Neutral Citation Number: [2019] EWHC 3474 (Admin)

Case No: CO/1279/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2019

Before:

Rhodri Price Lewis QC
Sitting as a Deputy Judge of the High Court

- -

Between:

Clive Douglas Risby	**Claimant**
- and -	
East Hertfordshire District Council	**Defendant**
- and -	
(1) East Hertfordshire District Council (as developer) **(2) Hertfordshire County Council** **(3) Highways Department Hertfordshire County Council** **(4) Bishop's Stortford Town Council**	**Interested Parties**

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- -

Richard Wald and Katherine Barnes (instructed by Birketts LLP, Solicitors) for the Claimant
Saira Kabir Sheikh QC (instructed by Victoria Wilders, Legal Services Manager,) for the Defendant
The Interested Parties did not appear and were not represented

Hearing dates: 26th and 27th November 2019

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Approved Judgment

Rhodri Price Lewis QC :

Introduction:

1. The Claimant, who lives near the site of the proposed development, challenges the decision of the Defendant Council, as local planning authority, to grant planning permission to itself for a multi-storey car park and other development on land in a conservation area in Bishop's Stortford.

2. Permission to proceed with the claim was granted by Mr. C.M.G. Ockelton, sitting as a Deputy Judge of the High Court, on two grounds, albeit those grounds have been numbered throughout as ground 1(a), ground 1(b) and ground 2.

3. The Claimant alleges that the Council failed to take into account in granting this planning permission that it had previously found in its grant of an earlier planning permission that has now been quashed by an order of the court for a very similar development that there would be harm caused to the conservation area by that development (that is Ground 1(a)), that there were no or no adequate reasons given for this change of view (Ground 1(b)) and that members of the Council were misdirected by officers on this issue of harm to the conservation area and in particular that the officers failed to advise the members that any balancing of harm to the conservation area with the public benefits of the proposal had to be a weighted one with the starting point being a presumption against the grant of planning permission (Ground 2).

The Facts:

4. The site for the proposed development lies to the north of Bishop's Stortford town centre. At present it is used as a surface level public car and as an area of green open space.

5. The Site lies within the Bishop's Stortford Conservation Area.

<u>The Initial Application</u>

6. On 27 February 2018 the Council applied for planning permission for:

> *"Erection of a Multi Storey Car Park (MSCP) over six levels providing 546 spaces, open air surface car parking for 27 spaces to the north of the cark park. Erection of a 4 storey building with commercial use at ground floor and 15 residential flats arranged over the upper 3 levels, a multi-use games area (MUGA) and associated highway and public realm works. Removal of fence and retaining wall"* ("**the Initial Proposal**"; "**the Initial Application**").

7. The Council's Conservation and Urban Design Advisor on being consulted observed on 4 April 2018 that "Whilst the proposed multi-storey will result in a limited level of harm to the character and appearance of the Conservation Area by reason of its bulky massing, this harm is less than substantial, and is seen to be outweighed by the significant public benefits of the scheme".

8. On 20 July 2018 the Council considered a report on the Initial Application by the then case officer at its Development Management Committee meeting. That report I shall refer to as OR1. OR1 recommended that permission should be granted. It identified "Design and Impact on Character of Area" as a main issue and the officer reported as follows:

> "8.63 The NPPF [the Government's National Planning Policy Framework] sets out the weight to be given to the impact of development proposals in relation to heritage assets. In that respect, it is not considered that these proposals will result in substantial harm or the total loss of significance of a designated heritage asset (NPPF para 133). It is considered that there will be some harm, but that this will be less than substantial. In these circumstances (NPPF para 134) it is necessary to weigh the harm against the public benefits of the proposal.
>
> 8.64 In relation to the character of the Conservation Area, there is a duty placed on the planning authority, in determining applications, to ensure that the character is either preserved or enhanced. In respect of this, the character of an area will clearly change, but this is not considered necessarily to be harmful in respect of character. As a result, the duty placed on the planning authority would be met if the proposals were to be approved.
>
> 8.65 There are some elements of the proposals that are considered to be harmful in character, design and visual impact terms. The loss of the trees for example, the relationship between the Northgate End Building and the new building to the south and the requirement for the significant enclosure to the MUGA. Whilst the scale of change is considered to be significant, given the positive elements of that change, well designed buildings and the use of appropriate design solutions, the overall impact is assigned neither positive or negative weight."

9. Under the heading "Planning Balance and Conclusion" OR1 ultimately concluded:

> "9.4 With regard to other matters set out in this report, the proposals are considered to have an impact to which weight is assigned neutrally. As a result it is concluded that the substantial positive weight that can be assigned to the social and economic benefits of the proposals is greater than the weight that can be assigned to its harmful impacts."

