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Case No: CO/836/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Thursday 14 July 2022

Before :

HHJ KAREN WALDEN-SMITH sitting as Judge of the High Court

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Between :

THE QUEEN (on the application of GLENN KINNERSLEY)	**Claimant**
- and -	
MAIDSTONE BOROUGH COUNCIL	**Defendant**
PAUL DIXON	**Interested Party**

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- -

HARRIET TOWNSEND (instructed by **Richard Buxton Solicitors**) for the **Claimant**
GILES ATKINSON (instructed by **Mid Kent Legal Services**) for the **Defendant**

Hearing dates: 11 & 12 May 2022

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Approved Judgment

Introduction

1. The Claimant, Mr Glenn Kinnersley, seeks to judicially review the decisions of the Defendant, Maidstone Borough Council ("MBC"), dated 21 January 2021 to grant both planning permission and listed building consent for the development of Courtyard Studios, Hollingbourne Hill, Hollingbourne, Kent ME17 1QJ ("the development site"). The interested party, Paul Dixon, took no part in the proceedings and was not represented at the hearing of the substantive judicial review proceedings.

The Factual Background

2. The planning permission granted to Paul Dixon is for:

> "Demolition of the rear section of the building and erection of replacement structure and conversion of front section of building including external alterations, to facilitate the creation of 2 dwellings with associated parking and garden areas.
>
> Demolition of existing derelict and unstable (north-east facing) garden wall, reconstruction on existing line at reduced height with 2 additional openings, repairs, restoration of other garden walls and restoration of 1 sunken glasshouse ("the development")".

3. The listed building consent is for:

> "Demolition of existing derelict and unstable (north-east facing) garden wall, reconstruction on existing line at reduced height with 2 additional openings, repairs, restoration of other garden walls and restoration of 1 sunken glasshouse."

4. The Claimant, Mr Kinnersley, and his family, live at Hollingbourne House, a Grade II listed building, and the entirety of the application site falls within the grounds of Hollingbourne House and the curtilage of the listed building.

5. The relevant statutory development plan is the Maidstone Borough Local Plan which was adopted in 2017. The polices said to be directly relevant to this issue are:

   (1) DM4: Development affecting designated and non-designated heritage assets;

   (2) DM5: Development on brownfield land;

   (3) DM30: Design principles in the countryside.

6. The application site includes two barn-type buildings which are joined and used together. These are known as the studio buildings. To the rear of the studio buildings, but adjacent to them is a historic walled garden. Hollingbourne House is at the top of Hollingbourne Hill which falls within the Kent Downs Area of Outstanding Natural Beauty and North Downs Special Landscape Area. Hollingbourne House is a Georgian property and designated heritage asset with four walled gardens, a separately listed Gazebo and Donkey Wheel.

7. Mr Dixon, the interested party, runs his photography business from the studio buildings which has B1 use for low key mixed commercial use. The dwellings known as Mulberry House and Well Cottage are also owned by Mr Dixon. These were formerly the servants' quarters of Hollingbourne House and in 2014 MBC granted planning permission for the studio buildings to be converted to use ancillary to the residential use of Mulberry and Well Cottages (for the purpose of providing an indoor swimming pool and related leisure facilities). This planning consent was not implemented.

The Planning History

8. Mr Dixon applied in 2018 (18/500228/FULL) for permission to convert the photography studio into two new residential dwellings. That application was refused on 17 April 2018. The Conservation Officer described the studio building as a *"single, linear unadorned construction, finished in brick and weatherboard and with a dual pitched roof in slate."* He said this:

> "[W]whilst I am prepared to accept some slight modifications to the building, the property's stark, agricultural character should continue to shine through, and this is necessary in order to conform with national guidance contained with Historic England's "The Conversion of Traditional Farm Buildings", and also the planning guidance associated with the Kent Downs AONB. Both these documents argue against the suburbanisation of the countryside…
>
> I think that the subdivision of the cowshed into two separate dwellings distorts the legibility of the traditional arrangement of outbuildings to the main house and the relationships between the various estate buildings… The essential criteria is to retain the long, linear qualities of the cowshed, its pitched slate roof and its simple agrarian form.
>
> The relationships between the functional outbuildings and the main house need to remain legible and obvious, and the answer is to adhere more closely to the shed's simple lines."

