….
>
> Development on OPOL will be permitted where it is appropriate, small-scale or ancillary development located close to existing buildings within the OPOL, which does not affect the openness, local distinctiveness or visual amenity of the OPOL, taking into account its cumulative impact. Where appropriate, development will be screened or landscaped to minimise its visual impact.
>
> …
>
> The council will assess OPOL in the Site Allocations DPD. The council will provide further advice and guidance on this policy."

19. Following the UDP Examination in 2011, the Inspector described the eastern part of the Site (quoted in the 2019 Report at [7.9]) as:

> "… a substantial area of attractive open land which has much in common with the open countryside to the south. It serves to separate the extensive suburbanised area of Grotton to the east and the existing and proposed housing area to the west."

20. The Report went on at [7.10] to record the Inspector's view that if the housing site on the western side of the Site was to be developed, it was 'imperative' that the eastern part of the Site remained open.

The 2018 planning application

21. As I have said, the application for which permission was given in 2019 was a resubmission of a materially identical application in 2018 (PA/340887/17). This application was refused by the Committee on 7 December 2018, contrary to the recommendation of the Council's Planning Officers in their 2018 Report.

22. In both 2018 and 2019 Officers advised that the Site was considered to be a 'valued landscape' for the purposes of [170(a)] of the NPPF. Paragraph [170(a)] requires planning decisions to contribute to and enhance the natural environment by protecting and enhancing valued landscapes:

> "Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> (a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan) …"

23. In this context a 'valued landscape' is a landscape that is more than 'mere countryside' but is a landscape that has physical attributes which take it 'out of the ordinary': *Stroud District Council v Secretary of State for Communities and Local Government* [2015] EWHC 488 (Admin), [16]; *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2016] EWHC 2429 (Admin), [31].

24. Paragraph [7.82] of the 2019 Report said that:

> "Officers consider that the site is a 'valued landscape' as defined in paragraph 170 of the NPPF for the following reasons:
>
> - The site itself is an open agricultural field sloping gently down to a wooded brook, with a well-used byway along its northern boundary, set within open countryside to the south and Green Belt beyond, coupled with the Wharmton Undulating Uplands character area. It is considered that this contribution of attributes takes the landscape 'out of the ordinary'.
>
> - It is obvious from the representations received from the public that the byway and footpath network is a popular route for access to and from the wider area for families and dog walkers for instance. Recreational users would find that the current views of the open fields would be irreversibly lost and it [is] these views that adds to the outdoor experience.
>
> - The application site is valued locally because it is part of the open countryside that provides a rural context for the urban area. It is the combination of the physical attributes of the area with how it is perceived that makes a valued landscape."

25. The 2018 Report described the Site in similar terms.

26. In their 2018 Report, Officers expressed the view that the Site fell within the landscape character study area analysed in the Council's Landscape Character Area Assessment in 2009. That Assessment was prepared to describe the evolution of Oldham Borough's rural landscape and to assess its special character, distinctiveness and qualities. The boundaries of the study area were aligned with the boundaries of Green Belt land within the Borough (see the Assessment at [2.17] and Map 1).

27. The Assessment drew on both the natural and cultural features of the area and classified seven different landscape character areas (LCAs) within the study area. These were devised to represent the variations in landscape character within the Borough. Each of these wider LCAs was then further sub-divided into separate landscape character types. These discrete geographical sub-areas were described in the Assessment as possessing common characteristics with the wider area in which they were situated, but also as having a distinct and recognisable local identity.

28. The seven areas are shown in Map 2 of the Assessment (at p14). A large part of the Borough labelled 'Urban Area', containing (*inter alia*) the towns of Oldham, Royton,

Shaw and Lees, was excluded from the study area and so did not form part of the seven LCAs.

29. Area 7 is an area known as the Wharmton Undulating Uplands. This was described as follows in the Assessment at [5.76]:

> "This open upland area sits between the urban fringe of Oldham and the settlements of the Tame Valley whilst providing long views out over the nearby urban areas. Scattered settlements and farmsteads are dispersed throughout the area and are linked by a network of narrow winding lanes. The area is predominantly farmland consisting of improved grassland managed for grazing and silage, although some areas are unmanaged and becoming rushy. These out-bye pastures are defined by a distinctive field pattern of gritstone walls. The farms of the area contain a significant number of horse paddocks whilst makeshift farm buildings associated with diversification are evident throughout the area."

30. This area was said to have the following key characteristics:

> "Open, upland landscape character created by the altitude, scarcity of trees and long views.
>
> A characteristic patchwork of upland pastures including small irregular fields and larger rectangular fields of moorland enclosure.
>
> A network of gritstone walls.
>
> Extensive network of footpaths and Public Rights of Way.
>
> Dispersed settlement pattern comprising scattered farmsteads. A network of narrow winding lanes connect the farmsteads and settlements.
>
> Distinctive vernacular architecture dominated by the millstone grit building stone. Frequent long views across the intersecting valleys."

31. A sub-area of Area 7, Area 7a, was described as 'Urban Fringe Farmland' with the following key features:

> "An open upland landscape character created by the altitude, scarcity of trees and long views.
>
> Frequent long views out over the urban settlements confined within the valleys below.
>
> A characteristic patchwork of upland pastures including small, irregular fields.

> Dispersed settlement pattern comprising scattered farmsteads sometimes in fairly close proximity.
>
> A network of narrow winding lanes connecting the farmsteads and settlements.
>
> Stone walls without grass verges often bound the lanes.
>
> A network of gritstone walls that create the field enclosures.
>
> The stone walls provide shelter and habitat for wildlife and are also of considerable historical/cultural interest.
>
> Wet pastures where agricultural land has not been drained.
>
> Noticeable presence of pylons and transmitters reducing the landscape's remote feel."

32. The 2018 Report concluded as follows in relation to OPOL 12:

> "[The Council's] Landscape Character Assessment (2009) includes the [S]ite within the Wharmton Undulating Uplands area (Area 7). However, it is noted that in the applicants submitted LVIA [Landscape and Visual Impact Assessment] they claim that the site lies within what they consider to be 'The Urban Area' and therefore does not fall within a defined Landscape Character Area. Whilst it is accepted that the current allocated housing site, could be defined as being within the 'Urban Area', it is officer's assertion (*sic*), based upon the work that has been done by [landscape architects], that the OPOL site does fall within the Wharmton Undulating Uplands.
>
> …
>
> The site and *majority* (council emphasis) of the study area falls within Type 7a Urban Fringe Farmland …"

33. Thus the 2018 Report identified OPOL 12 as a landscape type *within* an LCA, viz, Area 7, and assessed the development's landscape impact upon it as 'Major Adverse'.

34. On 7 December 2018, by a vote of nine to one, the Committee refused permission for the development. Members applied the 'tilted balance' in [11(d)(ii)] of the NPPF. In summary, this provides for a presumption in favour of sustainable development, subject to a number of conditions. Paragraphs 10 and 11 provide:

> "10. So that sustainable development is pursued in a positive way, at the heart of the Framework is a presumption in favour of sustainable development (paragraph 11).

> 11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> For plan-making this means that:
>
> (a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;
>
> (b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:
>
> > (i) the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area; or
> >
> > (ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
>
> For decision-taking this means:
>
> (c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> (d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date,[7]
>
> granting permission unless:
>
> > (i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[6]; or
> >
> > (ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

35. Footnote 7 in [11(d)], states:

> "This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites …"

36. As I will explain later, the Council cannot demonstrate a 5YHLS.

37. Footnote 6 in [11(d)(i)] explains that what are being referred to in this sub-paragraph are those policies in the NPPF relating to (inter alia): habitats sites (and those sites listed in [176], eg, special protections areas) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.

38. However, notwithstanding the 'tilt' in favour of development, the Committee concluded that the loss of land designated under Policy 22 of the DPD as OPOL, viz OPOL 12, and the harm to the landscape, significantly and demonstrably (in the language of [11(d)(ii)]) outweighed the benefits of the scheme, including the contribution to the Council's 5YHLS.

39. Some of the Committee's reasons for refusal in 2018 are set out in [4.4] of the 2019 Report:

> "The proposal would result in the loss of OPOL 12 land and subsequent landscape harm and harm to the visual amenity of the Wharmton Undulating Uplands (Area 7a) LCA and Thornley wooded valley landscape since the development will result in a significant fragmentation and loss of Green infrastructure assets and open landscape, as well as having a transformative effect on the openness, local distinctiveness and visual amenity of OPOL 12 and the Wharmton Undulating Uplands (Area 7a) LCA. This harm significantly and demonstrably outweighs the acknowledged benefits of the scheme when weighed against the Local Plan and NPPF policies taken as a whole.
>
> As such, the proposal is contrary to:
>
> - Policy 6 – Green Infrastructure
>
> - Policy 21 – Protecting Natural Environmental Assets; and
>
> - Policy 22 – Protecting Open Land
>
> of the Oldham Local Development Framework, Development Plan Document (November 2011) [ie, DPD] that seek to protect valued landscapes and OPOL land."

40. At [7.13] of their 2019 Report Officers said, after listing some of the benefits of the development, such as the need for housing in Oldham, that the development had been rejected in 2018 because:

> "… Members previously felt that these benefits did not significantly and demonstrably outweigh the loss of OPOL land and the landscape buffer value it provides in this location. Instead, they felt that the residential development of the eastern land parcel is in non-compliance with adopted Core Strategy Policy 22 [of the DPD] in respect of the proposed development of an area of Other Protected Open Land (OPOL) and that the harm this caused weighed against the scheme and was significant enough to support a refusal of the scheme."

41. At [7.44] Officers said that:

> "The Council's previous reason for refusal refers to:
>
> > '… landscape harm and harm to the visual amenity of the Wharmton Undulating Uplands (Area 7a) LCA'
>
> and that allowing the proposal would have:
>
> > '… a transformative effect on the openness, local distinctiveness and visual amenity of the Wharmton Undulating Uplands (Area 7a) LCA'."

The decision in 2019

42. After its application was rejected in 2018 the Interested Party carried out further work and resubmitted it in April 2019. In their 2019 Report the Council's Officers again recommended in favour of the development (see, in particular, at [8.13]-[8.15], [9.1]-[9.2]). In order to understand the issues arising on this application for judicial review it is necessary to consider the 2019 Report in some detail.

43. At [7.15]-[7.31] Officers considered the Council's housing land supply position. At [7.29]-[7.31] they concluded that the Council:

> "7.29 … is currently unable to demonstrate a five year supply of deliverable housing sites. Officers consider that it is not able to demonstrate more than a three-year supply of land for housing. As such, the shortfall in housing supply is significant. Consequently, in the absence of a five year supply of land for housing, Members have to recognise that the proposed new market and affordable housing carries very significant weight in favour of this application and that this weight is required to be applied by current planning legislation.
>
> 7.30Overall the above shows:
>
> - There have been almost no major planning applications in this ward for the last decade;

> - There has been under-delivery of housing and affordable housing within the Saddleworth West and Lees ward over the past ten years when measured against the historic requirement, current requirements and delivery in other wards within the Borough; and
>
> - The Council cannot show a five-year housing land supply.
>
> 7.31 In these circumstances, the delivery of up to 265 dwellings on the site would make a significant contribution to the supply of housing and affordable housing and this is a factor which must weigh in favour of the scheme and should be given weight in the determination of this scheme."

44. Ms Jackson on behalf of the Claimant does not challenge the factual conclusion that the Council cannot demonstrate a 5YHLS.

45. At [7.32]-[7.43] under the heading 'Weight that can be applied to the Council's OPOL policy', Officers concluded that they did not consider it a reason for refusal that the effect on landscape character and visual impact significantly and demonstrably outweighed the development's identified benefits when assessed against the NPPF as a whole. They added at [7.43]:

> "We say this particularly when considering that the Council's OPOL policy is clearly 'out-of date' and therefore carries less weight than it would if the Council could show a five-year land supply."

46. As I will explain later, Ms Jackson challenges this assessment in Ground 1(b) of her Grounds of Challenge.

47. The next section of the 2019 Report considered the Wharmton Undulating Uplands. Whilst the Officers' 2019 recommendation was the same as in 2018, their 2019 Report contained a significantly different analysis in relation to whether the Site was within an LCA, namely the Wharmton Undulating Uplands.

48. Whereas in 2018 the Officers had concluded that the Site fell within this LCA (and, specifically, Area 7a), in 2019, following submissions by the Interested Party, Officers concluded that, in fact, the Site fell *outside* Area 7a and so was *not* part of an LCA and so, for the reasons they explained, *not* part of the Green Belt.

49. The Officers said at [7.47]-[7.53] (emphasis added):

> "7.47 The position of the applicant in submitting this second application was that the site lay outside the Wharmton Undulating Uplands and consequently the weight applied to landscaping harm by Members was overstated in the assessment of the planning balance in the original application.