10. The Committee resolved, in accordance with the recommendation in the OR1, to grant permission ("the Initial Permission") on this application. The Initial Permission was granted on 24 July 2018.

11. On 4 September 2018 the Claimant lodged a claim for judicial review challenging the Initial Permission. I granted permission to proceed with the claim on certain grounds

on 2 November 2018. The Council subsequently consented to judgment, with a consent order dated 30 January 2019 quashing the Initial Permission. The consent order records the following basis for the quashing:

> *"3. The Defendant Council concedes that the said decision should be quashed on the grounds that:*
>
> > *a. The Judge considered that the determination of the application, reference 3/18/0432/FUL, was arguably unlawful in not expressly dealing with the provisions of section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990 concerning "appearance" […]*
>
> *4. The Defendant accepts that the Officer's Report to the relevant Committee of the Defendant Council did not expressly deal with "appearance" within section 72(1) and, therefore, the determination was unlawful for the reasons given by the Learned Judge."*

The Amended Application

12. The Council subsequently consulted on an amended version of the Initial Application. The amended scheme is described as:

> *"Erection of Multi Storey Car Park (MSCP) over six levels providing 546 spaces, open air surface car parking for 27 spaces to the north of the car park. Erection of a 4 storey building with commercial use at ground floor and 15 residential flats arranged over the upper 3 levels, provision of open space and associated highway and public realm works. Provision of emergency vehicle access between adjacent Youth Services site and land to external parking area to north of MSCP. Removal of fence and retaining wall."*

13. In his response to the consultation on this amended scheme the Council's Conservation and Urban Design Advisor made the following observations:

> *"Whilst careful consideration has been given to the massing of the car park through the architectural approach undertaken for the whole scheme, the proposed multi-storey car park is of a fundamentally large building typology of singular grain and bulky massing, which no design considerations can overcome. This singular grain and bulky massing will be visible from various locations in its immediate surroundings. It is considered that the proposed multi-storey car park due to the above singular grain and bulky massing will result in a degree of harm to the character and appearance of the Conservation Area, which we assess to be less than substantial, when compared with the general openness of the existing site. However, this harm is partially limited by the proposed*

> *residential and commercial building that will break up the bulk of the massing in views of the site looking along Hadham Road, and by the enclosed nature of the site to the east.*
>
> *Paragraph 196 of the NPPF states: "Where a development proposal will lead to less than substantial harm to the significance of a heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing the optimum viable use." In this instance this less than substantial harm is seen to be outweighed by the significant public benefits of this scheme. Including in the densification of parking in the area (by removing the swathes of unsightly surface level parking), the provision of new residential units and commercial space, and as part of the wider public benefits of the eventual Old River Lane redevelopment to which these proposals are a key part.*
>
> *Policy HA4* [of the Council's then recently adopted Local Plan] *states that new development should "preserve or enhance the special interest, character and appearance of the area", and whilst harm has been identified, the enhancements identified above to the character and appearance of the conservation area are on balance seen to outweigh this harm. It is recommended that permission is granted subject to suitable conditions for samples of materials, details of hard surfacing, and details of landscaping."*

14. A new case officer prepared an officer's report ("the OR2") on the proposal for consideration by the Committee at its meeting on 13 February 2019. The key extracts from the OR2, which recommended the grant of permission, are set out below. The Committee, in accordance with the OR2, resolved to grant permission for the Proposal on 13 February 2019. The Permission was issued two days later, on 15 February 2019. These proceedings were issued on 29 March 2019.

The Decision:

The OR2

Amendments

15. The OR2 summarised the amendments to the Initial Proposal as follows at paragraph [1.4]:

> "
>
> - *The deletion of the previously proposed multi use games area (MUGA);*
>
> - *Minor amendments to the commercial/residential building resulting in a need to increase the depth of the building by 450mm for the core area only, increase in balcony depth*

> *(without increased projection) and amendment to gable walls to match the geometry of the building so that all plans are consistent;*
>
> - *Landscaping amendments, resulting in the removal of two further trees and the creation of an emergency access between the parking area to the rear of the Northgate End building and the remaining green space to the rear (east), repositioning landscape strip and footway between youth service building and remaining green space."*

Heritage

16. At paragraph 1.5 the OR2 explains that two further pieces of heritage evidence, since the Initial Application, had been submitted by the applicant in support of the Amended Application: "One addresses Appearance and Character within the Conservation Area and the second is a Built Heritage Statement".