9. A further application (18/506662/FULL) was submitted on 27 December 2018. The Claimant, Mr Kinnersley, objected to permission being given on both planning and heritage grounds. He relied upon an assessment from a heritage expert which set out that Hollingbourne House has *"clear architectural and historical interest as a late 18th century mansion with associated grounds and individually listed features (Donkey Wheel and Gazebo both separately listed grade II)…The substantial walls encircling the four walled gardens contribute to the historical interest of the house by indicating its former grounds… Taking into consideration the specific application site buildings for conversion, they do not specifically enhance or contribute to the setting of the listing building but are of a form that does not disrupt the hierarchy of historic spaces and are largely benign in their current state … they are not heritage assets but [that] they play a neutral role within the setting of the listed building and at present are in keeping with the traditional outbuilding form one would expect of an estate of this type."* This expert considered the roof of the proposed building to be *"anomalous"* and the amount

of glazing in the proposed building to be *"excessive and will serve to detract from the character of the surroundings."*

10. Planning permission was granted for the development on 29 March 2019, which determination was quashed on 8 July 2019 with the consent of MBC.

11. The proposal for the relocation of the listed wall was abandoned by Mr Dixon in May 2020 and replaced with a proposal partially to reconstruct the demolished wall along its existing line.

12. Mr Kinnersley's planning consultant responded to the new proposals with points of objection relating to the impact of the proposed development:

> "Clearly the suburban design with a flat box roof and extensive glazing will have an impact on the setting of the Grade II listed Hollingbourne House as well as the nearby former coach house and service wings, both of which form part of the listing building. These features are out of keeping with the prevailing character of the site and will detract from the agricultural character of the building and from the overall aesthetic of the estate"

13. The officer's report dated 17 December 2020 ("the OR") was both long and detailed and the Planning Committee of MBC resolved to grant planning permission. Planning permission and listed building consent were both granted on 21 January 2021.

The Challenge

14. Mr Kinnersley contends in these judicial review proceedings that the decision of MBC to grant planning permission and listed building consent was unlawful and ought to be quashed on the four following grounds:

    (i) MBC erred in its interpretation of the Local Plan policy DM5 "Development on brownfield land";

    (ii) MBC was inconsistent in the approach it took to the assessment of the contribution to the setting of the listed building made by the existing studio buildings;

    (iii) MBC was flawed in the approach taken to the assessment of heritage impact and in doing so acted in breach of its statutory duties pursuant to the provisions of section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990;

    (iv) MBC failed to take into account a material consideration, namely the potential for a sensitive conversion of the front studio building for the purpose of providing a dwelling.

15. MBC contend that the judicial review challenge is misconceived and must fail on each of the four grounds set out. In essence, MBC contend that the arguments raised on behalf of Mr Kinnersley are either merits challenges or founded on merits challenges.

16. Permission to bring these substantive judicial review proceedings was granted at a renewed oral hearing by Lang J. The application for permission was originally refused on the papers by Mr Tim Mould QC, sitting as a Deputy Judge of the High Court. MBC seeks to rely upon the written reasons given by Tim Mould QC. However, as I said in the course of submissions, the reasons given for refusing or granting permission in no way bind or influence the decision made at the substantive hearing and can only be there to provide the basis upon which a determination to give or refuse permission is made.

The Legal Framework

17. In *R (Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452 Lindblom LJ set out the definitive summary of the principles to be applied where there is a judicial review of a planning permission based on criticism of an officer's report:

> "42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:
>
> (1) The essential principles are as stated by the Court of Appeal in *R v Selby District Council ex p Oxton Farms* [2017] PTSR 1103: see, in particular, the judgment of Judge LJ. They have since been confirmed several times by this court, notably by Sullivan LJ in *R (Siraj) v Kirlees Metropolitan Borough Council* [2011] JPL 571, para 19 and applied in many cases at first instance: see, for example, the judgment of Hickinbottom J in *R (Zurich Assurance Ltd (trading as Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin) at [15].
>
> (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed

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

18. The fundamental issue is whether the officer's advice to the members in this case is flawed in the way explained by Lindblom LJ. Namely, is there some distinct and material defect in the officer's report, which in this case is unusually long and thorough.

19. Insofar as the challenge is on *Wednesbury* grounds, the consideration is whether the decision is outside the range of reasonable decisions open to the decision-maker. Leggatt LJ and Carr J in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 set out the position as follows:

> "The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see *Associated Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223* , 233-4. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police [1998] UKHL 13; [1999] 2 AC 143* , 175 (Lord Steyn). The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged

> on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning - the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044."