7.48 Having considered the matter in some detail and taken legal advice, the Council consider[s] that, in this respect, the boundaries of the character areas with the urban area have been set to correspond with inner Green Belt boundaries. This is unsurprising given that the scope of the 2009 LCA was to characterise Green Belt areas. As these are Green Belt boundaries, they were clearly defined and not simply gradual transition lines or elastic concept[s]. *This site is not in the Green Belt. As such, it is clear that this site lies outside the Wharmton Undulating Uplands.*

7.49 Green Belt is, of course, not a landscape characterisation. However, the point is that the 2009 LCA set out to characterise only Green Belt areas and thus it is appropriate that the boundaries it incorporates, where corresponding with the extent of the Green Belt, should be understood to have been drawn accordingly and accorded due precision.

7.50 Secondly, and bringing the previous point to bear on this assessment, it is clear from the relevant plans that the boundary of the Wharmton Undulating Uplands (type 7a) aligns consistently with the inner boundary of the Green Belt in the vicinity of the site. The applicant's [ie, Interested Party's] analysis shows this to be the case. Moreover, the scale of the assessment in the 2009 LCA *does not occasion any difficulty on the facts of the present case in reaching the conclusion that follows from this that the site is outside the Wharmton Undulating Uplands (type 7a).*

7.51 Thirdly, the fact that the site can be said to be close to, or even at, the relevant Green Belt boundary does not mean that it falls within the Green Belt and is thus within the Wharmton Undulating Uplands (type 7a). The acknowledgement that the site is close to, or at the boundary with another area is, in fact, an acknowledgement that it lies outside that other area.

7.52 Finally the fact that the site (or parts of it) may share characteristics of the Wharmton Undulating Uplands (type 7a) is not a reason for regarding the site to be within that area if it is otherwise clear that it is outside it. It might be a reason for thinking that landscape impacts of the development would not be dissimilar on the basis that they would f[a]ll on land with similar characteristics, but that is a conceptually separate point. *Moreover, if the site is outside the Wharmton Undulating Uplands (type 7a), that does not, of course, mean that there could not be landscape effects on it from the development but that they will not be direct effects.*

7.53 In the light of the above, that it would not be reasonable for the Council to argue that the site is within the Wharmton

> *Undulating Uplands. As such, a significant part of the previous reason for refusal is felt to be weak and now has less weight to support it."*

50. In other words, whereas in 2018 Officers concluded that the site fell *within* the Wharmton Undulating Uplands, an area of Green Belt land and an LCA (Area 7), in 2019 they concluded that in fact it fell *outside* that area, and was merely adjacent to it, and that this weakened the reasons for refusing the development.

51. By saying 'Green Belt is not a landscape characterisation', what Officers were saying is that being Green Belt land did not of itself mean that the land has any particular landscape characteristics which mark it out. Much of it may have, but some of it may not.

52. At [7.67] the Officers set out what they saw as the benefits of the development, namely, the economic benefits; the social benefits; and the environmental benefits. At [7.68]-[7.69] they said:

> "7.68 Officers feel that significant weight must be given in the decision-making process to these benefits. In officer's opinion, these benefits significantly and demonstrably outweigh the loss of OPOL land and the landscape buffer value it has in this location. We say this particularly in view of:
>
> - the lack of weight the Council's OPOL policy has because of the Council not having a five-year land supply; and
>
> - the fact that Members previous concerns about the impact of the scheme on the Wharmton Undulating Uplands (Area 7a) LCA are lessened since the site sits adjacent to, but not in it.
>
> 7.69 Overall, the development's land use is consistent with policies and objectives of the development plan to which material weight should be afforded and any conflict with them is clearly outweighed by other material considerations. Officers consider the proposal is sustainable development and that its significant benefits outweigh its limited adverse impacts in land use terms. As such, Officers feel the scheme is acceptable in land use terms, particularly since the proposal would also result in the transfer of land to the adjacent school for their use, the scheme would provide a mix of housing types (and subsequent mixed and balanced community), there is no loss of high quality agricultural land and the scheme is viable enough to meet policy requirements."

53. The first indented paragraph in [7.68] links back to the Officers' conclusion in [7.43] that I set out earlier, and is challenged by Ms Jackson on the same basis in her Ground 1(b). The assessment in the second indented paragraph is challenged in her Ground 1(a).

54. In relation to heritage impacts, at [7.70] et seq Officers noted the proximity of a small number of Grade II listed buildings to the Site, and that the Lydgate Conservation Area

is located between 1km and 1.5km to the east of the Site. At [7.73] they recorded that the Interested Party's heritage statement and supplementary briefing note had concluded on a balance of considerations there would be some limited harm to the significance of Knowls Lane, Knowls Lane Farmhouse and Flash Cottage.

55. At [7.74] they recorded the view of the Council's Conservation Officer in June 2018 that any impact on 'each of the heritage assets affected' (including the Lydgate Conservation Area) would be 'less than substantial'. Her view is quoted in Ms Jackson's Skeleton Argument at [35]:

> "Turning to the assessment made of the impact on Lydgate Conservation Area, whilst I acknowledge that the linear form of development in the Conservation Area is an important aspect of its character, its hilltop location and visibility also contribute to its character as a ridge development in an isolated location. This element of its character, which contributes to its heritage significance, will be harmed by development on the applicant site eroding long distance views. As stated in my original comments, I maintain that this will result in 'less than substantial' harm and acknowledge the intention in the latest comments for the designer to be mindful of views of the area and church in bringing forward the detailed design."

56. Officers' assessment of heritage impact in 2018 was in similar terms, as follows (Core Bundle at p132):

> "The Council have considered the impact of the proposed development on the listed buildings … officers conclude that the proposal would cause 'less than substantial harm' to the designated heritage assets for the purposes of the NPPF.
>
> Turning to the assessment on the impact of the Lydgate Conservation Area (sic), whilst it is acknowledged that the linear form of development in the Conservation Area is an important aspect of its character, its hilltop location and visibility also contribute to its character as a ridge development in an isolated location. This element of its character, which contributes to its heritage significance, will be harmed by development on the applicant site eroding long distance views. This will result in 'less than substantial' harm. Therefore, any reserved matter applications will need to be mindful of views of the area and church in bringing forward the detailed design.
>
> *Conclusion of Impact on Heritage Assets*
>
> It is the opinion of the Conservation Officer that the proposed development, by causing 'less than substantial harm', would fail to preserve the special architectural and historic interest of the Grade II listed building, Knowls Lane Farm, Knowls Lane Farmhouse, Manor Farm and Flash Cottages …

> Given the statutory duty, set out in s 66(1) and s 72(1) of the 1990 Act, the Council must give considerable importance and weight to the desirability of preserving the setting of the listed buildings and preserving and enhancing the setting of the Lydgate Conservation Area in carrying out the planning balance exercise, even where the harm that would be caused has been assessed as 'less than substantial.'"

57. Paragraph 196 of the NPPF provides:

> "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."

58. At [7.75] of their 2019 Report Officers concluded:

> "In accordance with paragraph 196 of the NPPF, whilst giving the heritage harm great weight, Officers consider that it did not outweigh the wider public benefits generated by the proposal. Both the applicant and the Council agree that the public benefits outweigh the less than substantial harm that would be caused to any heritage assets and the effect of the development on those heritage assets is not a reason for refusing the scheme."

59. At [7.79]-[7.80] Officers said:

> "7.79 Officers also considered the significance of the Lydgate Conservation Area and the contribution made by setting to that significance. They conclude that the proposed development would not harm the conservation area and that its significance would be sustained.
>
> 7.80 As a consequence of the above, the scheme is considered acceptable in heritage terms."

60. In [7.79] I think the word 'its' is missing from before 'setting'. In her Ground 2 Ms Jackson relies on the ostensible conclusion that there would be *no* harm to Lydgate Conservation Area as being in conflict with the assessment elsewhere that there would be less than significant harm.

61. At [7.81] Officers considered the impact on the landscape. They acknowledged that:

> "The proposal will involve the loss of an OPOL allocation on the eastern part of the site with the removal of large parts of low-level vegetation. Some trees will also be lost …"

but went on to set out a variety of mitigating measures which would form part of the development, including tree planting and the retention and enhancement of existing public rights of way.

62. At [7.94] Officers again re-iterated that the site was not part of the Wharmton Undulating Uplands, but was adjacent to it.

63. At [7.98] and [7.99] Officers set out the landscape receptors (ie, viewpoints), including OPOL 12, and the development's impact upon their landscape character. The effect on OPOL 12 was assessed at 'Major adverse' at Year 1 of the proposal and 'Major-moderate adverse' at Year 15. For the Wharmton Undulating Uplands the respective assessments were 'Major-moderate adverse' and 'Moderate adverse'. At [7.100] Officers concluded that:

> "… the proposed development would clearly change the landscape character of the area from rural to urban. It is therefore felt that the proposal would have an adverse impact on the landscape resource of major/moderate significance …"

64. At [7.101] in relation to landscape visual impact, Officers concluded:

> "… with high sensitivity receptors and medium/high magnitude of visual effect, it is considered that the scheme would have an adverse impact on visual amenity of major/moderate to major significance, both on completion and beyond 15 years post construction."

65. At [7.104] et seq Officers set out their overall conclusion on the development's landscape impacts (I think in the paragraphs that follow references to the UDP should be read as references to the DPD, where the policies referred to are set out):

> "7.104 The identified moderate adverse effects on the adjacent Wharmton Undulating Uplands (Area 7a) LCA is contrary to UDP policy 6 – Green Infrastructure [GI]. The development will result in significant, loss and fragmentation of GI assets, namely the Thornley Wooded Valley landscape feature and open landscape of the adjacent Wharmton Undulating Uplands (7a). Both features are important to the physical integrity of the identified GI corridor and network which is already significantly eroded by former residential development within the valley landscape.
>
> 7.105 The identified moderate adverse effects on the adjacent Wharmton Undulating Uplands (Area 7a) LCA is contrary to UDP Policy 21 – Protecting Natural Environmental Assets. The development has been found to not protect and conserve the local natural environments functions or provide new and enhanced functional GI; the policy stipulates that development proposals must extend or link existing green corridors as well as conserve

> and reinforce the positive aspects and distinctiveness of the surrounding landscape character.
>
> 7.106 The identified moderate adverse effects on the adjacent Wharmton Undulating Uplands (Area 7a) LCA is contrary to UDP Policy 22. However, these impacts are indirect, rather than direct impacts. Furthermore, the scale, form and layout of the development is considered to have a transformative effect on the local distinctiveness and visual amenity of OPOL 12. However, the OPOL policy is out of date in view of the Council's lack of a five-year housing land supply. As such, this policy does not have significant weight.
>
> 7.107 Nevertheless, on the issue of landscape impact, it is considered that the proposal would harm the character and appearance of the area and would conflict with the relevant development plan policies as outlined above. This landscape harm therefore weighs against the proposal somewhat."

66. The last sentence of [7.106] is, again, a reference back to Officers' earlier conclusion at [7.43].

67. At Section 8 of their Report Officers turned to the key question of the planning balance, ie, the balancing of factors required by [11] of the NPPF.

68. They said at [8.3]-[8.4] (emphasis added):

> "8.3 Paragraph 11 of the Framework explains how the presumption in favour of sustainable development applies. Where the development plan is absent, silent, or the relevant policies are out of date, *permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.*
>
> 8.4 Because the Council's lack of a five-year housing land supply, it is clear that the Council's OPOL policies – and indeed any other policies that restrict development of this land – are out of date. Consequently, it is considered that the presumption in favour of approving the development on the OPOL land can only be displaced if the adverse impacts of approving the development would significantly and demonstrably outweigh the benefits of such development, when assessed against the policies of the NPPF 2018 as a whole."

69. At [8.6] et seq Officers again set out what they saw as the benefits of the development saying that it was 'unarguable that additional housing arising from this scheme would be a significant public benefit for the area.' I think they meant to say 'unarguable *but* that …', however I think the sense of what they were intending to say is clear.

70. At [8.12] they said:

> "Importantly, the Council needs to significantly boost the supply of housing to meet the Borough's needs. The requirement to significantly boost the supply of housing in the district, coupled with the fact that there have been very few major planning applications for housing submitted to and approved by the Council in the past 10 years in the Saddleworth West and Lees ward, attracts substantial weight in favour of granting permission for the proposals. However, the need to boost the supply of housing does not necessarily override all other considerations."