17. The OR2 addresses heritage matters at paragraphs 8.46 to 8.99. Paragraphs 8.48 to 8.51 read as follows:

> *"8.48 Given that the application site is located within the Bishop's Stortford Conservation Area, section 72(1) of the above Act obliges the Local Planning Authority to pay special attention to the desirability of preserving or enhancing the character or appearance of the Conservation Area when determining planning applications. Consideration will be given to the potential impact of the proposed development upon the character and appearance of the area in this section of the report.*
>
> *8.49 Compliance with both the development plan policies and the NPPF requires account to be taken also of the desirability of taking opportunities to enhance the character and appearance of the Conservation Area. Case law has established* [and there is then a footnote referring to the case of Forge Field Society v Sevenoaks DC, see below] *that the finding of harm to a Conservation Area creates a strong but rebuttable presumption against the development to which "considerable importance and weight" is attributed as a start point.*
>
> *8.50 Given the particular status of Conservation Areas, and the rebuttable presumption in favour of their preservation, the proposed development will be assessed against the appropriate NPPG guidance, policy HA4 of the District Plan, which deals with Conservation Areas, Neighbourhood Plan Policy HDP2 and in addition to HA4 and HDP2* [sic] *as part of the statutory development plan.*

> *8.51 The following paragraphs of the NPPF are considered to be relevant to this application:*
>
> > *Para 193: When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset, the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.*
> >
> > *Para 196: Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate securing its optimum viable use."*
> >
> > *...*
> >
> > *Para 201: Not all elements of a Conservation Area ...will necessarily contribute to its significance."*

18. The OR2 then goes on to set out the policy relevant to developments in conservation areas in the recently adopted District Plan, policy HA4, and assesses the proposal against the six relevant criteria contained in the policy. This section of the OR2 concludes that "the proposals are considered to both preserve and enhance both the character and appearance of the Conservation Area and are acceptable in relation to the requirements of policy HA4": see paragraph 8.91.

19. On the question of any harm that would be caused by the car park building element of the Proposal to the conservation area by virtue of the building's scale, proportion, form, height, design and overall character, the analysis in the OR2 is as follows:

> *"8.80 Turning to the car park building, this is the element where the Conservation and Urban Design Advisor concludes there is harm. However, its frontage immediately onto Link Road will be three storeys in height. To the east it will be well screened by the adjacent long established trees. The remaining storeys will be set back from the frontage. They will be perceived in longer views, but these are also well screened as are view of the foodstore building to the south. In views had close to the site, the upper floors are not likely to be dominant. The frontage height is comparable to the foodstore building to the south. From the west the building will be largely obscured by the commercial/residential building.*
>
> *8.81 Apart from the frontage, there are few public locations at which the scale of the building will be noticeable. Strong and established tree planting exists along the east side of the site, existing buildings enclose the west. Views to the north will be largely private ones. […] In respect of its impact on the green*

> *space to the rear of the youth services building, it is not considered that this space contributes to the significance of the Conservation Area, because of its enclosed and semi private nature.*
>
> *8.82 Your Officers reach the conclusion then, contrary to that of the Conservation and Urban Design Advisor, that the proposals do not result in harm to the character and appearance of the Conservation Area in respect of the issues set out in part (c) of policy HA4 but are indeed neutral. They therefore do preserve or enhance the character and appearance of the Conservation Area."*

20. The OR2's conclusions on whether the Proposal would cause harm to the character and appearance of the conservation area are at paragraphs [8.94 to 8.96]:

> *"8.94 In this respect, as set out above, the Conservation and Urban Design Adviser sets out that the proposed multi storey building will result in some harm to the character and appearance of the Conservation Area, albeit that he concludes that the development would lead to less than substantial harm. In this situation, para 196 of the NPPF sets out that the harm should be weighed against the public benefits of the proposals. A balanced judgment will be required, having regard to the scale of any harm or loss and the significance of the heritage asset.*
>
> *8.95 By contrast, the agents Heritage Consultant, following additional detailed assessment of the potential harm against the Conservation Area statutory test, considers that the impact of the proposal would be neutral to the character and appearance and that there would be no harm.*
>
> *8.96 Your Officers, in assessing the proposals against all aspects of the relevant policies, reach the conclusion that no harm is caused and that the proposals preserve or enhance the character and appearance of the area. It is not necessary then, in respect of the impact of the proposals on the Conservation Area, to undertake the balancing exercise set out in paras 195 and 196 of the NPPF."*