Ground 1:

MBC erred in its interpretation of the Local Plan policy DM5 "Development on brownfield land

20. The permitted development includes the demolition of the existing and unstable (north east facing) garden wall, reconstruction on existing line at reduced height with 2 additional openings, repairs, restoration of other garden walls and restoration of 1 sunken glasshouse. The walled garden itself is not part of the proposal for development. The only other parts of the development which related to the garden are the other walls, which are to be repaired, and the sunken glasshouse, which is to be restored.

21. As is set out by Lindblom LJ in *Gladman Developments Ltd v Canterbury City Council* [2019] EWCA Civ 669:

> "Section 38(6) of the 2004 Act requires the determination to be made "in accordance with the [development] plan unless material considerations indicate otherwise." The development plan thus has statutory primacy, and a statutory presumption in its favour – which government policy in the NPPF does not. Under the statutory scheme, the policies of the plan operate to ensure consistency in decision-making. If the section 38(6) duty is to be performed properly, the decision-maker must identify and understand the relevant policies, and must establish whether or not the proposal accords with the plan, read as a whole. A failure to comprehend the relevant policies is liable to be fatal to the decision."

22. The statutory development plan that is relevant to this site is the Maidstone Borough Local Plan, which was adopted on 25 October 2017. The application was determined on the basis that the proposed development accords with the statutory development plan. It is the contention of the claimant that policy DM5 of the local plan either applies to the entirety of the site, including both the residential garden (which is greenfield) and the previously developed land (pdl) and the development is contrary to DM5; alternatively DM5 does not apply at all and there is no policy support for the development so that the countryside policies of restraint apply.

23. Policy DM5, where it applies, requires the site not to be of high environmental value and residential development to be of a density which reflects the character and appearance of individual localities.

24. Paragraphs 6.34 to 6.38 of the Maidstone Local Plan sets out the explanation for policy DM5, which includes the following:

> "6.34 One of the core principles of the NPPF encourages the effective use of land by re-using land that has been previously developed, provided it is not of high environmental value. This is known as brownfield land... Making the best use of previously developed land will continue to be encouraged throughout the lifetime of this plan.
>
> 6.35 It is important to ensure that brownfield land is not underused and that the most is made of vacant and derelict land and buildings in order to reduce the need for greenfield land …
>
> 6.38 Residential gardens in urban and rural areas are excluded from the definition of brown field site."

25. In the summary reasons for recommendation set out in the OR the planning officer set out that the *"site is not of high environmental value, but significant improvement will arise from the works in a number of ways."*

26. The claimant criticises MBC for applying DM5 to only part of the site, averring that MBC erred in coming to a conclusion that the development of the historic walled garden is irrelevant to the policy test requiring an environmental gain.

27. The claimant suggests that the site should not have been artificially divided so as to consider what was proposed for the brownfield site alone, as DM5 relates to the entirety of the site not just the brownfield part. It is suggested that MBC fell into error by exchanging "site" with "building" and to apply DM5 only to the building, ignoring that part of the site which is land of high environmental value, and that changes to the site would, it is said, involve harm to a heritage asset.

28. The claimant is concerned that by concentrating upon the building, as the officer's report sets out in paragraph 6.47:

> "The two key questions here [referring to DM5] are whether the large commercial building on the site is currently of high environmental value, and whether the "redevelopment" will result in a significant environmental improvement to this building"

MBC have artificially restricted the scope of DM5. The claimant avers that MBC erred in coming to a conclusion that the development of the historic walled garden is irrelevant to the policy test requiring an environmental gain. The contention of the Claimant is that had MBC applied DM5 to the entirety of the site then the proposal would have conflicted with the local plan.

29. The respondent, MBC, contends that policy DM5 simply does not apply to the development of gardens. Gardens are expressly excluded in accordance with paragraph 2 *"... brownfield sites in the countryside which are not residential gardens."*

30. The fundamental difficulty for the claimant with respect to its arguments under ground 1 is that DM5 does not apply to residential gardens. DM5 itself expressly provides that residential gardens in urban and rural areas are excluded from the definition of a brownfield site. The walled garden to the rear of the studio building is to be retained as a residential garden and is not brownfield land.