71. At [8.13]-[8.15] Officers concluded:

> "8.13 In this case there are concerns in respect of the adverse effects on adjacent landscape and loss of OPOL land. It is considered that the scheme would cause harm to the character and appearance of the current valued landscape. However, the weight that can be applied to this landscape harm is limited because:
>
> - Firstly, the land in question does not sit in an allocated landscape character area; and
>
> - Secondly, the Council's OPOL policy is out-of-date because of its lack of a five-year housing land supply.
>
> 8.14 Ultimately, the key test in considering the planning balance of this application is whether the harm to the valued landscape is outweighed by the significant benefits new housing brings on an already part-allocated site and that enables the provision of a new link road sought in the Local Plan.
>
> 8.15 Given:
>
> - The significant economic and social benefits associated with the scheme and the positive weight that is given to the environmental benefits of the scheme;
>
> - The fact that the site is part allocated for residential use;
>
> - The site will deliver a long sought, policy compliant link road; and,
>
> - The scheme has no design, ecology, amenity, flood risk, drainage, highways or other impactions that would sustain a reason for refusal,
>
> full planning permission is recommended to be granted for the link road and outline planning permission be granted for the

> residential use since the benefits of the scheme clearly outweigh the harm."

72. It is apparent that the Committee followed this advice when resolving to grant permission. Neither Mr Evans for the Council nor Mr White QC for the Interested Party disputed this.

73. At this point I should make clear that I fully understand that there is considerable local strength of feeling about the development, and that a lot of, if not most, local people oppose it. The Council's consultation drew over 200 responses opposing the development, with only one response in favour of it. The Committee meeting on 1 July 2019 was attended by many members of the public. The Committee voted to approve the development by seven votes to three (with one abstention). The way in which the meeting was conducted generated a large number of complaints, as explained by the Claimant in his witness statement. A subsequent Council investigation acknowledged that the decision-making process had been visibly 'chaotic'.

74. All of that said, my task is solely to decide whether the Council's decision was a lawful one, and not whether the development is a good or bad idea. This was emphasised by Sullivan J in *R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] EWHC 74 (Admin), [5], when he said that an application for judicial review in relation to a planning officer's report is not an opportunity for the Court to review the planning merits of the proposal, such judgments being for the LPA alone to make.

Grounds of challenge

75. This claim is brought on four grounds. Ms Jackson for the Claimant argued that:

a. The 2019 Report significantly misled the Committee about the correct approach to [170] of the NPPF and the tilted balance in [11(d)(ii)] in that:

i. Having concluded that the Site had physical attributes which raised it above 'ordinary' countryside, and that it therefore qualified as a 'valued landscape' for the purposes of [170] of the NPPF, Officers misdirected members as to the relevance (or irrelevance) of its inclusion within an LCA (viz, the Wharmton Undulating Uplands), when ascribing weight to the conflict with this policy for the purposes of the tilted balance.

The Assessment in 2009 only considered the landscape characteristics of the designated Green Belt area of the Borough, Green Belt land not being itself a landscape designation. Even then, the Assessment did not ascribe landscape *value*, but instead simply described the landscape *characteristics* of the land falling within the study area. It was therefore irrelevant when determining the weight to be given to harm to the Site as a valued landscape under [170] of the NPPF, that the Site was now deemed to fall outside the boundary of Area 7.

Further or alternatively, the reasoning in the Report as to why the weight to be given to this landscape harm was materially reduced for this reason was illogical and irrational (Ground 1(a));

ii. The Report also misdirected members by advising that only limited weight should be given to the harm to the valued landscape because the Council's OPOL policy is out of date. As the Council was unable to demonstrate a 5YHLS, the tilted balance applied in favour of granting permission. However, once this policy test was engaged, the absence of a 5YHLS did not also dictate that only limited weight could be given to the harm to the valued landscape in the balancing exercise required under paragraph [11(d)(ii)] of the NPPF. By following this misleading advice, members failed properly to weigh the adverse impacts for the purposes of [11(d)(ii)] and/ or to give 'due weight' to the 'harm' side of the planning balance: see *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, [47] (Ground 1(b)).

b. By following the approach in the 2019 Report, Members erred in law by failing to apply s 72(1) of the PLBCAA properly or all and/or by failing to give any weight (let alone any significant weight) to the less than substantial harm to the Lydgate Conservation Area in the planning balance. Further or alternatively, Members failed to act consistently by following Officers' advice that no harm would be caused to the Lydgate Conservation Area, contrary to the approach adopted in respect of the 2018 application, and/ or failed to provide adequate reasons for their decision. (Ground 2)

c. Members failed to have regard to relevant development plan policies and/ or failed to have regard to a highly material consideration, by failing to consider whether or how the development would comply with Policy 18 of the DPD and/or [153] of the NPPF concerning the energy requirements of the development and/ or by failing to consider whether (and if so, how) the proposal would mitigate the impacts of climate change or contribute positively to the objective of moving to a low carbon economy. (Ground 3)

76. Permission was granted on all grounds by Lang J on 25 February 2020.

77. I held a remote hearing on 28 July 2020. I am grateful to all counsel for their written and oral submissions.

Legal principles and policies

Principles

78. These were not materially in dispute between the parties and can be summarised as follows.

79. Section 70(2) of the TCPA and s 38(6) of the PCPA 2004 provide that proposals for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The former section provides:

> "(2) In dealing with an application for planning permission or permission in principle the authority shall have regard to -
>
> (a) the provisions of the development plan, so far as material to the application …"

80. Section 336 provides that 'development plan' must be construed in accordance with s 38 of the PCPA. Section 38(3) provides that for areas outside Greater London the development plan is:

> "(a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region), and
>
> (b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and
>
> (c) the neighbourhood development plans which have been made in relation to that area."

81. Section 38(6) provides:

> "(6) 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.".

82. In this case it was common ground that the development plan comprises the DPD and the saved policies from the UDP.

83. When considering applications which may impact upon a conservation area, s 72 of the PLBCAA requires that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area:

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

84. Where an LPA's planning decision is challenged on the basis that the report by its planning officers is legally erroneous or misleading, then the approach the Court must take was summarised by Lindblom LJ in *R (Watermead Parish Council) v Aylesbury*

Vale District Council [2017] EWCA 152, [22] in a passage which has become well-known:

> "The law that applies to planning officers' reports to committee is well established and clear. Such reports ought 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). The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way – for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy – that the court will be able to conclude that their decision was rendered unlawful by the advice they were given (see the judgment of Sullivan LJ in *R (on the application of Siraj) v Kirklees Metropolitan District Council* [2010] EWCA Civ 1286, at paragraph 19, citing the familiar passage in the judgment of Judge LJ, as he then was, in *R. v Selby District Council, ex parte Oxton Farms* [1997] EGCS. 60). 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)."

85. Where a planning decision is made by a planning committee, and the committee follows the recommendation of their officers in a report, the public is entitled to look to the officers' report for the reasoning that informed that decision. The decision will be vitiated by errors in the report where, on a fair reading of the report as a whole, officers have materially misled Members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. If the Committee's decision would, or might, have been different had the error in the report not been made, then the Court will conclude that the decision itself was rendered unlawful by that advice: *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [42(2)].

86. Specifically, the 'tilted balance' was discussed by Lord Carnwath in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865. The appeals related to the proper interpretation of [49] of the then edition of the NPPF which was in these terms:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

87. Paragraph 14 of that edition of the NPPF was in broadly similar terms to [11] of the current edition. Lord Carnwath said at [12]:

> "12. Paragraph 14, which is important in the present appeals, deals with the 'presumption in favour of sustainable development', which is said to be '[at] the heart of' the NPPF and which should be seen as "a golden thread running through both plan-making and decision-taking". It continues:
>
> > 'For plan-making this means that:
> >
> > • local planning authorities should positively seek opportunities to meet the development needs of their area;
> >
> > • local plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
> >
> > - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> >
> > - specific policies in this Framework indicate development should be restricted [footnote 9].
> >
> > For decision-taking this means [footnote 10]:
> >
> > • approving development proposals that accord with the development plan without delay; and
> >
> > • where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
> >
> > - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
> >
> > - specific policies in this Framework indicate development should be restricted.'"

88. At [54]-[56] Lord Carnwath said:

> "54. The argument, here and below, has concentrated on the meaning of paragraph 49, rather than paragraph 14 and the interaction between the two. However, since the primary purpose of paragraph 49 is simply to act as a trigger to the operation of the "tilted balance" under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are "significantly and demonstrably" outweighed by the adverse effects, or where "specific policies" indicate otherwise. (See also the helpful discussion by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [42] et seq.)
>
> 55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgment, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgment, not dependent on issues of legal interpretation.
>
> 56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed "out-of-date" under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as "out-of-date" merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgment for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the 'tilted balance'."

89. In *Hallam Land Management Ltd*, supra, [46]-[47], [51], Lindblom LJ described the balancing exercise required, once the tilted balance is engaged, as follows:

> "46. As this court said in *Hopkins Homes Ltd.* (in paragraph 47), the policies in paragraphs 14 and 49 of the NPPF do not prescribe

how much weight is to be given to relevant policies of the development plan in the determination of a planning application or appeal. Weight is always a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H) (paragraph 46). It will "vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements". The decision-maker must judge "how much weight should be given to conflict with policies for the supply of housing that are out-of-date". This is "not a matter of law; it is a matter of planning judgment" (see the first instance judgments in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) (at paragraphs 70 to 75), *Phides* (at paragraphs 71 and 74), and *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council* [2015] EWHC 1173 (Admin) (at paragraphs 87, 105, 108 and 115).

47. The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth.

…

51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet."

90. Paragraph [47] of the Court of Appeal's judgment in *Hopkins Homes*, supra, said:

> "47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy—such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment: see Lindblom J's judgment in *Crane's* case [2015] EWHC 425 at [70]–[75], Lindblom J's judgment in the *Phides Estates (Overseas) Ltd* case [2015] EWHC 827 at [71]–[74], and Holgate J's judgment in *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] JPL 1151, paras 87, 105, 108 and 115."

91. There is a statutory presumption against granting planning permission for developments which would cause harm to heritage assets: see *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137.

92. The principle of consistency in planning decision-taking is well-established: see *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137, 145. The principle is exercised with a view to the public interest in planning decisions in like cases being consistent or, if inconsistency arises, 'a clear explanation for it being given in the second of the two decisions concerned': *Hallam Land Management Ltd*, supra, [74].

93. Earlier I explained what a valued landscape is in planning terms. The quality of the surrounding area may also be relevant to the determination of whether a site is or falls within a valued landscape, or not. Thus, in *CEG Land Promotions II Limited v Secretary of State HCLG and Aylesbury Vale District Council* [2018] EWHC 1799 (Admin), [59], Ouseley J observed (by reference to his earlier judgment in *Stroud*, supra) that it would be absurd and artificial to approach the question of whether a landscape was a valued landscape by examining the demonstrable physical attributes of the development site

alone. At [52] he added when considering the relationship between local plan landscape policies and [14] (now [11]) and [109] (now [170]) of the NPPF:

> "52. Of course, when judging a 'tilted balance' under [14] which requires harm and benefit to be measured against the Framework policies, greater weight can rationally be given to harm which breaches its policies than to harm which only breaches Local Plan policies, or to put it another way, greater weight can be given to those policies than to other Local Plan policies. After all, s 38(6) [of the TCPA] means that Local Plan policies which are inconsistent with the Framework still provide the statutory basis for the decision. But the weight given to the 'other material considerations' means that those which accord with the Framework are weightier."

94. Finally, Ms Jackson reminded me that the mitigation of climate change is a material planning consideration in the determination of planning applications, by virtue of [148], [153] and [154] of the NPPF: see eg *R (McLennan) v Medway Council* [2019] EWHC 1738 (Admin), [22]

Policies

95. As I have said, the development plan in this case is the DPD (adopted on 9 November 2011) and the saved policies of the UDP. Both the DPD and the UDP therefore predate the publication of the 2012 edition of the NPPF.

96. Policy 1 of the DPD puts the mitigation of climate change at the forefront of the Council's development plan strategy, by stipulating that all development will be required to 'adapt to and mitigate against climate change and address the low carbon agenda'. The explanatory text expands upon this policy priority in a local context and notes (for example) that:

> "5.12 Greater Manchester's LCEA [Low Carbon Economic Area] vision is that by 2015 Greater Manchester has established itself as a world leader in transforming to a low carbon economy. The physical retrofit and supply of energy to both the residential and non-residential building stock plays a key role in achieving this vision.
>
> ...
>
> 5.23 Policy 18 provides details of how we will reduce energy consumption and increase energy conservation by securing use of appropriate low carbon and renewable energy technologies."