21. The OR2 ends by addressing the overall planning balance in the following terms:

> *"9.2 Given that the application site is located in the Bishop Stortford Conservation Area, section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, obliges the Local Planning Authority to pay special attention to the desirability of* ***preserving or enhancing*** *the character of the Conservation Area. This requires both character and appearance to be especially considered and raises a strong and important rebuttable presumption against the development if*

> *any harm from it is identified. If so, harm falls to be weighed against other factors. Consideration has been given to the potential impact of the proposed development upon the character and appearance of the area whilst taking account of the desirability of taking opportunities to enhance the character and appearance of the Conservation Area.*
>
> *9.3 The Council's Conservation and Urban Design Advisor considers the proposed multi-storey car park element of the scheme would result in a degree of harm to the character and appearance of the Conservation Area, which is assessed as less than substantial. Submissions from residents and the public have referred to harm.*
>
> *9.4 Two recent assessments, undertaken by consultants on behalf of the applicant, have however concluded that the effect was neutral in respect of harm to the Conservation Area, i.e. that there was no harm from the development because it was concluded that the application site did not contribute to the distinct historic or architectural significance of the Conservation Area. The impact of the proposal would be neutral.*
>
> *9.5 Your Officers' view is that harm is not caused to the Conservation Area. The compatibility of the proposals with each element of the relevant policies (District Plan HA4 and Neighbourhood Plan HDP2) has been considered very carefully and is set out in the report above. The conclusion is that no harm is caused and that the proposals therefore preserve or enhance the character and appearance of the Conservation Area.*
>
> *…*
>
> *9.13 In conclusion, then, whilst some elements of harm have been identified as a result of the development (as set out above), it is considered that the benefits of the proposal far outweigh any harm and substantial positive weight can be given to those benefits. In relation to the location in the Conservation Area, special attention has been paid to the desirability of enhancing the character and appearance of the area. The conclusion has been reached that no harm is caused."*

The Committee meeting of 13 February 2019

Amendments

22. The transcript from the Committee meeting of 13 February 2019 indicates that members were told the Amended Application was "the same as that which was before members in July 2018, save for the proposal for the MUGA […] which has been

excluded" and the "minor" amendments summarised above at paragraph [1.4] of the OR2.

Treatment of the Initial Application

23. In response to the question "what is the difference between this scheme and the one you looked at in July 2018?" the planning officer said:

> *"There is no difference, as I said earlier, except the MUGA, the multi-use play area isn't included, but what is different really is not only, as I mentioned, the policy context is different, the National Policy Guidance is different, but also we have had subsequently two detailed reports by experts, not just ordinary – I shouldn't say ordinary planners, we are not ordinary, but by people who don't have a specific qualification in heritage matters, and so two reports have been submitted, and these are on the Council website. One is by Calfordseaden, and this is a 12 page document, very detailed. There is another one, a 14 page study looking specifically at the impact of the proposal on the conservation area, and the difference is that they come to various conclusions which, because of time factors our conservation officer wasn't able to do, the consultants came to the conclusion that this part, this corner of the conservation area wasn't extraordinary, there was lots of surface car parking there which didn't add to the character of the conservation area, the surface car parking was a detraction and, as I say, 12 pages and 14 pages. Now the Conservation Officer, which one of the speakers said we should, you know, hold up and follow, and he mentioned some harm, but that was a one-and-a-half page email to the previous case officer and similar comments were sent forward this time."*

Heritage Balance

24. The transcript records that members were also given indications of the approach to be taken if, contrary to the officer's view, they were to conclude that the Proposal would result in harm to the CA. The author of the OR2 outlined his own approach: *"I looked, as I said earlier, at the relevant Planning Policy and in the event that it was considered that there was harm I looked in detail at the public benefits which I believe significantly outweigh the harm"*. The legal officer explained to members: *"So you have to look at: well there is the harm on the one hand and there is the benefits of the development proposal on the other hand: what outweighs the other?"* The legal officer reminded members that they needed *"to do this harm and benefit approach throughout"*. The Chairman summarised the position as follows: *"I would think that we will have to come back to do the calculation and make the judgment in your own minds as to whether the potential harm outweighs the potential benefits, and vice versa"*.

The Law:

The s.72(1) Duty

25. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 creates a duty in respect of conservation areas when exercising powers under the Town and Country Planning Act 1990 including determining an application for planning permission, as follows:

> *"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."*

26. If there is harm (whether "substantial" or "less than substantial") then the requirement of "special attention" creates a strong but rebuttable presumption against the grant of permission for the development. It is not, therefore, just a material consideration among others as explained by Lindblom J (as he then was) in *R (Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin) at [48]-[49]:

> *"As the Court of Appeal has made absolutely clear in its recent decision in Barnwell, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in Barnwell it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.*
>
> *This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in Barnwell, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."*

The consistency principle

27. The importance of consistency in public law decision-making is established in the planning context. As Mann LJ explained in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P & CR 34:

> *"In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. 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 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."*
>
> *[…] 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 and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."* (at page 145).