31. DM5 is very clearly worded and provides for development on brownfield land in the following terms:

> "1. Proposals for development on previously developed land (brownfield land) in Maidstone urban area, rural service centres and larger villages that make effective and efficient use of land and which meet the following criteria will be permitted:
>
> i. The site is not of high environmental value; and
>
> ii. If the proposal is for residential development, the density of new housing proposals reflects the character and appearance of individual localities, and is consistent with policy DM12 unless there are justifiable planning reasons for a change in density.
>
> 2. Exceptionally, the residential development of brownfield sites in the countryside which are not residential gardens and which meet the above criteria will be permitted provided the redevelopment will also result in a significant environmental improvement and the site is, or can reasonably be made, accessible by sustainable modes to Maidstone urban area, a rural service centre or larger village"

32. The officer's report considered the impact on the wall in paragraph 5.05:

> "it is unlikely that enough bricks will be salvaged to rebuild the wall to its present height. It was also considered as acceptable that the applicant could make some new openings in the wall to suit the needs of the redeveloped adjacent build. The result will be a wall which retains the historic boundary line of the walled area and one which is stable and generally clear of other agents of decay. This seems to me to be a significant gain for the historic asset, where there is currently a high risk of collapse and loss."

33. There was also consideration in the OR of the impact of the proposals upon the listed house. At paragraph 6.90 of the OR the planning officer noted the obligation to have special regard to the desirability of preserving the building, or its setting, or any features of special architectural or historic interest (section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990) and reached the conclusion, in paragraph 6.133 that

"the current application building has a negative impact on the setting of the grade II listed building Hollingbourne House and the impact of the proposal on the significance of this heritage asset will be less than substantial."

34. DM5 does not apply to residential gardens and the OR correctly set out that:

> "6.43 The Local Plan (paragraph 6.38) excludes residential garden land in both urban and rural locations from the definition of brownfield land.
>
> 6.44 In this context, the rear of the studio building (that is associated with the two cottages and will be retained as residential garden land) is not brownfield land. The studio building with the existing commercial use is located on brownfield land."

35. The claimant's contention that the manner in which MBC has applied DM5 is artificial, and an impermissible restriction of the scope of the policy and offends against the clear wording of DM5, is not a contention with which I can agree. DM5 is clearly worded. It applies to this development but it expressly does not apply to residential gardens. The officer clearly applied the policy and considered the correct issues in coming to the conclusion he did. The policy is only applicable to that part of the site which is brownfield.

36. The claimant is relying upon an incorrect interpretation of DM5 in an effort to show that the development is contrary to DM5. The officer's report correctly refers to the relevant parts of DM5 and to the relevant guidance on the application of DM5. There was no proposal for the development of any part of the residential garden. The planning officer properly focussed on whether the proposed works would fulfil the policy considerations.

37. Ground one of the judicial review challenge therefore fails.

Ground 2

Inconsistent approach to the assessment of the contribution to the setting of the listed building made by the existing studio buildings without explanation or justification

38. The claimant contends that the approach taken by the officer in his report was inconsistent with respect to the planning judgment made as to the contribution made by the existing studio buildings to the significance of the listed building. It is submitted by the claimant that this inconsistency made unlawful MBC's decision given the judgment as to the impact of the setting and significance of Hollingbourne House.

39. The fundamental principle relied upon by the claimant in support of this ground is that like cases are to be determined alike. See Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* [1993] 65 P & CR 137 where he set out the following:

> "One important reason why previous decisions are capable of being material is that like cases should be decided in a like

> manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments of assessment of need. "

40. In *R (Irving) v Mid Sussex DC & Anr* [2019] EWHC 3406 (Admin), Lang J set out that *"a local planning authority ought to have regard to its previous similar decisions as material considerations, in the interests of consistency. It may depart from them, if there are rational reasons for doing so, and those reasons should be briefly explained."* Lang J. found on the facts of *Irving* that there was an unexplained inconsistency between the way in which the Council assessed the benefits of the proposal and how it had assessed public benefit on previous occasions and that, because the site was within a conservation area, the assessment of public benefits was a critical issue. She found the inconsistent approach to be unjustified and unlawful.