97. Policy 6 is entitled 'Green Infrastructure'. It advises that:

> "Development proposals, where appropriate, must:

> a. promote and enhance the borough's Green Infrastructure network. This currently consists of nature conservation sites, strategic recreation routes, green corridors and links, canals and open spaces which are defined below;
>
> …
>
> g. enhance and reinforce distinctive elements of the borough's landscapes and have regard to the Oldham Landscape Character Assessment…"

98. Policy 17 safeguards land for the extension of the Lees New Road.

99. Policy 18 is entitled 'Energy'. It states that when determining planning applications, the Council will have regard to the aims and objectives specified in the Policy. It goes on to state that:

> "Development must follow the principles of the zero-carbon hierarchy. This is outlined in the Government's `Sustainable New Homes - The Road to Zero Carbon: Consultation on the Code for Sustainable Homes and the Energy Efficiency standard for Zero Carbon Homes. This will be achieved through:
>
> - energy efficiency: the first priority is to ensure a high level of energy efficiency in the design and fabric of the building and
>
> - carbon compliance: the second priority is the minimum level of carbon reduction through energy efficient fabric and on-site technologies (including directly connected heat networks) and
>
> - allowable solutions: a range of measures available for achieving zero carbon beyond the minimum carbon compliance requirements.
>
> All developments over 1,000 square metres or ten dwellings and above (until such time that all development is required by the Code for Sustainable Homes to achieve zero carbon) are required to reduce energy emissions in line with the targets set out in Table 8. These targets are taken from the Greater Manchester Decentralised and Zero Carbon Energy Planning study...
>
> Compliance with the targets must be demonstrated through an energy statement which must be assessed to the council's satisfaction. Developers will be expected to meet the targets unless it can be clearly demonstrated by the developer that it is not financially viable and would prejudice the proposed development.
>
> ...

> Where possible, new development will be required to connect to or make contributions to existing or future decentralised heat or power schemes. Development should be sited and designed in a way that allows connection to decentralised, low and zero carbon energy sources, including connections at a future date or phase of the development... Where possible new development will be used to help improve energy efficiency and increase decentralised, low-carbon energy supplies to existing buildings."

100. Policy 21 is entitled "Protecting Natural Environmental Assets". It states, insofar as relevant:

> "New development and growth pressures must be balanced by protecting, conserving and enhancing our local natural environments, Green Infrastructure, biodiversity, geodiversity and landscapes to ensure a high quality of life is sustained. The council will value, protect, conserve and enhance the local natural environment and its functions and provide new and enhanced Green Infrastructure.
> …
> Development proposals must:
> …
> d. have regard to the principal landscape objective for the relevant landscape character area and type found within the Oldham Landscape Character Assessment. Development must enhance the visual amenity of the area, including Green Belt land, through conserving and reinforcing the positive aspects and distinctiveness of the surrounding landscape character."

101. Policy 22 is entitled 'Protecting Open Land'. It provides, insofar as relevant:

> "The majority of the borough's open land is designated Green Belt. The main purpose of the Green Belt is to keep land permanently open. Pressure for development in the Green Belt is generally small-scale developments such as the re-use of agricultural buildings. The borough also has locally protected open countryside called `Other Protected Open Land` (OPOL) which aims to preserve the distinctiveness of an area
>
> …
>
> Development on OPOL will be permitted where it is appropriate, small-scale or ancillary development located close to existing buildings within the OPOL, which does not affect the openness, local distinctiveness or visual amenity of the OPOL, taking into account its cumulative impact. Where appropriate, development will be screened or landscaped to minimise its visual impact."

102. The supporting text to the policy advises that the OPOL identified in the 2006 UDP (including the eastern part of the Site) will continue to be protected. At [6.142] the text advises that:

> "6.142 OPOL is open land which, while not serving the purposes of the Green Belt, is locally important because it helps preserve the distinctiveness of an area. As well as providing attractive settings, they provide other benefits, such as informal recreation and habitats for biodiversity, therefore helping to provide sustainable communities and help mitigate climate change."

103. I turn to the NPPF. The relevant paragraphs are as follows.

104. Paragraph 8 identifies the three overarching objectives of the planning system, in order to achieve sustainable development, namely the economic, social and environmental objectives. Mitigating and adapting to climate change, including moving to a low carbon economy, is specifically defined as part of the environmental objective.

105. Earlier, I set out [11], footnote 6, footnote 7, and the tilted balance.

106. Paragraph 153 provides that:

> "In determining planning applications, local planning authorities should expect new development to:
>
> a) comply with any development plan policies on local requirements for decentralised energy supply unless it can be demonstrated by the applicant, having regard to the type of development involved and its design, that this is not feasible or viable; and
> b) take account of landform, layout, building orientation, massing and landscaping to minimise energy consumption."

107. I set out [170] and [196] of the NPPF earlier.

108. Paragraph 193 provides:

> "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."

109. Finally, in relation to the Council's Landscape Character Assessment carried out in 2009, [1.2] explained the methodology of the assessment:

> "Landscape Character Assessment is a method of describing an area in a systematic way. It describes what makes a place distinctive. It does not assign values to landscapes."

110. Under the heading 'Study Area' the LCA identifies the study area as follows:

> "2.17 The location plan and study area is shown in Map 1. It covers the Green Belt surrounding Oldham…"

111. Paragraph 3.1 confirmed that 'this [Assessment] presents a characterisation of the Borough's Green Belt areas.'

112. The Assessment did not, therefore, assess the landscape character of areas falling outside the Green Belt, including the Site.

The parties' submissions in summary

The Claimant's submissions

113. In relation to Ground 1(a), Ms Jackson submitted that because Officers accepted in [7.82] of their 2019 Report that the Site was a valued landscape, the fact that the development did not protect and enhance it, *per* [170(a)] of the NPPF, meant that there was an adverse impact which had to be weighed in the tilted balance under [11(d)(ii)].

114. She said that in [8.13] Officers were addressing the harm to the Site as a valued landscape. She submitted that the Report was erroneous when it came to advising Members on the weight that should be given to the harm to the Site. She said that on a proper analysis, the fact that the Site had been found not to fall within an LCA was irrelevant to the question of how much weight should be given to the conflict with the principle in [170(a)] caused by the development's adverse impact. She said that was because:

    a. The Assessment in 2009 did not consider the landscape characteristics of the Site because it fell outside the Green Belt and hence the study area. The intrinsic landscape value of the Site was instead correctly identified by Officers at [7.82]. The relationship with the wider landscape was held, on that analysis, to enhance the Site's landscape value.

    b. Moreover, the explicit function of the Assessment was simply to identify the characteristics of land falling within the study area. Consideration of the characteristics identified in the Assessment might help to inform an assessment of landscape value but inclusion in the Assessment was not, therefore, a landscape designation in its own right, and the Assessment did not purport to ascribe landscape *value* at all (as opposed to describing landscape *characteristics*).

    c. The Assessment study area was defined simply by reference to the boundary of the Green Belt, which is not a landscape designation. The fact that the Site fell outside an LCA therefore said nothing whatsoever about the value of the Site in landscape terms, let alone materially reducing the weight that could be attached to harm to this landscape.

115. Further or alternatively, Ms Jackson said that the advice in the Report was illogical and irrational. Having acknowledged that: (a) the Site was a valued landscape for the reasons

set out in [7.82] (and would therefore have a higher landscape value than much of the land considered in the Assessment, much of which would be 'mere countryside'); and (b) that the landscape impacts of the development would not be dissimilar, regardless of whether the Site fell within or adjacent to the LCA ([7.52]), it is impossible to understand how the weight to be attributed to the harm to the valued landscape could have been said to be materially reduced, merely as a result of the Council's revised opinion about the location of the Site outside the boundary.

116. In summary, therefore, Ms Jackson said that it is clear that the Report significantly misled Members, by advising that only limited weight should be given to the conflict with [170] of the NPPF which the development would cause, because the Site did not sit within an LCA area and/or the advice on this critical issue (which Members clearly accepted in resolving to grant permission contrary to their previous decision) was illogical and irrational.

117. In other words, Ms Jackson's short point in relation to Ground 1(a) was that just because the Site had been found on further analysis to fall outside an LCA did not affect the weight that had to be afforded to the harm to OPOL land which the development would entail when the tilted balance was applied.

118. In relation to Ground 1(b), Ms Jackson said that there had been a misdirection by Officers concerning the correct approach to the tilted balance in [11(d)(ii)] of the NPPF.

119. She pointed out that the second factor said by Officers to limit the weight that could be given to the harm to the Site as a valued landscape which the development would cause was that the Council's OPOL policy was out-of-date because of the Council's lack of a 5YHLS ([8.4] and [8.13]). She said that this advice was erroneous as a matter of law.

120. She said the Supreme Court had made clear in *Hopkins Homes*, supra, that a finding that the Council cannot demonstrate a 5YHLS merely acts as a trigger to the operation of the tilted balance. It does not dictate the weight that is to be given to competing policies, once the tilted balance is engaged. On the contrary, she said that the planning balance required under [11] can only be struck if the considerations on either side of the balance are given 'due weight', having regard not only to the extent of any housing shortfall but also to the nature of the policy or policies weighing on the other side of the balance and the implications of their being breached. She also relied on *Hallam Land,* supra, [47].

121. Hence, Ms Jackson submitted that the 2019 Report significantly misled Members by advising them that the inability to demonstrate a 5YHLS meant, in and of itself, that only 'limited' or 'less than full' weight could be given to the harm to the valued landscape. The fact that the Council could not demonstrate a 5YHLS meant that any such harm would need significantly and demonstrably to outweigh the benefits of the scheme, including the contribution to the Council's housing supply. She said this inability did not mean, however, that the weight to be given to that harm was automatically also 'limited', when undertaking that balancing exercise. She argued that if this was the necessary consequence of concluding that there was a 5YHLS shortfall, it would never be possible for the adverse impacts of a scheme to attract sufficient weight to outweigh the benefits, once the tilted balance was engaged.

122. Ms Jackson said that what she called a 'holistic reading' of the 2019 Report (in particular, [7.32]-[7.42]) lent further weight to the Claimant's contention that Members were significantly misled as to the correct approach to [11(d)(ii)] and the balancing exercise required. She submitted that having advised at [7.43] that [11(d)(ii)] was engaged, Officers went on to advise Members that the adverse impact of the development in terms of landscape harm, did not significantly outweigh the benefits for two main reasons: firstly, because the OPOL policy is 'clearly out of date and therefore carries less weight than it would if the Council could show a five-year land supply'; and, secondly, and following on from this, because the UDP Inspector's view that it was 'imperative that the OPOL 12 land remains open' could no longer therefore be given enough weight to sustain a reason for refusal. She said this section of the Report unlawfully treated the absence of a 5YHLS as being determinative of the weight to be given to the landscape harm, and thus of the question of whether permission should be granted or refused.

123. On Ground 2, Ms Jackson said that Officers had failed to apply s 72(1) PLBCAA and/or failed to act consistently with regard to the impact on a designated heritage asset and/or had failed to provide adequate reasons.

124. As explained above, the consultation response from the Council's Conservation Officer, dated 21 June 2018 (referred to in [7.74] of the 2019 Report), concluded that there would be 'less than substantial harm' to the Lydgate Conservation Area as a result of the development.

125. However, Ms Jackson said that Officers' advice in the 2019 Report as to the heritage impact on the conservation area was inconsistent and opaque. She said that on the one hand, Officers appeared in places to have advised that the Lydgate Conservation Area *would* be affected by the proposals in line with what the Conversation Officer had reported. On the other hand, Ms Jackson said that Officers had stated that the proposal would *not* harm the conservation area at all (at [7.79]). She said that no explanation had been given as to why Officers had departed from the consistent view of the Conservation Officer, or the advice in the 2018 Report, that the setting of the Lydgate Conservation Area would be harmed by the development.