28. The consistency principle, and its application to quashed planning decisions specifically, was recently considered by Thornton J in *R (Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin). Having reviewed the relevant authorities, she set out the relevant principles as follows at [56]:

> *"i) The principle of consistency is not limited to the formal decision but extends to the reasoning underlying the decision (North Wilts v Secretary of State; Dunster; Baroness Cumberledge; Fox Stategic and Vallis).*
>
> *ii) Of itself, a decision quashed by the Courts is incapable of having any legal effect on the rights and duties of the parties. In the planning context, the subsequent decision maker is not bound by the quashed decision and starts afresh taking into account the development plan and*

> *other material considerations (Hoffman La Roche; and Kingswood).*
>
> *iii) However, the previously quashed decision is capable in law of being a material consideration. Whether, and to what extent, the decision maker is required to take the previously quashed decision into account is a matter for the judgment of the decision maker reviewable on public law grounds. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account (DLA Delivery Ltd v Baroness Cumberledge of Newark)*
>
> *iv) The decision maker may need to analyse the basis on which the previous decision was quashed and take into account the parts of the decision unaffected by the quashing (Fox and Vallis). Difficulties with identifying what has been quashed and what has been left could be a reason not to take the previous decision into account (as with the cases of Arun and West Lancashire).*
>
> *v) The greater the apparent inconsistency between the decisions the more the need for an explanation of the position (JJ Gallagher)."*

29. The first of those principles was adopted by the Court of Appeal, Hickinbottom LJ giving the main judgment, in *R (oao Bates) v Maldon District Council* [2019] EWCA Civ 1272 at [19] in these terms:

> *"viii) Where a planning decision maker differs from an earlier decision-maker on a crucial planning issue (e.g. whether a first floor extension would in principle harm the appearance of a conservation area) he is thus required to "grasp the intellectual nettle of the disagreement" and explain his reasons for disagreeing in terms of analysis."*

Reasons:

30. Where a planning decision is taken in line with an officer's report, then there is an assumption that the reasons for that decision are those set out in the report: see *Palmer v Herefordshire Council [2016] EWCA Civ 1061* at [7] per Lewison LJ and *Bates, above,* at [19 vi].

31. The reasons given for a decision must enable an informed reader to understand why the matter has been decided as it has, and what conclusions were reached on the principal important controversial issues; but again they must be considered on the basis that they are drafted for informed parties who are well aware of the issues involved and the arguments advanced: see *South Bucks DC v Porter (No 2)* [2004] UKHL 33 per Lord Brown of Eaton-Under-Heywood at [33] and [36] and *Bates* at [19 vii].

32. Where the consistency principle may be engaged, then, as was said in *Bates,* the decision-maker must "grasp the intellectual nettle of the disagreement" and explain his reasons for disagreeing in terms of analysis: at [19 viii].

Officers' Reports

33. An officer's report must be read as a whole and in a straightforward and common sense way, and on the basis that it is drafted to an informed readership: see *Bates* at [19 iv]. 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. It is only if the advice in the officer's report is such as to mislead 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 the advice : see *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 at [42] per Lindblom LJ.

Submissions:

Ground 1(a): Failure to take into account the previous finding of harm to the conservation area

34. Mr. Wald on behalf of the Claimant submits that in taking the decision to grant planning permission for this amended scheme following the quashing of its original decision, the Council failed to take into account a material consideration, namely the Council's previous finding of harm to the conservation area and that the key issue for determination by the court is whether the relevant previous finding is a material consideration as the Claimant contends.

35. The Claimant submits that the Council's previous conclusion on the degree of harm to the conservation area is nullified by the quashing and requires redetermination, but the previous finding of the existence of harm to the conservation area (which is at least less than substantial) remains. He submits that this is because, as recorded in the consent order, the Council's previous conclusion on the overall degree of harm to the conservation area, found to be less than substantial, was based on an incomplete and therefore unlawful assessment in that it was reached without express consideration of "appearance" as s.72(1) requires. It follows that this conclusion must be set aside because it is vitiated by the legal error. However, in so far as it goes (i.e. without giving express consideration to appearance), there was no error in the Council's previous finding at paragraph 8.65 that the proposal was "harmful in character, design and visual impact terms". He submits that this previous finding of some harm (at least less than substantial harm), which he described as the baseline, therefore survives the quashing and any new finding of harm that does take appearance into account must be a finding of comparable or greater harm.