41. In this case, when planning permission for conversion of the photography studio into two new dwellings was submitted on 27 December 2018, it was not said that the studio buildings detracted from the setting or significance of Hollingbourne House. What was said by the Conservation Officer was that:

> "At present it is a single, linear unadorned construction, finished in brick and weatherboard and with a dual pitched roof in slate. The proposal is to divide the building into two, to install a central walkway, and to extend out at the back with papated [sic.] extensions. The garden will be subdivided with a linear hedge.
>
> Whilst I am prepared to accept some slight modifications to the building, the property's stark, agricultural character should continue to shine through, and this is necessary in order to conform with national guidance…

> I think that the subdivision of the cowshed into two separate dwellings distorts the legibility of the traditional arrangement of outbuildings to the main house and the relationships between the various estate buildings… The essential criteria is to retain the long, linear qualities of the cowshed, its pitched slate roof and its simple agrarian form.
>
> The relationships between the functional outbuildings and the main house need to remain legible and obvious, and the answer is to adhere more closely to the shed's simple lines …"

42. MBC purported to grant planning permission for the development as originally submitted, which permission was quashed on 8 July 2019. In May 2020, Mr Dixon, the IP, abandoned the proposals to relocate the listed wall and replaced that with a proposal to partially reconstruct the demolished wall along its existing line. The claimant objected to the amended proposals, including by a letter from his planning consultant that

> "the suburban design with a flat box roof and extensive glazing will have an impact on the setting of the Grade II listed Hollingbourne House as well as the nearby former coach house and service wings, both of which form part of the listed building. These features are out of keeping with the prevailing character of the site and will detract from the agricultural character of the building and from the overall aesthetic of the estate"

43. The OR refers to the current construction as having a negative impact upon the nearby listed building (Hollingbourne House). In paragraph 6.33 it is said that whilst the front part of the application building is of quality construction it is not listed and *"its impact on the setting of the nearby listed building is a negative one."* Similarly in paragraph 6.49 of the OR it is said that the commercial building makes a negative contribution to the setting of the listed building, and in paragraph 6.133:

> "… the current application building has a negative impact on the setting of the grade II listed building Hollingbourne House and the impact of the proposal on the significance of this heritage asset will be less than substantial"

which opinion is repeated in paragraph 6.155 (under the heading "The setting and significance of the donkey wheel (Grade II)".

44. The assessment in the OR that the application building has a negative impact is not the view that was expressed in the earlier report of the Conservation Officer of MBC, or the view of the claimant's heritage expert when she said that the application site buildings *"…do not specifically enhance or contribute to the setting of the listed building but are of a form that does not disrupt the hierarchy of historic spaces largely benign in their current state. I would concur with the planning officer who dealt with the last application that they are not heritage assets but that they play a neutral role within the setting of the listed building…"*

45. With respect to the impact of the proposals on the significance of the curtilage listed walls and the glasshouses, the impact of the existing building is described by the OR to be neutral. In paragraph 6.147 it is set out that the conclusion is that the current application building has a neutral impact on the setting of the curtilage listed walls and the glasshouses and the impact of the proposal on the significance of those heritage assets *"will be less than substantial."* This view is set out in paragraph 6.165 as a conclusion: "*the current application building has a neutral impact on the setting of the curtilage listed walls and the glasshouses and that the impact of the proposal on the significance of these heritage assets will be less than substantial".*

46. The inconsistency that is relied upon in this challenge is that the current building was previously referred to as having a neutral impact on the listed building, whereas the OR referred to the current building as having a negative effect on the significance of the listed building. In assessing the impact of proposals on the significance of affected heritage assets in accordance with the NPPF and the associated Planning Practice Guidance, the OR's report failed to contain any reference to the earlier conclusions of MBC's conservation officer or the heritage statements from both the claimant's expert in 2019 and the IP in 2020. It is the complaint of the claimant that this inconsistency was neither identified nor explained in the OR and that the failure to do so makes the decision unlawful.

47. The claimant contends that the contribution made by the existing building to the heritage asset (Hollingbourne House) is an essential element of the impact assessment and that the failure to address the inconsistency cannot be ignored. It is said by the claimant not to be a minor matter as, when considering whether there was a clear and convincing justification for the identified loss of significance resulting from new openings in the curtilage listed wall and the roof extensions to the application building, the MBC was required to weigh the less than substantial harm caused by the development to the setting of Hollingbourne House against the public benefits of the proposal.

48. It is said by the claimant that the alteration of the impact of the existing building from neutral to negative alters the base line or starting point for an assessment of impact and the Planning Committee of MBC would not have known that the expressed view in the OR was not in line with the earlier view of the Conservation Officer or the view of both the claimant and the IP's experts.