126. She made the forensic argument that the Council and the Interested Party were unable to agree as to the conclusions actually reached in the 2019 Report, concerning this impact:

    a. The Council had argued in its Grounds of Defence at [17] that it was 'obvious' that 'the reason that harm to the Lydgate Conservation Area was not considered in the balancing exercise as part of the treatment of heritage issues… was because of the conclusion in paragraph 7.79 of the [2019 Report] … that the proposed development would not harm the conservation area and that its significance would be sustained.'

    b. By contrast, she said that the Interested Party had argued that the less than substantial harm to the Lydgate Conservation Area *was* acknowledged by Officers and was explicitly taken into account and weighed in the balance. She said the Interested Party had contended in its Summary Grounds at [5.1]-[5.2] that it 'is simply inconceivable that the express statement in paragraph 7.75 [of the 2019 Report] can give rise to the contention that the less than substantial harm to the conservation area was not considered at all …'

127. Relying on *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, [36], Ms Jackson said there is substantial doubt as to whether the Committee erred in law by failing to apply s 72(1) and/or to take account of the harm to the Conservation Area in undertaking the tilted balance because:

    a. The balancing exercise required by [196] of the NPPF was referred to at [7.70]-[7.78] of the 2019 Report. However, only the harm to the listed buildings identified at [7.71] (viz, Knowls Lane Farmhouse, Knowls Lane Farm, Manor Farm and Flash Cottages) was taken into account in this exercise. She argued that the less than substantial harm to the Lydgate Conservation Area, as identified by the Council's Conservation Officer, was not considered at all. If the correct interpretation is that put forward by the Interested Party (ie that less than substantial harm to the Conservation Area was recognised and acknowledged by Officers), it is clear that the Committee failed to give any weight, let alone significant weight, to the identified harm to the Lydgate Conservation Area, or to apply the statutory presumption in s 72(1) of the PLBCAA with regard to the harm to this heritage asset;

    b. If, on the other hand, the correct interpretation is that put forward by the Council, ie, that Officers did in fact conclude that *no* harm would be caused to the Lydgate Conservation Area, that approach was contrary to the well-established principle of consistency in planning decision-making. Given that the previous application was materially identical to the current scheme some explanation for this change of position (from less than substantial harm to no harm) was required, particularly as it was inconsistent with the advice of the Council's own Conservation Officer, and there was no such explanation.

128. On either analysis, therefore, Ms Jackson said this ground of challenge should succeed. The harm to heritage assets (and the number of heritage assets affected) was a highly relevant adverse impact to be weighed in the overall balance under [11(d)(ii)], both in its own right and as part of the landscape harm caused by the proposals.

129. Lastly, in relation to Ground 3, Ms Jackson said that the Council had failed to have regard to Policy 18 of the DPD and/or had failed to consider whether or how the development would satisfactorily contribute towards mitigating the impacts of climate change.

130. She said that Policy 18 sets out ambitious energy emission reduction targets for new developments, as well as requirements for new development to make contributions to existing or future decentralised heat or power schemes. This is consistent with [153(a)] of the NPPF, which was also therefore a material consideration in the determination of the application.

131. However, Ms Jackson said that neither Policy 18 nor [153(a)] were addressed at all in the 2019 Report, and no energy statement was submitted in support of the application as required by Policy 18.

132. She said that the Council and the Interested Party were wrong to contend that these matters could lawfully be left to be dealt with at the reserved matters stage. She pointed to the language of Policy 18, which she said expressly requires the Council to have regard

to a wide range of policies and standards relating to climate change and the zero-carbon target 'when determining planning applications'. She therefore said that the question of whether development complies with these energy policies and standards plainly cannot be deferred to the reserved matters stage.

133. For any or all these reasons, Ms Jackson therefore said that I should quash the Council's decision dated 5 December 2019.

The Council's submissions

134. In response, on behalf of the Council, Mr Evans submitted that the issues to be decided were:

    a. Whether the Council fell into error in relation to the weight to be given to [170] of the NPPF and the relevance of the Council's Landscape Character Assessment to this issue;

    b. Whether the Council fell into error in relation to weighting issues under the tilted balance in [11(d)(ii)] of the NPPF.

    c. Whether the Council failed to apply s 72(1) of the PLBCAA and/or failed to act consistently with regard to the impact on a designated heritage asset and/or failed to provide adequate reasons.

    d. Whether the Council failed to have regard to Policy 18 of the DPD and/or failed to consider whether the development would satisfactorily contribute towards mitigating the impact of climate change.

135. In relation to Ground 1(a), Mr Evans said the Claimant put the matter in two ways: (a) the 2019 Report misled Members because the fact the Site was considered not to fall within a LCA was irrelevant to the question of how much weight should be given to the conflict of the development with [170] of the NPPF in relation to valued landscapes; and (b) [8.13] of the 2019 Report (where it was said harm would be limited because the Site does not sit in an allocated landscape area) was illogical and irrational.

136. Mr Evans submitted that neither variant of the ground should succeed, and that the Claimant's submissions took what was said in the 2019 Report out of its proper context and treated the notion of whether the Site fell within a LCA area at an abstract level without sufficient regard to the particular facts of the case. He said that the Claimant had sought to create an error of law out of what was a planning judgment and that the 2019 Report was not misleading.

137. He said that important context for the statement in [8.13] was to be found in [7.44] to [7.53]. Mr Evans said these paragraphs carefully explained why it was that officers considered that, contrary to a plank of the previous reason for refusal, the Site could not be considered to fall within the Wharmton Undulating Uplands LCA so that the weight to be given in that reason for refusal to the effect of the development on that LCA had to be reduced accordingly. It was that particular LCA with which [8.13] was concerned.

138. Mr Evans said that the previous reasons for refusal in 2018 had identified, on the basis that the Site was within the Wharmton Undulating Uplands, landscape harm and harm to the visual amenity of that area as well as 'a transformative effect on the openness, local distinctiveness and visual amenity of … the Wharmton Undulating Uplands (Area 7a) LCA' (as quoted in 7 December 2018 decision notice) The 2019 Report at [7.44] confirmed this point. At [7.53] the 2019 Report also confirmed that this had been a significant part of the previous reason for refusal.

139. Mr Evans' Skeleton Argument at [9] said it was a matter of 'unexceptionable planning judgment' that the conclusion reached in the 2019 Report at [7.44] to [7.53] that the Site was not, in fact, in the Wharmton Undulating Uplands LCA, should effect a reduction in the weight that could be afforded to the impact of the development on that LCA and its characteristics. So it was that the conclusion was then reached in [7.53] of the 2019 Report 'that it would not be reasonable for the Council to argue that the site is within the Wharmton Undulating Uplands' with the consequence that 'a significant part of the previous reason for refusal is felt to be weak and now has less weight to support it'. Similarly, [7.68] of the 2019 Report recorded that, 'Members previous concerns about the impact of the scheme on the Wharmton Undulating Uplands (Area 7a) LCA are lessened since the site sits adjacent to, but not in it.' Mr Evans said that seen in that context, the reference in paragraph [8.13] of the 2019 Report to the Site not being in an allocated LCA area, with its attendant consequence for the weighting of landscape harm, was a perfectly understandable reference to the previous sections of the Report namely [7.44] to [7.53] and [7.68]. Hence it was that [8.13] of the Report stated (repeating in substantially the same terms what had been said in [7.53]) that 'the Council's previous reason for refusal is not as robust as Members previously considered.'

140. Mr Evans argued that, contrary to the Claimant's submission, the fact that the Site did not in fact fall within the Wharmton Undulating Uplands LCA was *not* irrelevant to the question of how much weight should be given to the conflict of the development with the protection and enhancement required to be accorded to valued landscapes by the NPPF. The fact that the Site did not in fact fall within the Wharmton Undulating Uplands was the specific point at issue, not the abstract question of whether the Site was within an LCA. He said the fact that the Site was not within the Wharmton Undulating Uplands was plainly relevant to the overall evaluation (including the valued landscape issue) of the weight to be attached to the landscape harm occasioned by the proposal. That was particularly so given that harm to this LCA area had loomed large in the previous reason for refusal. He said it was clear that members of the Committee were now being advised that the harm could not be considered as extensive as they had thought.

141. Turning to Ground 1(b), Mr Evans said that this ground took issue with two sections of the 2019 Report. The first related to the second part of [8.13], which referred to the Council's OPOL policy (Policy 22 of the DPD) being out-of-date because of the lack of a 5YHLS. He said the claim did not dispute that the Council was correct to proceed on the basis that its OPOL policy was out-of-date by virtue of the lack of a 5YHLS. He said the source of the alleged error was said to lie in the advice in [8.13] that, in consequence of the OPOL policy being out-of-date, the weight that was to be attached to the landscape harm found to exist was 'limited' or 'less than full'.

142. Mr Evans said that the second section of the 2019 Report which was relied upon in this ground of challenge was [7.43], which contained advice to Members similar to that found

in [8.13]. Paragraph 7.43 concluded that the OPOL policy was 'clearly out-of date' and therefore that landscape impact 'carries less weight than it would if the Council could show a five-year land supply.' It then went on to say that it was 'this fact which means that the UDP Inspectors view at the 2011 UDP inquiry – that it is imperative that the OPOL 12 land remains open – cannot be given enough weight to sustain a reason for refusal since this view was taken under a different policy regime when weight applied to having or not having a five-year housing land supply was not a material planning consideration.' Mr Evans said that the Claimant's Skeleton Argument alleges that the references to 'weight' in these passages betrayed a legal error.

143. Mr Evans said that in each case the error which was alleged to have occurred was that the 2019 Report proceeded wrongly on the basis of an 'automatic' (per [73] of the Claimant's Skeleton Argument) reduction in the weight to be attached to landscape harm following the absence of a 5YHLS or on the basis that such a deficiency in supply was 'determinative' (per [75]) of the weight to be given to landscape harm. Mr Evans submitted that there was no legal error and that the 2019 Report was not misleading. He said it was all a matter of weight and planning judgment, which was a matter for the planning authority. He said that the weight to be attached to the requirement to boost housing supply and delivery, on the one hand, and the weight to be attached, on the other, to policies (and the harm flowing from their breach) which restrict supply are necessarily interrelated. He relied on *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] 1 WLR 1865, [83]. That decision related to the 2012 NPPF, but Mr Evans said it held equally good in respect of the issue presently being considered for the current version of the NPPF which similarly contains the objective of boosting significantly the supply of homes (at [59]). He also referred me to the judgment of Lindblom LJ in *Hallam Land Management Ltd*, supra, [47], which I quoted earlier.

144. In relation to Ground 2, and the alleged failure to apply s 72(1) of the PLBCAA and/or failure to act consistently with regard to the impact on a designated heritage asset and/or failure to provide adequate reasons, Mr Evans replied that there had been no failure to apply s 72(1), no legally operative failure to act consistently with regard to the impact on a designated heritage asset, and no such failure in relation to the provision of reasons.

145. Mr Evans explained the background and the work done in 2018 which had produced the Conservation Officer's opinion of 'less than substantial harm'. This then informed the conclusion in the 2018 Report that any harm was outweighed by the benefits of the development.

146. Mr Evans said Officers' overall reasoning was clear and that it would be overly legalistic to read the various paragraphs as somehow being in conflict. He said to read them in this way would violate the injunction in *Mansell*, supra, [42], that 'excessive legalism' should be avoided in relation to the planning system.

147. Mr Evans said that in light of the conclusion in [7.79] of the 2019 Report that there would be no harm to the Lydgate Conservation Area, the contention that the Council had failed to apply s 72(1) of the PLBCAA (and the statutory presumption it embodies) on the basis of failure to take account of harm to the Lydgate Conservation Area could not be sustained. Equally, any complaint about an alleged failure to carry over into the tilted balance under [11(d)(ii)] of the NPPF harm to the Lydgate Conservation Area fell away. He said so much was accepted in the Claimant's Skeleton Argument at [80(b)] if it is

accepted that the 2019 Report had in fact concluded that no harm would be caused to the Lydgate Conservation Area.

148. Mr Evans said there was nothing in the claim of inconsistent reasoning. There was no obligation on the Council's Officers to provide an explanation of the present change of position (on the basis of no harm, as opposed to less than significant harm), and relied on *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137, 145-147. That case shows that the obligation to provide an explanation arises where a later decision maker disagrees with an earlier decision-maker on a critical aspect of a previous decision and comes to a different conclusion on the point leading to a different decision. That situation simply did not arise in the present case. That was because, primarily, the heritage impact of the development (which related not just to the Lydgate Conservation Area but also listed buildings on Knowls Lane) was never in fact a critical aspect of the previous decision in the sense of providing any ground for its refusal.

149. Finally, in relation to Ground 3, and the alleged failure to have regard to Policy 18 of the DPD and/or the alleged failure to consider whether the development would satisfactorily contribute towards mitigating the impact of climate change, Mr Evans replied that none of the responses as summarised at [6.1] to [6.4] of the 2019 Report had suggested that the development should be refused because of conflict with Policy 18 of the DPD [CB2/298-305] or on the basis that it would not contribute satisfactorily towards mitigating the impact of climate change. No one had suggested that it would be possible for the (outline) residential element of the development to comply with the requirement in Policy 18 of the DPD (conditioned on such possibility) to connect to, or make contributions to, existing or future decentralised heat or power schemes. Such a requirement was also obviously irrelevant to the new link road element of the development (the full planning application component of the scheme).

150. Mr Evans said, in summary, that matters relating to climate change could properly be reserved pursuant to Policy 18 and that the need to have regard to various matters 'when … determining planning applications' did not exclude the ability of the Council to leave matters which were the subject of the policy to be considered appropriately under a reserved matters submission.