36. He submits that this previous finding by the Council constitutes a material consideration in the Council's determination of the Amended Application, such that no reasonable decision-maker could have failed to consider it, in circumstances where:

(a) it related to the same site as the Amended Application;

(b) it concerned development which was the same in all material respects to that for which planning permission was sought under the amended application. Indeed, the similarity between the two schemes was a point stressed to members;

(c) The time between the initial OR1 (June 2018) and the OR2 (February 2019) is limited, with no intervening material changes either to the conservation area itself or to relevant policy;

(d) the Council was awarding itself planning permission in circumstances where its previous decision had been criticised by the courts.

37. He complains that the OR2 did not acknowledge that the Council had previously concluded that there would be harm to the Conservation Area and that it did not contain any adequate analysis of the recent heritage assessments. Members were not referred to the schedule to the consent order which set out the basis for that order. He observed that a Councillor at the meeting who was an objector to the proposal but not a member of the committee, Councillor Wyllie, referred members to the policy of the NPPF in respect of conservation areas that required decision makers "to give great weight to the conservation of heritage assets and provide clear and convincing justification for the harm or loss". He observed that: "The planning balance exercise must be weighted in favour of the heritage of our town." Mr. Wald submits that that was a correct understanding of the position in policy terms and in law, but it was not supported or endorsed by officers and that the tenor of the advice given by officers was at odds with what Councillor Wyllie had correctly said. They referred to a straight balance between harm and benefits whereas they should have advised that it was a weighted balance with special attention being given to preserving or enhancing the character and appearance of the conservation area and so with a rebuttable presumption against the grant of planning permission.

38. He submits that just as the Council in *Davison* acted unlawfully in failing to take into account its previous decision that the development in that case could have an adverse impact on Green Belt openness when determining the second application before it, so the Defendant Council here has failed to take into account its earlier finding of harm to the conservation area in its consideration of the amended application.

39. Ms Sheikh on behalf of the Defendant Council submits that Ground 1(a) is based on a misapplication of the public law principle of consistency. She submits that there was no baseline finding as to harm to the conservation area in its original quashed decision that the Council could rely on in its decision under challenge and so the Council were re-determining afresh. The OR1 appeared to find no harm to the character of the conservation area but went on to refer to some elements of the proposals that were "considered harmful in character, design and visual impact terms". She characterised this part of OR1 as confused and "pulling in all directions" and submits that it was therefore unsafe for the Defendant to rely on any of the earlier findings and so it set out to determine the amended application afresh. She points out that the members of the committee were the same at both meetings except for one member as one member had since retired and had been replaced by a new member and so the members were

familiar with the site and proposals. The finding of less than substantial harm in the previous decision was not a material consideration which engaged this principle because that finding is tied up with the reason why the previous decision was quashed. She submits that even if this principle is engaged, adopting the finding of less than substantial harm as a baseline or minimum position to which the impact on appearance is then added is an approach which is both complex and artificial and so it was not unreasonable for the Defendant to have concluded that the exercise required by section 72(1) and by policy should be considered again and afresh by officers. She submits that in those circumstances it was reasonable for the Defendant not to have relied on the previous finding of less than substantial harm.

Ground 1(b) No adequate reasons were given for the Council's changed view on whether the proposal would harm the Conservation Area.

40. The Claimant submits that there was a stark change from the consideration of the original application by the Council when it was found that there would be harm, albeit less than substantial harm, to the conservation area to the consideration of the amended scheme when there was a finding that the amended scheme would cause no harm to the conservation area. Mr. Wald accepts that the Council was entitled to change its view but in doing so it had to acknowledge that it had changed its view and give adequate reasons for that change and he submits that they did not do so before granting planning permission. He submits that the fact that the two new assessments were more thorough than the earlier observations of the Conservation and Urban Design Officer is not enough to provide adequate reasons explaining the stark departure from the earlier view of the Council that there would be some harm to the conservation area.

41. Ms Sheikh submits on behalf of the Defendant Council that it is readily discernible from the OR2 and from the transcript of the meeting why the Council departed from the previous finding of less than substantial harm to the conservation area. She points to the two new expert reports that were not available when the initial decision was made and to the fact that the officer preparing OR2 was entitled reasonably to prefer the analysis in those reports to the views of the Conservation and Urban Design officer. He explained this to members in the meeting as the transcript records.