49. However, in my judgment this is not a matter which would have materially misled the members on a matter bearing on their decision (see *Mansell).*

50. What the Planning Committee was considering was the impact of the proposals on the significance of the setting of the listed house, Hollingbourne House. There is no evidence to support any submission that the proposals of the IP were harmful to the significance of the setting of the listed house and the Conservation Officer of MBC reported that it was considered acceptable that the applicant could make some new openings in the wall to suit the needs of the redeveloped adjacent building, the result being a wall which retains the historic boundary line of the walled area and one which is stable and generally clear of other agents of decay which *"… seems to me to be a significant gain for the historic asset where there is currently a high risk of collapse and loss."* It is also set out in the OR that the conversion of the existing studio buildings will bring about some alterations to the external appearance but that "*this is minor and*

it is not considered that it will cause damage to the setting of the listed building."(para 5.08 of the OR)

51. Consequently, while there is an inconsistency between the description of the impact of the existing building on the significance of the setting of Hollingbourne House being negative rather than neutral, as previously described, this was a relevant but not a "critical aspect" of the decision making.

52. The Planning Committee were not considering whether the proposals were removing something which was negative or damaging to the significance of the listed house, but rather they were considering what was being put in the place of the existing building and whether that was damaging to the setting of the listed building. The concentration on this inconsistency between whether the existing building has a neutral or a negative impact is not where the focus should be.

53. The reporting officer was entitled to reach the planning decision he did, relying (at least in part) on the conservation officer's conclusion that *"The conversion of the existing studio building will bring about some alterations to the external appearance but that this is minor and it is not considered that it will cause damage to the setting of the listed building."*

54. Insofar as the Planning Committee could have been misled by what was in the report, the claimant sought to put that right by the letter he sent to the individual members of the Planning Committee on 16 December 2020, the day before the decision. In that letter he set out clearly that he disagreed with the Planning Officer that the application site currently has a negative impact and said that the site has an agricultural character that is entirely suitable to its location. In that letter he sets out, on planning grounds, why the application ought to be refused.

55. The members of the Planning Committee would, therefore, have been fully aware of the issue with respect to whether the current impact was neutral (as per the earlier report of the Conservation Officer and the reports of the experts) or negative (as per the OR).

56. In conclusion on this ground, the impact of the existing building is plainly a matter for consideration by the planning committee but it is not a "critical aspect". The major concern for the planning committee was in assessing the impact on the significance of the setting of the listed house if the proposals were undertaken. That was explored in full in the OR. While the "baseline" may have changed from a neutral impact to a negative impact, that did not alter the impact of the proposed development which was what the planning committee were concerned about. The advice was that the proposed conversion of the existing studio building would bring about some alterations to the external appearance and that was minor and not considered that it would cause damage to the setting of the listed building. There was no inconsistency that amounted to a material misdirection to the planning committee.

57. Even if it could properly be said that the difference between the OR describing the impact on the setting of the listing building as negative, whereas the Conservation Officer had previously described it as neutral, was a material matter that required highlighting and explanation, it would not, in my judgment, lead to a different decision having been reached.

58. In all the circumstances ground two of this judicial review must also therefore fail.

Ground 3: MBC adopted a flawed approach to the assessment of heritage impact and in so doing acted in breach of its statutory duty under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act")

59. The claimant contends that in determining this application for planning permission, MBC were required to *"have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses"* (pursuant to the provisions of section 66 of the Listed Buildings Act) and that MBC failed to do so having concluded that the existing studio building had a *"negative impact on the setting of the grade II listed building and the impact of the proposal on the significance will be less than substantial"*. The claimant contends that the assessment that the existing studio buildings had a negative impact was a flawed assessment and contrasts that opinion contained in the OR with the opinion from the claimant's expert and the earlier opinion of MBC's conservation expert.

60. This ground is a direct attack on the planning officer's assessment and evaluation of the impact of the proposed development on the setting of the listed house. The court will not interfere unless there is a distinct and material defect in the officer's advice: *"The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made". (Mansell).*

61. In paragraph 6.90 of the OR, the planning officer set out the statutory duty pursuant to section 66 of the Listed Building Act. In that section of the OR from 6.90 through to 6.170 the planning officer has set out a detailed appraisal of the impact of the proposed development upon heritage issues, referring in paragraphs 6.91 to 6.99 to the relevant advice from Historic England and the relevant passages from the Local Plan and the National Planning Policy Framework (NPPF), and correctly identifying that the relevant heritage considerations of the proposed development include consideration of the potential impact upon the listed building Hollingbourne House, the Gazebo, the Donkey Wheel, the brick garden walls and the sunken glasshouses.