151. He also pointed out that sub-clause (xiv) of condition 19, recommended by the Officers, required the design framework which is to accompany the submission of each phase of the development to show how environmental standards and sustainable design elements (to include electric vehicle charging infrastructure) were addressed. This was clearly intended to embrace, inter alia, the contribution of the development to the mitigation of climate change and was appropriately drafted to extend to the energy requirements of the development. It shows that relevant climate change considerations were in the Officers' minds. Further, he pointed out that Policy 1 **(**Climate Change and Sustainable Development) and Policy 18 (Energy) were referred to in [5.1] of the 2019 Report as relevant policies. The decision notice also listed these policies as ones which had been applied in taking the decision. He said the court should not go behind those statements and conclude that the policies were ignored.

The Interested Party's submissions

152. To begin with, Mr White emphasised the legal principles (summarised earlier) that an Officers' report should only be found to be unlawful if members were misdirected in a serious way on material matters; that legal judgment is to be reached considering the whole of the Report; and that such reports should not be read with undue rigour but with reasonable benevolence. He also reminded me that I should bear in mind that such Reports are written for councillors with local knowledge: *R(Morge) v Hampshire County Council* [2011] PTSR 337, [36]. He also said that the operation of the tilted balance and the weight to be given to the two parts of the tilted balance, viz, the benefits v the impacts, are a matter for the decision maker: *Hallam Land Management Ltd*, supra, [46]-[47] and [51].

153. He also emphasised:

    a. Section 70 of the TCPA and s 38(6) of the PCPA give clear guidance to decision makers that proposals for planning permission should be determined in accordance with the development plan unless material considerations indicate otherwise;

    b. in considering applications within a conservation area, s 72 of the PLBCAA requires that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

154. Also by way of introduction, Mr White said:

    a. The principle of residential development on the western part of the site and the link road was established in the development plan;

    b. The context of the application was the Council's failure to have a 5YHLS. He said this failure had 'material and fundamental consequences' to the consideration of housing applications, because in such circumstances, effectively, the Government through [11(d)(ii)] of the NPPF requires the activation of the tilted balance to make it a requirement that the planning balance is tilted in favour of the development;

    c. The Council has what he said was a 'parlous' housing requirement (2019 Report, [7.29]);

    d. In this case it is common ground the tilted balance of in [11] of the NPPF was activated and therefore the Members had to consider if any of the alleged impacts of the proposal 'significantly and demonstrably' outweighed the benefits of the proposal;

    e. The benefits of the proposal were significant and established in the 2019 Report;

    f. The impacts alleged were minor even on the Claimant's case;

    g. Therefore, this was a planning decision where, as a requirement of the position in the development plan and the operation of the tilted balance, the factors were heavily in favour of the development going ahead.

155. Turning to the Claimant's specific grounds of challenge, Mr White responded as follows.

156. In relation to Ground 1, he said that the Claimant's fundamental contention was that the Council's Members were materially misled as to the approach to valued landscapes (per [170] of the NPPF) and the tilted balance [11(d)(ii)] by being advised only to apply limited weight to the harm to the valued landscape in the overall tilted balance and the approach to the factors that reduced that weight (namely, firstly, because the Site was not now within an allocated LCA, and secondly because the OPOL Policy was out of date).

157. Mr White's first submission was that the parties were agreed that the tilted balancing exercise in [11(d)(ii)] needed to take place, and the only difference between them was the weight to be given to the harm to the valued landscape: whether it should be limited, or have the greater weight attached to it that the Claimant contended for.

158. He said this whole ground related to the planning balancing exercise which was required by [11(d)(ii)] of the NPPF**.** That required the weighing of the benefits of the proposal against the adverse impacts of the proposal. He said it was common ground that the balance was the tilted one because the Council could not show the existence of a 5YHLS.

159. He pointed out that the Claimant had not attempted to disturb or challenge the Council's judgment that this was a tilted balance matter (Claimant's Skeleton Argument, [72]). Therefore, [11(d)(ii)], the Council was required to consider whether the alleged impacts of the proposal significantly and demonstrably outweighed the benefits.

160. That was the key exercise Members were required to carry out. It was incumbent on Officers in their 2019 Report to weigh the factors that lay in favour and against in determining what conclusion the tilted balance produced.

161. In reaching a conclusion Members had to grapple with the weight to be given to the fact that this site was within a valued landscape as referred to in [170] of the NPPF. However, Mr White said the existence of a valued landscape was not a veto or bar on development but a factor to be weighed in reaching a judgment whether permission should be granted or not.

162. He therefore said that the only issue between the parties on this ground was 'tiny' and was whether it was unlawful for the Council only to give limited weight to this impact, or whether greater weight should have been given to landscape impact (Claimant's Skeleton Argument, [67]).

163. Mr White's main point was that the weight properly to be given to this factor was essentially a matter of planning judgment, and thus it was open to the Council to give the factor only limited weight: *Hallam Land Management Ltd*, supra, [51].

164. Mr White accepted that the Court could interfere with planning judgments on the usual *Wednesbury* grounds, that is, if no reasonable LPA could have made that judgment, but he said that high test was not met here. He said the weight the 2019 Report had given to landscape impact per [170] of the NPPF by virtue of the site lying beyond rather than in an LCA was a reasonable exercise of judgment. He said the fact the Claimant would have liked greater weight to be given to it did not make the decision unlawful on the basis of the limited weight which was given to it.

165. He accepted the weight to be given to the harm to the valued landscape constituted by the Site was a highly material matter because of the 2018 refusal. In 2018 the Council had refused planning permission for an identical scheme, and he conceded it would unquestionably have been in Members' minds as to whether the approach taken in 2018 was still correct, and in particular, the concern they then expressed about harm to the Wharmton Undulating Uplands, given the revised conclusion in 2019 that the Site did not, in fact, sit within that LCA, but was adjacent to it.

166. He said that in 2018 Members had obviously been influenced in their weighing of matters by the presence of the site within an LCA. However, in its work for the 2019 application, the Interested Party had shown that that conclusion was wrong, and the Interested Party's submissions had been accepted by Officers. Therefore, Mr White said that it was reasonable for Officers to explain the correct position and to bring the new and accurate position to Members' attention. He said the 2018 reason for refusal recorded in the 2019 Report at [7.44] was undermined. He said the only issue in dispute was whether the weighting to be given to landscape impact should have been reduced in comparison to 2018 because of the realisation that the Site did not fall within the LCA. To that question, Mr White answered rhetorically, 'Of course it should.'

167. He said that the Assessment had identified characteristics of importance in the Wharmton Undulating Uplands**.** He said the purpose of the Assessment was so that decision-makers could judge the degree of harm from any development which might affect that LCA.

168. Mr White argued that once it had been realised by Officers that the characteristics of the Wharmton Undulating Uplands would not be harmed *to the same extent* by the development as thought in 2018, then it was obvious that that had to affect the weighting to be given to landscape impact.

169. Mr White said it was 'patently highly pertinent' for Members, when they were considering the 2019 planning application, to be advised whether the considerations that had led them to refuse permission in 2018 were still relevant, and whether those matters should be weighed in the same way.

170. Next, Mr White submitted that the Council's failure to have a 5YHLS was 'absolutely' a reason for reducing the weight to be given to the designation of the eastern part of the site as OPOL. He said this had been a key part of his client's case as put in the planning statement accompanying the Application. He referred me to, for example, [10.26]-[10.28] of the Application which argued:

> "10.26 Policy 22 of the Core Strategy Provides the principal policy framework against which this proposal is to be assessed against. Policy 22 establishes that development on OPOL will be permitted where it is appropriate, small scale or ancillary development, located close to existing buildings on the OPOL, which does not affect the openness, local distinctiveness, or visual amenity of the OPOL, taking account of its cumulative impact.
>
> 10.27 In view of this policy context, the applicant recognises that the development would be in conflict with the requirements of

> Policy 22. As such the proposal is contrary to a specific part of the development plan.
>
> 10.28. Notwithstanding this however, Policy 22 is considered to be related to the supply of housing, insofar as it places a constraint on development. Given the clear shortfall in housing demonstrated by the Housing Delivery Test, and referenced throughout this planning statement, Policy 22 is considered to be out of date and should be afforded limited weight in the determination of this application."

171. Mr White said that this is exactly what [11] of the NPPF was intended to achieve.

172. In this case the Council's Officers concluded that it only had a three-year supply (2009 Report, [7.29]). Mr White said a lack of housing had to be given weight, and that that had been accepted by the Claimant in his Skeleton Argument at [11]. He said it was not disputed that Policy 22 was out of date by reason of footnote 7 in the NPPF. Policy 22 is policy aimed at restricting development by protecting OPOL land. Mr White said it was perfectly reasonable of officers to give significant weight to the need to provide housing when considering the weight to be given to Policy 22 (2009 Report, [7.31], [7.36]).

173. He therefore said the only possible basis of the challenge was that the weighting that had been given to the breach of Policy 22 (namely, reduced weight) was perverse, but that was not the case. He said the opposite was true, and that where an LPA has no 5YHLS it would border on perverse to give Policy 22 full weight as against development in the operation of the tilted balance

174. Finally, Mr White said that the Claimant had submitted that the Council had conflated both sides of the tilted balance by effectively 'double counting' the out of date nature of Policy 22. He said the Council had correctly looked at the weight to be given to the alleged impact caused to the OPOL and attributed weight to it. The Council concluded that Policy 22 should have reduced weight given to it when it considered its breach, and that had been a planning judgment open to it.

175. Turning to Ground 2, and whether the Council had failed in its statutory duty with regard to conservation areas, Mr White said the Claimant's fundamental contention under this ground is that Officers had failed to give any or any proper weight in context of the [196] of the NPPF and s 72 to the less than substantial harm identified to the Lydgate Conservation Area in their decision. Mr White replied to this by saying, first, that this ground of challenge was based on a misreading of the 2019 Report and in particular [7.75]. He said that [80(a)] of the Claimant's Skeleton Argument contended that Officers had recognised harm to the Lydgate Conversation Area but there had been a failure to give weight let alone significant weight to that harm.

176. Mr White said that contention was wrong. What [7.75] did was to set the context for the 2019 judgment by setting out what judgments had been reached in 2018.

177. Further, he argued that Officers had paid attention to the desirability of preserving or enhancing the Lydgate Conservation Area. The 2019 Report expressly referred at [7.77]

to the 'considerable importance and weight' that had to be applied to the statutory duties of the PLBCAA, and that 'great weight' ([7.75], [8.11]) should be given to the conservation of heritage assets and great weight to any harm ([7.75], [8.11]). However, he said that there had to be a sense of realism applied to the special attention to be afforded to conservation given the area in this case lies over 1km from the Site.

178. Mr White accepted that the Council's Conservation Officer concluded in 2018 that there would be less than substantial harm to the listed heritage assets (including the Lydgate Conservation Area). In 2019 that conclusion was twice brought to the Members' attention at [6.1] and [7.74]. Paragraph 6.1 expressly referred to the Conservation Officer's conclusion that the development would cause 'less than substantial harm' to the Lydgate Conservation Area. He also accepted that the Officers said at [7.79] that 'the proposed development would not harm the conservation area and that its significance would be sustained.'

179. Mr White said that if Officers did indeed conclude at [7.79] that no harm would be caused to the Lydgate Conservation Area, as opposed to 'less than substantial harm' as the Conservation Officer had concluded, then that was a conclusion which it was open to them to reach because they were not bound by the Conservation Officer's view. He said that, in general, it is perfectly lawful for planning officers not to follow and to disagree with the views of a Conservation Officer. He added that this difference in judgment was clear for Members to see because, as the Claimant accepted at [48] of the SFG, the Conservation Officer's view was made plain to Members.

180. Next, Mr White submitted that the law on consistency of decisions did not apply here. He did not take issue with the existence of the principle but said that it applied to decisions and not guidance in planning officers' reports. In short, he said the decision to refuse permission in 2018 was not on the basis of harm to the Lydgate Conversation Area, and the decision in 2019 that the harm was outweighed by the benefits of the development was in no way inconsistent with the earlier refusal.

181. One final point made by Mr White was that the actual effect of the development on the Conservation Area would be marginal and not in any way determinative; and that there was no inconsistency of position between the Council and the Interested Party on this issue as alleged by the Claimant at [79] of his Skeleton Argument.

182. In relation to Ground 3, and the effect of the development on climate change, the Interested Party said that the Claimant's central contention was that the 2019 Report had failed to consider how the proposal would mitigate the impacts of climate change as required by Policies 1 and 18 of the DPD and [153] of the NPPF.

183. Mr White accepted that the impact of the proposal on climate change was a material consideration, but said it plainly had been taken into account. Policy 18 was brought to Members's attention in [5.1] of the Officer's Report. The Planning Decision Notice also directly referred to it.

