In the High Court of Justice
Queen's Bench Division
Planning Court

CO Ref:
CO/836/2021

In the matter of an application for Judicial Review

The Queen on the application of

GLENN KINNERSLEY **Claimant**

versus

MAIDSTONE BOROUGH COUNCIL **Defendant**

and

PAUL DIXON **Interested Party**

Application for permission to apply for Judicial Review
NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgement of service filed by the Defendant

Order by Timothy Mould QC (sitting as a Deputy High Court Judge)

1. Permission is hereby refused.

2. The costs of preparing the Acknowledgment of Service are to be paid by the claimant to the defendant, in the sum of £3,848.10 unless within 14 days the claimant notifies the court and the defendant, in writing, that he objects to paying costs, or as to the amount to be paid, in either case giving reasons. If he does so, the defendant has a further 14 days to respond to both the court and the claimant, and the claimant the right to reply within a further 7 days, after which the claim for costs is to put before a judge to be determined on the papers. [Where the claimant seeks reconsideration, costs are to be dealt with on that occasion].

3. This is an Aarhus Convention Claim to which the limits on costs recoverable from the parties set out in CPR 45.43(2)(a) and (3) apply – Claimant £5,000; Defendant £35,000.

Reasons:

1. Ground 1 – I can detect no arguable misinterpretation of policy DM5 of the Local Plan in paragraphs 6.43 to 6.68 of the Officer's Report. Paragraph 6.45 refers to the relevant part of Policy DM5. Paragraph 6.46 directs the Defendant correctly to the guidance on the application of Policy DM5 given in paragraph 6.37 of the Local Plan. Given that the principal purpose of the planning application was to seek authority for building works to convert the existing studio building into two dwellings (paragraphs 2.01 to 2.07 of the OR), it seems to me that the planning officer's focus on the question whether the proposed works would produce an outcome that fulfilled the two policy considerations discussed in paragraphs 6.47 to 6.55 of the OR is obviously consistent with the lawful application of DM5 in accordance with its terms, to the facts of this case. Nobody was arguing for the

development of any area of existing residential garden. Insofar as the proposed development involved built development in the wider application site (i.e. the reconstruction of the existing wall), that element was regarded as positive in its environmental impact by the Conservation Officer (see OR at paragraphs 5.04 to 5.07). The change of use to residential was also seen as beneficial in environmental terms – see OR at paragraph 6.55. Ground 1 is not reasonably arguable.

2. Ground 2 – in *Mansell* at [42], Lindblom LJ said that the Court would not generally intervene in a case founded upon an alleged error in a planning officer's reported advice on a planning application unless that error involved a material misdirection to the decision making planning committee. That principle is very much in play in relation to the complaint under this ground. There is a difference of opinion evident in the reported views of conservation professionals and the planning officer in his report about the contribution that the existing studio building makes in the setting of Hollingbourne House. But even assuming that the planning officer's "inconsistent" judgment on that question is unexplained (which in itself is barely arguable – see below), it can hardly be said to have had a material bearing on the decision to grant planning permission. Nobody was arguing that the partial demolition and alteration of the existing studio building would in itself diminish the setting of the listed house in any material way. So the real question was whether the proposed replacement was acceptable in its impact on that setting. On that material question, as I understand it, the Conservation) was clear in her advice: the impact of the proposed works to the studio building would not materially harm the setting of the listed main house (see OR at paragraph 5.08). Applying the *Mansell* principle, ground 2 is not reasonably arguable.

3. Ground 3 – this ground asserts that the Defendant adopted a "flawed approach" to the assessment of the proposed development's heritage impact and acted in breach of its statutory duty under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. That contention essentially impugns paragraphs 6.90-6.170 and section 7 of the OR. In my view, it is simply unsustainable, in the light of the careful and thorough appraisal that is found in those paragraphs, supported by the advice of the Conservation Officer in paragraphs 5.02 to 5.08 of the OR. In fact, the planning officer reminded the Defendant of its statutory duty at the outset (paragraph 6.90); then set out the relevant policy requirements of the Local Plan and the NPPF (including paragraph 196 of the latter – see OR at paragraph 6.97). The setting and significance of the listed main house are described in paragraphs 6.104 – 6.133. The conclusion in paragraph 6.133 that there will be less than substantial harm to the setting of the listed main house is well explained. Paragraphs 6.134 – 6.170 address the impact on other listed elements (including the walls) and identify the benefits of the proposed development that bear upon the question whether the identified less that substantial harm should lead to refusal. In short, the planning officer's assessment sits properly within the framework of analysis set by the 1990 Act and the NPPF. As does his summary in section 7 (bullet three from the end). In short, ground 3 is, in substance an attack on the planning officer's assessment and evaluation of the impacts of the proposed development on the relevant heritage assets. That involves no arguable issue of law.

4. Ground 4 – The principles upon which the court approaches the contention that the decision maker in a planning decision has acted unlawfully in failing to take account of a relevant or "material" consideration were summarised by Lord Carnwath JSC at [30] – [31] in *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221, [2020] UKSC 3. Applying those principles, the contention that the Defendant acted unlawfully in failing to take account other than fleetingly of the Claimant's putative alternative proposal is unarguable. It cannot be said that the Defendant acted irrationally in taking that course.

5. The attack on the listed building consent is founded entirely on the asserted challenge to the legality of the decision to grant planning permission.

6. The proposed claim is unarguable.

Signed. TIMOTHY MOULD QC

The date of service of this order is calculated from the date in the section below

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For completion by the Planning Court

Sent / Handed to the claimant, defendant and any interested party / the claimant's, defendant's, and any interested party's solicitors on (date): 05/05/2021
Solicitors:
Ref No.

Notes for the Claimant
If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed FORM 86B within 7 days of the service of this order. A fee is payable on submission of Form 86B. ***For details of the current fee see the Court website*** https://www.gov.uk/court-fees-what-they-are. Failure to pay the fee or lodge a certified Application for Fee remission may result in the claim being struck out. The form for Application for Remission of a Fee is obtainable from the Justice website https://www.gov.uk/get-help-with-court-fees.