62. It is not sufficient simply to recite the appropriate statutory and policy tests, it is necessary for the duty to be performed: *R (Liverpool Open and Green Spaces Community Interest Co) v Liverpool City Council* [2020] EWCA Civ 861, [2021] P & CR 10 per Lindblom LJ and *R (Kinsey) v Lewisham LBC* [2021] EWHC 1286.

63. The OR sets out in detail heritage considerations in the context of the setting and significance of Hollingbourne House (paragraphs 6.104 to 6.133), the setting and significance of the brick garden walls and the sunken glasshouses (paragraphs 6.134 to 6.147), the setting and significance of the Gazebo building (paragraphs 6.148 to 6.150), and the setting and significance of the Donkey Wheel (paragraphs 6.165 to 6.170).

64. Criticism is levelled against the conclusion in the OR that the courtyard studios have a negative impact on the setting of the grade II listed building and the impact of the proposal on the significance of this heritage asset *"will be less than substantial"* (paragraphs 6.133 and 6.155) and, as in the challenge contained under Ground 2, the claimant contends that the disparity between the officer's view (that the existing building has a negative impact) with the view of the other experts and the Conservation

Officer (that the impact of the existing building is neutral) was a material consideration and it is contended that the flawed assessment of the baseline infected the judgment of impact. I do not accept that to be the case. These two paragraphs do set out the officer's view that the existing building has a negative impact, which does differ from the view of others, however, the conclusions that the impact of the proposed development is less than substantial is based upon the details set out in this part of the OR (spread over 80 paragraphs) and is thoroughly explained. Neither paragraph 6.133 nor 6.155 stand alone and must be read in the context of all that is said in that part of OR. It is a proper analysis of the heritage matters that the officer was required to consider both by reason of the Listed Buildings Act and the NPPF.

65. The second part of the challenge under this third ground, is the submission that the planning OR wrongly equates "less than substantial harm" with a less than substantial objection in breach of the duty imposed by section 66 of the Listed Building Act. Paragraphs 68 to 72 of the Statement of Facts and Grounds sets out the details of the complaint as follows:

> "68 The reduction in the footprint of the building … and the proposed residential use are said to make a positive contribution to the "setting of the wall and glasshouse" [OR 6.146]. This conclusion is bizarre since
>
> (a) The footprint reduction is marginal
>
> (b) The walled garden is already in residential use
>
> (c) The walls and glasshouse are of significance for the role they play in revealing the significance of the principal listed building – not in themselves
>
> "69 The proposal, the OR goes on, would have a neutral impact on the setting of the walls and the glasshouses and the impact would be less than substantial [6.147 and 6.165]. Not only is it the setting of the principal listed building and an impact on its significance that counts, not any setting of the wall per se, but this reinforces the reader's impression that a "less than substantial" impact is – erroneously – taken by the writer to be one that is "neutral" or unimportant.
>
> 70. As for the impact on the gazebo and the donkey wheel, the OR concludes "that the current application building and the application site make no contribution to the significance of the grade II listed Donkey Wheel and the Gazebo and they will not harm their setting with less than substantial harm" [6.155]. Again, the OR appears to equate lack of impact and less than substantial harm which undermines the reader's confidence that the writer properly understood their legal duty, or the relevant policies.
>
> 71. Finally, and without any analysis at all of why this is so, the OR concludes "The harm arising from the proposal relates to

> the new openings in the curtilage listed wall and the roof extensions to the application building" [6.166]. Thus, there is at least some acknowledgement that – as advised by both the IP's expert and Liz Vinson – the development would cause less than substantial harm to the significance of the principal listed building. The roof extensions are part of it, but there were other harmful elements which are not mentioned in the OR.
>
> 72. In these several ways, the OR equates "less than substantial harm" with a less than substantial objection, in breach of the section 66 duty. It also incorrectly assesses the impact on the setting of the curtilage listed wall and glasshouse, instead of the principal listed building. The impression given by a fair reading of the OR, as illustrated by these quotes, is confused about what the heritage asset is and of the significance of the a judgment that development causes less than substantial harm".

66. It is the contention of the claimant that the alleged confusion renders the OR materially misleading.

67. This is fundamentally an argument that the planning officer's judgment was wrong, which is an impermissible challenge. The court will only interfere if there is a distinct and material defect in the officer's advice and in this case the planning officer has set out a detailed analysis of the proposal on each aspect of the heritage assets. Given the detail the planning officer has given with respect to each aspect of the heritage assets it is of course possible to point to minor errors and less than tight language, but that is not what the court is concerned with. The court considers the OR and the advice contained within it as a whole to determine whether it is misleading to the planning committee.