184. Most fundamentally, Mr White submitted that the full import of Policy 18, which relates to emissions targets, will be applied at the reserved matters stage in any event. Planning Condition 19 requires a detailed design framework to be submitted by the Interested Party and therefore the details of Policy 18 will be correctly considered then. Policy 18 could

not have been considered in the manner contended for by the Claimant for the simple reason there is no detailed design dealing with the matters identified in the policy. Mr White also said that [153] of the NPPF had clearly been taken account of: it was mentioned at [5.1]; [8.8]-[8.10]. Moreover, Mr White said that there had been no particular argument by the Claimant that if the effect of the proposal on climate change were set out in full detail in the 2019 Report the members would have changed their view.

Discussion

Ground 1(a)

185. I agree with Mr White that the difference between the parties on this issue is comparatively narrow. It is whether Officers wrongly advised Members that something less than full weight should be afforded to landscape harm in the operation of the tilted balance in [11(d)(ii)] (as compared with the weight given to it in 2018), once it had been concluded that the Site did not lie in the Wharmton Undulating Uplands LCA, and so was not on Green Belt land, but was adjacent to it.

186. Ms Jackson in her Skeleton Argument at [67] agreed the critical question was one of weighting. There, she wrote:

> "It is equally clear that §8.13 of the [2019 Report] is concerned squarely with the (critical) question of the weight to be given to the conflict with paragraph 170 of the NPPF, in the application of the tilted balance."

187. Ms Jackson's argument was that whether or not the Site was within the Wharmton Undulating Uplands was irrelevant to the landscape harm because it was accepted to be a valued landscape. Mr Evans' and Mr White's argument was that, in terms of the weight to be afforded, the location made a critical difference and that it was a matter of pure planning judgment for the Officers and the Council what weight they gave landscape harm in light of the revised factual conclusion on the Site's location.

188. It seems to me to be clear that the question of how much weight was to be afforded to the landscape harm, and the conflict with the policy in [170(a)] to which it gives rise, was a matter of planning judgment for the Council, and I can only intervene with its judgment on well understood *Wednesbury* grounds: *Hallam Land Management Ltd*, supra, [51].

189. The starting point is, as Officers concluded at [7.29], that the Council has a significant shortfall in housing land supply. It is not able to demonstrate more than a three-year supply. Officers were therefore entitled to advise Members that the development, and in particular the opportunities for affordable housing that it offered, should be afforded 'very significant weight': *Hallam Land Management Ltd*, supra, [47]. The question, per [11(d)(ii)] of the NPPF, was whether any and all of the adverse impacts of the development 'significantly and demonstrably' outweighed its benefits.

190. In their 2018 Report, Officers concluded as follows in relation to landscape impact:

> "The identified moderate adverse effects on the Wharmton Undulating Uplands (Area 7a) LCA is contrary to UDP policy 6

> – Green Infrastructure. The development will result in significant loss and fragmentation of GI [green infrastructure] assets, namely the Thornley Wooded Valley landscape feature and open landscape included in the Wharmton Undulating Uplands (7a). Both features are important to the physical integrity of the identified GI corridor and network which is already significantly eroded by former residential development within the valley landscape.
>
> The identified moderate adverse effects on the Wharmton Undulating Uplands (Area 7a) LCA is contrary to UDP Policy 22 – The scale, form and layout of the development is found to have a transformative effect on the local distinctiveness and visual amenity of OPOL 12.
>
> On the issue of landscape impact, it is considered that the proposal would harm the character and appearance of the area and would conflict with the relevant development plan policies as outlined above. The landscape harm and policy conflict therefore weighs against the proposal."

191. Later, in applying the tilted planning balance in [11(d)(ii)], Officers concluded:

> "In this case there are concerns in respect of the adverse effects on this area of landscape and loss of OPOL land. It is considered that the scheme would cause harm to the character and appearance of the area, and specifically to this valued landscape. The key test in this regard is whether or not the harm to the valued landscape is outweighed by the benefits new housing brings on a part allocated site and the provision of a new link road.
>
> Given the significant economic and social benefits associated with the scheme and the positive weight that is given to the environmental benefits of the scheme, the fact that the site is part allocated for residential use, it will deliver a long sought link road and has no design, ecology, amenity, flood risk, drainage, highways or other impactions that would sustain a reason for refusal, full planning permission is recommended to be granted for the link road and outline planning permission is recommended to be granted for the residential element of the application, since the benefits outweigh the harm is justified in this respect."

192. Paragraph 7.104 of the 2019 Report was to similar effect.

193. I have not found this issue straightforward. On the one hand, Officers' reasoning in 2018 and 2019 was very similar (and, in places, identical). On the other hand, they reached different conclusions on the weight to be afforded to landscape impact in the operation of the tilted balance in [11)(d)(ii)].

194. I have concluded that it was open to Officers to advise Members in 2019 that something less than full weight should be afforded to landscape harm. That is to say, I have concluded that this conclusion was not irrational. That is because, as Officers concluded at [7.106], once it had been concluded that the Site did *not,* in fact, lie within the Wharmton Undulating Uplands LCA, harm to the Uplands caused by the development would be indirect, rather than direct, and therefore less severe, it was open to Officers to advise that less than full weight to be accorded to it than in 2018 when it had been concluded that the harm would be direct. In my judgment the 2018 reason for refusal recorded in [7.44] including landscape harm to the Wharmton Undulating Uplands was indeed weakened by the realisation that there would not, in fact, be direct harm to that area.

195. It seems to me there is a justified and rational material distinction to be made between the harm a development will cause to an LCA when the development takes place actually on that LCA, and the harm to the LCA land which will occur when the development takes place not actually *on* the LCA, *but next to it*. The respective harms can, I think, be legitimately described as direct and indirect (the terms used in [7.106]). I understand Ms Jackson's point that the location of the Site within or without the Uplands made no difference to the harm because the Site is a valued landscape in either case, but in my judgment the question of the extent and nature of the harm lay squarely within the planning expertise of Officers armed, as they were, but I am not, with detailed and local knowledge.

196. I consider that Officers were entitled to conclude that there is a qualitative difference between the harm which arises from developing a site, which will directly harm LCA, and developing a site adjacent to an LCA , which will only cause indirect harm.

197. When the 2009 Assessment is read in full, whilst it did not ascribe values to landscapes (see at [1.2]), what it *did* do was to identify characteristics of importance within each of the seven areas forming the study area. So, it said at [2.1]-[2.3] (emphasis added):

> "2.1 This Landscape Character Assessment (LCA) has been prepared to describe the evolution of the borough's rural landscape and *assess its special character, distinctiveness and qualities*. It draws on both the natural and cultural features of the area and classifies 7 landscape areas that contain more detailed landscape types.
>
> *What is a Landscape Character Assessment ?*
>
> 2.2 The former Countryside Agency's publication 'Making Sense of Place' defines LCA as a tool for identifying the features that give a locality its sense of place and pinpointing what makes it different from its neighbouring areas. This is sometimes referred to as local distinctiveness.
>
> 2.3 The same publication goes on to state: "Landscape Character Assessment provides a framework for describing an area in a systematic way. *It lets different interest groups make better judgement by knowing what is present and what is distinct, so any*

> *change can respect local character, or add to it, and even change it if that is what is desired*."

198. At [2.7]-[2.8] the Assessment said (again, emphasis added):

> "*Making judgements*
>
> 2.7 Land management decisions will ultimately lie with society - owners, politicians, land managers, local communities and many other stakeholders. *But their decisions will be more sound if they are based on information assembled through the Landscape Character Assessment process*.
>
> *The Value of Landscape Character Assessment*
>
> 2.8 The former Countryside Agency, again in 'Making Sense of Place' identify the fact that:
>
> > 'People can welcome development if it is well designed and contributes to quality of life. Policy makers and practitioners need ways of achieving this, and Landscape Character Assessment is one of the key techniques.
> >
> > Landscape Character Assessment tells you what makes a place distinctive. You can use this information to achieve high quality development that is not only in the right place, but which respects and enhances its surroundings. It can also inform land management decisions that will help the economy, as well as sustain the environment.'"

199. These paragraphs demonstrate, in my judgment, that the assessment of an area as an LCA is directly connected to development questions. Therefore, I consider Mr White was correct to submit that the Assessment was intended in part to assist decision makers in judging the degree of harm from any development when it affects an LCA. For this reason, when it is realised that the characteristics of an LCA cannot be harmed to the same degree by a development where the site does not fall within the LCA as it would if it fell within it, then this is capable of affecting the weight to be given to the level of harm in the application of the tilted balance in [11(d)(ii)] of the NPPF.

200. I agree with Mr White that the fact the Claimant would have liked greater weight to be given to landscape harm did not make the decision unlawful on the basis of the limited weight which *was* given to it. I reiterate the question is not what I consider the merits to be and whether I would have concluded the same as Officers in 2019. It is whether the Officers' recommendation in 2019 is vitiated by public law error. I am unable to say that it is.

201. It follows that I accept the Interested Party's submission that the reduced weight the 2019 Report gave to landscape impact per [170] of the NPPF as compared with 2018 by virtue

of the site lying beyond rather than in the Wharmton Undulating Uplands was not *Wednesbury* unreasonable. It was a determination that the Site was not, as had previously been thought, in an LCA but lay beyond it within an area designated as 'Urban' in the Assessment. Although I accept Ms Jackson's point that being Green Belt land is not a landscape determination, realisation that the Site did not lie within an LCA did properly entitle Officers to conclude that harm to it should carry less weight.

202. To the same effect, I also accept the Council's submission in [9] of its Skeleton Argument that it was a matter of unexceptional planning judgment that the conclusion reached in the 2019 Report at [7.44] to [7.53] that the Site was not, in fact, in the Wharmton Undulating Uplands, could justify a reduction in the weight that could be afforded to the impact of the development on that LCA and its characteristics.

203. In my view the conclusion reached in [7.53] of the 2019 Report 'that it would not be reasonable for the Council to argue that the site is within the Wharmton Undulating Uplands' was one of fact which was plainly open to the Council, which had specifically considered the matter and concluded the Site lay outside the relevant area. It follows that 'a significant part of the previous reason for refusal is felt to be weak and now has less weight to support it' was a justified conclusion. It was not irrational or illogical, as Ms Jackson contended.

204. Close and adjacent to the Wharmton Undulating Uplands the Site might be, it is not within it, and the Uplands will not therefore be directly affected by the development in the same way as was concluded in 2018. On any view, the harm would not be direct harm in the way it would if the Uplands were themselves to be built upon. Similarly justified was the conclusion at [7.68] of the 2019 Report that, 'Members' previous concerns about the impact of the scheme on the Wharmton Undulating Uplands (Area 7a) LCA are lessened since the site sits adjacent to, but not in it.' I agree with Mr Evans' argument that, seen in that context, the reference in [8.13] of the 2019 Report to the Site not being in an allocated LCA area, with its attendant consequence for the weighing of landscape harm, was a perfectly understandable reference to [7.44] to [7.53] and [7.68] of the Report, where the issue was addressed in detail.

205. I therefore reject this ground of challenge.

Ground 1(b)

206. I turn to the issue whether the Officers' Report misdirected members by advising that only limited weight should be given to the harm to the valued landscape because 'the Council's OPOL policy is out of date.'

207. The nub of Ms Jackson's argument was that although the Council was unable to demonstrate a 5YHLS, meaning that the tilted balance in [11(d)(ii)] applied in favour of granting permission, once this policy test was engaged, the absence of a 5YHLS did not also dictate that only limited weight should be given to the harm to the valued landscape. In her Skeleton Argument at [73] she referred to Officers having concluded that the inability to demonstrate a 5YHLS meant, 'in and of itself' that only limited weight should be given to landscape harm. In the same paragraph she said Officers had concluded that the weight to be given to that harm was 'automatically' also limited.

208. I do not accept this submission, or that the Officers advised in these terms. As I have already said, the Claimant did not (and, indeed, could not) challenge the Officers' factual conclusion that the Council cannot demonstrate a 5YHLS. This meant that, by virtue of footnote 7 in the NPPF, Policy 22 to the DPD in relation to OPOL land – which is a policy restrictive of housing supply - was out of date, and hence that the tilted balance in [11(d)(ii)] applied. The question then became one of weighing the relevant policies and all the different factors in order to determine whether the adverse impacts of allowing the development would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF.

209. The question whether the out-of-date OPOL policy, as well as triggering the tilted balance (per *Hopkins Homes*, supra), could also properly result in less weight being given to landscape harm was, it seems to me a matter of planning judgment for Officers in the first instance and then for Members, and I think the Council and the Interested Party were right in their submissions. I consider the matter is made clear by [46] and [47] of Lindblom LJ's judgment in *Hallam Land Management Ltd*¸, supra, where he said that once the tilted balance was triggered, it did not prescribe how much weight was to be given to relevant policies of the development plan, but that 'weight is always a matter for the decision-maker …' ([46]) and '… the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies' ([47]).