Ground 2: That the members were misdirected on the issue of harm to the conservation area and on the effect of section 72(1)

42. The Claimant submits that the members were repeatedly advised by two officers during the meeting that if, contrary to the views of officers, they found that there would be harm caused to the conservation, they should weigh the harm against the benefits without being advised that the balance must be pre-weighted with the starting point being a presumption against the grant of planning permission even where the harm is less than substantial. He relies in support of that submission on the dictum of Lindblom LJ in *Forge Field Society* at [48] - [49] quoted above.

43. Ms Sheikh in reply submits that there was sufficient information both in the OR2 and in the background documents submitted with the application to enable members to comply with the duty under s. 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990. She submits that, in any event, the alleged

misdirection recorded in the Committee Minutes which lies at the heart of this ground was in fact an accurate summary of the relevant legal principles.

Discussion and Conclusions:

44. **Ground 1(a):** In my judgment it was a material consideration for the Defendant Council when determining the amended application that it had based its original decision on an OR1 that at one point (paragraph 8.63) considered that less than substantial harm would be caused to the conservation area by the initial proposal but also considered that the change to the character of the area was "not considered necessarily to be harmful in respect of character" (paragraph 8.64) , then went on to advise that there were "some elements of the proposal then that are considered harmful in character, design and visual impact terms" before concluding that "the overall impact is assigned neither positive or negative weight" (paragraph 8.65). It did not expressly deal with the effect of the proposed development on the appearance of the conservation area as is set out in the schedule to the consent order. In my judgment the Council needed to be aware in its determination of the amended application that that advice had been the basis of its earlier determination. The proposed schemes were very similar and on the same site. There was a short period of time between the initial determination in June 2018 and the later determination in February 2019. Whilst it is right that a new District Plan had been adopted as part of the development plan since the initial determination, it is not suggested that there was a significant change of policy on the relevant issues. Further, the original decision had been quashed by a consent order after I had decided that it was arguable that the original consideration of harm to the conservation area had been flawed. It was incumbent on the Council therefore to recognise that it had based its earlier determination on that advice and to grasp the intellectual nettle of explaining any new view: see *Davison*, above, at [56] and [47] and *Bates,* above at [19 viii].

45. However, that advice was so confused, seeming to reach inconsistent conclusions and failing to deal expressly with the appearance of the conservation area, that I do not consider that it can properly be said that there was a clear finding of less than substantial harm to the conservation area as a basis for the grant of planning permission. I am satisfied that the Defendant Council did adequately take the nature of the previous advice in OR1 into consideration in determining the amended application for planning permission. The case officer began his OR2 under the heading "Summary of Proposal and Main Issues in this way:

> *"1.1 members will recall that this application (which at the time included a multi-use games area (MUGA) was first considered by the Development Management Committee on 20th June 2018 and subsequently on 18th July 2018. Planning permission was granted with a decision notice issued on 24th July 2018.*
>
> *1.2 Subsequently, the planning permission has been quashed following the submission of a challenge in the High Court on the basis that section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, had not been lawfully addressed. Section 72(1) requires that both 'character and appearance' of a Conservation Area be given special attention*

> *when development proposals are determined. On the initial consideration of the matter, the Court held that the Officer's report expressly addressed 'character' but not 'appearance'.*
>
> *1.3 On the basis of the above, leave to appeal was granted. This is not the same as a full hearing. However, at that stage the Council as applicant conceded to judgment. This means that the challenge did not progress to a full hearing and the outcome of what a hearing would have been, were it held, is not known. However, as a result of conceding to judgment to judgement, the planning application has returned to being a 'live' application which the Council, as Local Planning Authority, is required to determine...This report then sets out the considerations for members to take into account in coming to a further decision on the matter.*

46. The OR2 goes on to refer to the two new heritage assessments which were available to members on the Council website (paragraph 1.5). It continued:

> *" 1.7 The decision will now fall to be made in the light of the relevant statutory development plan at the new date of determination and having regard to material considerations – the latter includes the National Planning Policy Framework (NPPF) 2018 and the former is the Council's newly adopted District Plan which forms part of the statutory development plan and was formulated against the NPPF (2012). Therefore, the policy background against which a new determination of the application will be made is different to the previous background of the previous development plan (the East Herts Local Plan 2007) and an emerging development plan (as the District Plan was in July 2018).*
>
> *1.8 Against that new policy context most of the relevant issues to be considered will remain the same as those presented to members on 18 July 2018, but without reference to the MUGA and with special consideration to the matters contained in the High Court Order. Members are referred to the two previous reports, which were presented to Committee on 20 June 2018 and 18 July 2018, which serve as useful references and within which consultation responses that remain relevant to the determination are set out. These are to be taken into account by members of the committee in this new consideration. These are appended to the report as Essential Reference Papers A and B"*

47. It is clear from these passages from OR2 that the case officer understood the reasons why the earlier grant of planning permission was quashed by consent order as can be seen from paragraph 1.2 above and they were put before members. He understood too that special consideration had to be given to the matters contained in that order and that members needed to take into account as an "Essential Reference Paper" the OR1 that had contained the advice which had led to the quashing of the earlier grant of permission.