68. The OR contains a full appraisal of the impact of the proposal on all aspects of the heritage elements and in reading the document as a whole, there is no error of law which makes the decision properly open to challenge. The planning committee were not being misled on a material matter.

69. Ground three of this judicial review consequently does not succeed.

Ground Four: alternative proposal – a sensitive conversion of the front building

70. It is contended on behalf of the claimant that MBC failed to take into account a material consideration in granting permission, namely the potential for a sensitive conversion of the front studio building to provide a dwelling in a way which avoids harm to the significance of the listed building. The claimant, through his advisors, put forward an alternative proposal for the conversion of the front studio and the claimant referred to that proposal in his letter to the members of the planning committee on the eve of the decision.

71. The MBC contend that this is an impermissible merits based challenge based upon the planning officer's judgment being wrong. It is said on behalf of the claimant that this ground is not an attack on the planning officer's judgment, questions of weight being a matter for the decision maker, but as a matter of law the planning committee must take

into account all material considerations when deciding whether or not to grant planning permission and that MBC failed to do so.

72. The principles with respect to such a challenge are set out in *R (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3, [202] PTSR 221, where Lord Carnwath JSC referred to his earlier decision in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19, the issue in that case being whether the authority had been obliged to treat the possibility of alternative sites a material consideration:

> "17. It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.
>
> 18. For the former category the underlying principles are obvious. It is trite and long-established law that the range of potentially relevant planning issues is very wide (*Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281); and that, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for decision-maker *(Tesco Stores Ltd v Secretary of State for the Environment and West Oxfordshire District Council* [1995] 1 WLR 759, 780). On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him not merely empowered) him to do so."

73. In *Samuel Smith* Lord Carnworth also said the following:

> "31. I referred to the discussion of this issue in a different context by Cooke J … and in the planning context by Glidewell LJ in *Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority…*
>
> > *"27. … ' … in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act.' (In re Findlay)*
> >
> > *28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account 'as a matter of legal obligation.'"*

> "32. …
>
> The question therefore is whether under the openness proviso visual impacts, as identified by the inspector, were expressly or impliedly identified in the Act or the policy as considerations required to be taken into account by the authority "as a matter of legal obligation", or alternatively whether, on the facts of the case, they were "so obviously material" as to require direct consideration."

74. The alternative proposal put forward by the claimant was in fact considered in the body of the OR. In paragraph 4.01

> "Following a "design exercise" carried out by the neighbour's consultant, it is considered that an alternative scheme to convert the existing barn into one large 4-bed house is entirely achievable and is possible with less harmful impact"

While this may have been a brief consideration, it does mean that there was a consideration of the alternative proposal. The question of weight to be given to that alternative proposal is a matter for the decision maker and is not something the court will interfere with. The planning officer was entitled to consider that alternative proposal as not having any prospect of being given permission and not a proposal that needed further consideration – that is purely a planning judgment.

75. The OR includes a consideration of proposals in the context of both DM 30 (in paragraphs 6.71 to 6.81), and DM31 (in paragraphs 6.15 to 6.42) depending upon whether the proposal is properly a conversion or a new build. The conclusion in the OR that the proposals were for a new build and that, accordingly, DM31 was not relevant. The OR also advised that it did accord with DM30.

76. Given the reference to the alternative proposal put forward by the claimant and the references to the appropriate policies, it cannot be said that MBC was acting irrationally.

77. The challenge under ground 4 must also fail.

Listed Building Consent

78. The challenge to the Listed Building Consent rests entirely upon the challenges to the legality of the design to grant planning permission. As those four challenges to the legality of the grant of the planning permission have failed, the challenge to the Listed Building Consent must also fail.

Conclusion

79. For the reasons set out the judicial review challenging the decision to grant planning permission and the Listed Building Consent fails on the various grounds advanced by the claimant.

80. In summary: Ground 1 fails as there was no misinterpretation of policy DM5 of the Local Plan, there was no proposal to develop existing residential garden; Ground 2 fails

as there was no material misdirection contained within the OR; Ground 3 fails as it amounts to an attack upon the planning officer's assessment and evaluation of the impacts of the proposed development as set out in the OR; Ground 4 also fails as it is an attack upon a planning judgment, the alternative proposal having been considered but only briefly.