210. I also found helpful and relevant Mr Evans' reference to *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] 1 WLR 1865, [83], where Lord Gill said:

> "83 If a planning authority that was in default of the requirement of a five years' supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated. The purpose of paragraph 49 is to indicate a way in which the lack of a five years' supply of sites can be put right. It is reasonable for the guidance to suggest that in such cases the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date."

211. There was, it seems to me, no 'automaticity' in the Officers' reasoning in the manner suggested by the Claimant, but that they reached the conclusion they did pursuant to a careful exercise of planning judgment that took into account all of the relevant matters. Their conclusion was not perverse.

212. Taking a step back and viewing matters generally, it seems to me likely in most cases (I do not say automatically because circumstances can always differ) that an out-of-date policy (of whatever stripe) will generally attract less weight in a weighing exercise than a policy that is current. That seems to me to be a matter of common sense. If a policy is out of date it will, in general, have less relevance and/or less utility than a policy that is current. If that is so, then the decision-maker will be entitled to accord it less weight in a weighing/balancing exercise.

213. I therefore reject Ground 1(b).

Ground 2

214. I have concluded that Officers did not fail to apply, or have regard to, s 72 of the PLBCAA, or [196] of the NPPF, when they came to assess the impact of the development on the Lydgate Conservation Area and other heritage assets, nor that their reasoning was flawed or incomplete or inconsistent with their 2018 conclusion on heritage assets. I have concluded that Officers had well in mind the duties imposed upon them by these provisions and that their conclusion was lawful.

215. I set out s 72 and [196] earlier. Section 72 requires special attention to paid to the desirability of preserving or enhancing the character or appearance of conservation areas. Paragraph 196 provides in the case of a development which will cause less than substantial harm to the significance of a designated heritage asset, that harm has to be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.

216. At [7.70]-[7.75] Officers considered heritage impact. In [7.71] they listed a number of named listed buildings and, at [7.72], the Lydgate Conservation Area. At [7.73] they said:

> "The applicant's heritage statement and supplementary briefing note considered each of the heritage assets affected and the contribution that its setting makes to their significance. They also assessed the impact of the development on that significance. They concluded that, on balance of considerations, there will be some limited harm to the significance of Knowls Lane, Knowls Lane Farmhouse and Flash Cottage."

217. At [7.74] Officers noted the Conservation Officer's overall conclusion that such harm would be 'less than substantial'. I consider this paragraph has to be read as including harm to the Lydgate Conversation Area and not just the named individual properties, because here they were quoting the Conservation Officer's 2018 conclusion, which specifically referred to the Lydgate Conservation Area, as I set out earlier.

218. At [7.75] they concluded (emphasis added):

> "In accordance with paragraph 196 of the NPPF, whilst giving the heritage harm great weight, Officers consider that it did not outweigh the wider public benefits generated by the proposal. Both the applicant and the Council agree that the public benefits outweigh the less than substantial harm that would be caused to *any heritage assets* and the effect of the development on those heritage assets is not a reason for refusing the scheme."

219. In my view the words I have italicised, 'any heritage assets', plainly include the Lydgate Conservation Area.

220. Officers then listed the benefits of the scheme, such as its economic benefits, social benefits, etc. At [7.77]-[7.78], they concluded (again, emphasis added):

> "7.77 Overall, the proposed development would result in a limited level of harm at the lower end of the scale *to the listed heritage assets*. Such harm is 'less than substantial'. As set out in paragraph 196 of the NPPF, this harm has been weighed against the public benefits of the proposal, whilst acknowledging the considerable importance and weight to be applied to the statutory duties of the Planning (Listed Buildings and Conservation Areas) Act 1990.
>
> 7.78 The public benefits associated with the proposed development clearly and demonstrably outweigh the less than substantial harm that would be caused to the listed buildings. It is therefore felt that the effect on heritage assets is not a reason for refusal of the application that could be sustained."

221. In my judgment the 'listed heritage assets' referred to in [7.77] plainly must be read as including the Lydgate Conservation Area. This had been listed in [7.72] as a heritage asset under the heading 'Heritage Impact'.

222. Thus far, it seems to me the Officers' conclusions were an entirely unremarkable exercise of planning judgment. They had noted the assets involved (including the Lydgate Conservation Area); noted the level of harm as found by the Conservation Officer; and then noted the benefits of the development. They then weighed the one against the other having regard to their statutory and policy duties (which they expressly mentioned), and then reached a reasoned conclusion.

223. However, they then went on to say this, which lay at the heart of Ms Jackson's submissions under this ground of challenge (see her Skeleton Argument at [78]) (emphasis added):

> "7.79 Officers also considered the significance of the Lydgate Conservation Area and the contribution made by setting to that significance. *They conclude that the proposed development would not harm the conservation area and that its significance would be sustained*.
>
> 7.80 As a consequence of the above, the scheme is considered acceptable in heritage terms."

224. Ms Jackson's central point is that the statement that the proposed development 'would not harm the conservation area' was inconsistent with the Conservation Officer's view, and also the conclusion which Officers had reached in the preceding paragraphs that the development *would* harm listed heritage assets, including the Lydgate Conservation Area, albeit in a way that was less than substantial. She said it was also inconsistent with the heritage harm conclusion that had been reached in 2018 (see earlier). Her point was that only the harm to the named listed buildings in [7.71] was taken into account.

225. I readily understand Ms Jackson's point, but in my judgment the answer is simply that [7.79] was sloppily worded and that the word 'significantly' should have appeared between the words 'not' and 'harm'. I do not consider it to be a sensible, fair or reasonable reading of [7.79] to conclude that Officers genuinely were concluding there would be *no* harm to the Lydgate Conservation Area when they had quoted the Conversation Officer's opinion to the contrary without demur earlier, and then expressly referred to there being less than significant harm no fewer than three times in the immediately preceding paragraphs. It seems to me that [7.79] contains the sort of 'minor mistake' which Lindblom LJ said in *Watermead*, supra, [22], ought to be forgiven.

226. This conclusion is reinforced by [7.88], where Officers concluded (emphasis added):

> "7.88 There are *significant heritage assets that are materially affected by the proposal*, which in turn, has an impact on the landscape, including the Lees Conservation Area, *Lydgate Conservation Area* and the Church of St Anne (Grade II listed). In relation to the site itself, Knowls Lane Farm and Knowls Lane Farmhouse (Grade II listed) and Flash Cottages (Grade II listed) *are also materially affected* in landscape impact terms."

227. This was a clear and express recognition that there would be some harm to those heritage assets listed, including the Lydgate Conservation Area.

228. This conclusion is further reinforced by [8.11], which is in the section of the 2019 Report headed 'Planning Balance':

> "8.11 As noted above, paragraph 196 of the Framework requires the harm to the significance of heritage assets to be balanced against the public benefits of the scheme. In addition, paragraph 193 requires that, when considering the impact of a proposed development on the significance of heritage assets, great weight should be given to their conservation. However, for the reasons explained, it is considered that the level of harm to heritage assets would be limited and should be placed at the lower end of the 'less than substantial' spectrum. In this case, it is found that any harm to heritage assets would be outweighed by the scheme's public benefits. Consequently, it is considered that the so-called 'tilted balance' of paragraph 11 of the Framework is not displaced in this instance."

229. I cannot see any proper or reasonable basis for reading 'heritage assets' in this paragraph as excluding the Lydgate Conservation Area when in [7.88] (and elsewhere) it had been specifically identified as a heritage asset that would be affected by the development.

230. I therefore conclude that heritage harm was properly and correctly weighed in the balancing exercise required by [11] of the NPPF.

231. I accept the wording of the 2019 Report could have been tighter, and its reasoning perhaps better expressed. But I think overall, the Officers' reasoning was tolerably clear: the development will cause less than significant harm to the listed heritage assets

(including the Lydgate Conservation Area), but that any harm is outweighed by the benefits the development will bring.

232. It follows I do not accept the Council's or Interested Party's main submissions (as now advanced: a different line seems to have been taken in its Acknowledgement of Service) to the extent they suggested that Officers were intending to reach a different conclusion on heritage harm to the Conservation Officer or different to that which they reached in 2018. I do not think that they were. Given the lengths to which Officers went to explain their different conclusion on the location of the Site as compared with 2018, I can take it Officers were well aware of the need to explain themselves when they reached a different conclusion on any aspect of the decision in 2019. Thus, if they *had* intended to reach a different conclusion about harm to the Lydgate Conservation Area, I would have expected them to have clearly said so, and explained why. I am satisfied that when read in context and alongside the rest of the Report, [7.79] represents a minor slip. Any contrary conclusion would be inconsistent with [7.88], where the effect of the development on the Lydgate Conservation Area was directly acknowledged as a factor, and inconsistent with the other paragraphs of the Report that I have discussed.

233. It also follows that I do not accept there was any inconsistency in decision making. In both 2018 and 2019 less than significant harm to heritage assets was acknowledged.

234. I therefore reject this ground of challenge.

Ground 3

235. I am also satisfied that this ground of challenge is unmeritorious. Despite Ms Jackson's attractive submissions, I do not accept that the Council failed to have regard to Policy 18 of the DPD or [153] of the NPPF; that the grant of permission was inconsistent with it; and/or the Council failed to consider whether or how the development would satisfactorily contribute towards mitigating the impacts of climate change.

236. In my judgment, the short answer to this ground of challenge is that the grant of planning permission is usually a multi-staged process, with different matters being approved at different stages, beginning with the grant of outline planning permission and then continuing with reserved matters coming up for approval later in accordance with the conditions attached to the outline grant and further detailed plans and designs.

237. It is quite clear that Policy 18 and [153] of the NPPF permit the necessary matters relating to sustainability, climate change, energy, and the like, to be determined at different stages as part of the ongoing planning decision-making process. Policy 18 says that, 'Compliance with the targets must be demonstrated through an energy statement which must be assessed to the council's satisfaction'. This neither expressly nor, to my mind, by necessary implication, requires the energy statement to be submitted and approved as part of the outline planning permission process as opposed to at a later stage of the approval process.

238. To begin with, I have to say that I find the premise of part of the Claimant's argument - namely that Officers overlooked such a vital policy as Policy 18 and other relevant policies - implausible. It is scarcely credible that the Council could have failed to have in mind such crucially important planning matters such as the need for sustainability,

energy conservation, and mitigation of climate change, or that they failed to consider how the development would comply with Policy 18 of the DPD and/or [153] of the NPPF concerning the energy requirements of the development. This is borne out by the evidence.

239. As Mr Evans pointed out, none of the responses as summarised at [6.1] to [6.4] of the 2019 Report suggested that the development should be refused because of conflict with Policy 18 of the DPD, or on the basis that it would not contribute satisfactorily towards mitigating the impact of climate change.

240. That these matters were not overlooked by Officers is also borne out by the 2019 Report. At [5.1] Officers specifically noted Policy 1 (Climate Change and Sustainable Development) and Policy 18 as being relevant to the determination of the application. The decision notice at page 11 of 13 also listed these policies as ones which had been applied in taking the decision.

241. In addition, sub-clause (xvii) of condition 19 requires the design framework which is to accompany the submission of each phase of the development to show how environmental standards and sustainable design elements (to include electric vehicle charging infrastructure) were addressed. I accept the Council's submission that this was intended to embrace, *inter alia*, the contribution of the development to the mitigation of climate change, and was appropriately drafted to extend to the energy requirements of the development. It clearly shows that relevant climate change considerations were in Officers' minds.

242. Ms Jackson submitted that the energy statement required by Policy 18 had to be submitted along with the outline planning permission application. I do not accept this. Policy 18 is detailed and complex and refers to a number of other policies that are concerned with energy efficiency and mitigating the effects of climate-change. It seems to me to be obvious that it does not require all of the matters which it addresses to be dealt with expressly at the outline planning permission stage, nor does it require the submission of an energy statement at that stage. I accept Mr White's submission that Policy 18 could not have been considered in any detail at the outline stage because there were at that stage no detailed designs dealing with the matters identified in it as having to be fulfilled. They are only capable of being fulfilled once the detailed designs for the development have been worked out.

243. As I have already indicated, I also accept Mr Evans's submission that the need for the Council to have regard to the matters listed in the Policy 'when … determining planning applications' in Policy 18 does not exclude the ability of the Council to leave matters that are subject to the policy to be considered appropriately at the reserved matters stage. That stage is part and parcel of the determination of a planning application.

244. I therefore reject this ground of challenge.

Conclusion

245. It follows that this application for judicial review is dismissed.