48. In my judgment that is adequate consideration of the fact and nature of the advice that had led to the quashing of the earlier grant of planning permission.

49. The observations of the Council's Conservation and Urban Design Advisor were included in the committee's papers as "Essential Reference Papers E": see paragraph 5.4. So the committee considering the amended application had to address the same advice in substance from that Advisor that less than substantial harm would be caused to the character and appearance of the conservation area as the earlier committee, all but one being the same members, had had to do. The OR2 sets out at paragraphs 8.80 to 8.82 and at paragraphs 8.94 to 8.96 why the planning officers had taken a different view from the Conservation and Urban Design Advisor. Paragraphs 8.80 to 8.82 set out the detailed matters concerning the amended scheme's scale, location and visibility that led the new case officer to take the view that the amended proposals would not result in harm to the character and appearance of the conservation area.

50. In my judgment those passages provide an adequate explanation of why the advice now being given to members that no harm would be caused to the character and appearance of the conservation area was different from the advice that was contained on this issue in OR1 and from the advice of the Conservation and Urban Design Advisor. The earlier advice has not been "ignored" as Thornton J warned in *Davison* should not occur in these circumstances (see [55]) and there is sufficient analysis and explanation in paragraphs 8.80 to 8.82 and 8.94 and 8.96 of OR2 to explain why a different view is being taken.

51. In my judgment there was no obligation on the Council to maintain any view previously expressed in the OR1 which had led to the quashing of the grant of planning permission. The members had their attention drawn to that earlier advice in OR2 by its inclusion as an "Essential Reference Paper", they were the same members all but one, who had received that advice and they had available to them two new assessments on heritage which the OR2 addressed. The case officer gave a reasoned explanation of why he reached his judgment and why he differed from the Conservation and Urban Design Advisor's view.

52. In my judgment that was a lawful consideration of the amended application in the circumstances here.

53. **Ground 1(b) Reasons**: In my judgment paragraphs 8.80 to 8.82 and paragraphs 8.94 to 8.96 give adequate and intelligible reasons why the officers were advising that there would be no harm caused to the character and appearance of the conservation area from the amended proposals. They relied particularly on the two new assessments. The one entitled Built Heritage Statement expressly recorded the quashing of the earlier permission and accurately sets out the duty under section 72(1) and its consideration by the courts. The members to whom these assessments were available knew that they were not available at the time of the original determination.

54. It my judgment it was not necessary for the Council to go further and seek to unpick the earlier advice in OR1 and seek to explain why the view they now adopted was being taken. They did address why they differed from the observations and conclusions of the Conservation and Design Advisor which had been at the initial determination and had remained at the redetermination that there would be less than substantial harm caused to the character and appearance of the conservation area from

the proposed multi-storey car park. OR2 explains why a different view was taken by officers in that report. The officers at the meeting reiterated and expanded upon those reasons as the transcript shows.

55. **Ground 2: the balance under section 72(1):** This ground is based upon what was said during the meeting but it is clear that in OR2 the members were given clear and accurate guidance on the nature of the duty under section 72(1) including the requirement that considerable importance and weight had to be given to any harm to the conservation area. See paragraphs 8.48 to 8.50 set out above. Paragraphs 193 and 196 of the NPPF were quoted in full at paragraph 8.51 including the advice that "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."

56. Members were reminded of this accurate advice at the meeting by Councillor Wyllie, who was an objector and not a member of the committee. None of the officers made any adverse comment on Councillor W½yllie's observations.

57. In my judgment given the clear and accurate advice given in the OR2 on the nature of this duty including advice that "the finding of harm to a Conservation Area creates a strong but rebuttable presumption against the development to which 'considerable importance and weight' is attributed as a start point" (see paragraph 8.49) it is not credible that members should have forgotten or ignored that advice that they had in the report before them and which was also set out in the Built Heritage Assessment that was on the Council's website and available to them. I am satisfied that when determining this application members understood full well the nature of the duty under section 72(1). Nothing that was said at the meeting about the balance of harm to a conservation area against the public benefits was said so as to contradict or undermine the clear advice in the written OR2 that members had before them.

58. The claim is therefore dismissed and I invite Counsel to seek to agree an appropriate order.