The Queen on the application of Felicity Irving v Mid-Sussex District Council v Mr J Ball T/A SDP Developers and Building Contractors


No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
28 June 2016

Case No: CO/2757/2015

High Court of Justice Queen's Bench Division **Planning** Court

[2016] EWHC 1529 (Admin), 2016 WL 03506186

Before: Mr Justice Gilbart

Date: 28/06/2016

Hearing dates: 19th May 2016

Representation

Andrew Sharland (instructed by Thomas Eggar , Crawley) for the Claimant.
Robert Walton (instructed by Legal Department , Mid-Sussex DC) for the Defendant.
The Interested party did not appear and was not represented.

Judgment

Mr Justice Gilbart:

ACRONYMS USED IN JUDGMENT

TCPA 1990	Town and Country **Planning** Act 1990
PLBCAA 1990	**Planning** (Listed Buildings and Conservation Areas) Act 1990
PCPA 2004	**Planning** and Compulsory Purchase Act 2004
NPPF	National **Planning** Policy Framework (March 2012)

LPA	Local **Planning** Authority
SSCLG	Secretary of State for Communities and Local Government
MSDC	Mid-Sussex District Council
MSLP	Mid Sussex Local Plan
CNP	Cuckfield Neighbourhood Plan

1. In this matter Mrs Irving challenges the grant on 1st May 2015 by MSDC of a **planning** permission, on the application of the Interested Party, to erect a new detached house on land to the west of Newbury, Courtmead Road, Cuckfield, West Sussex.

2. I shall deal with the matter under the following heads
   a. The application site and surroundings;
   b. **Planning** and procedural history;
   c. The development plan and the housing land supply position;
   d. NPPF guidance;
   e. The officer's report;
   f. Mr Sharland's submissions for the Claimant;
   g. Mr Walton's submissions for the Defendant MSDC;
   h. Discussion and Conclusions

3. I shall start by saying that in what is a very straightforward case, the Court was presented with bundles containing no fewer than 490 pages of documentary material. The vast majority was quite irrelevant, and included, for example, all the pages in a development plan or **planning** policy document rather than just those which were relevant. My estimate is that no more than a total of 50 pages were actually relevant, even if the matter had been heard by a judge unfamiliar with **planning** law and practice.

4. But that said, the arguments deployed require my setting out relevant Development Plan policy, and the officer's report to Committee, in a little detail.

(a) The application site and surroundings

5. The site is an area of open land adjacent to the end of Courtmead Road, which is a private road. Until comparatively recently it was a play area for children. Photographs show a flat grassed area of land bounded by hedges, and with a gated access. It is rectangular, with its longer sides being to east and west. The eastern boundary is the boundary of a house called "Newbury" which is a detached house sitting at the western end of a row of such houses on the southern side of

Courtmead Road. It has a long garden to the rear. The northern side is bounded by Courtmead Road. North of the road lie a pond and the old vicarage. To the west are allotments on an open area of land beyond which sits the church.

6. To the south the land is open. The site has views to the south towards the South Downs Area of Outstanding Natural Beauty (AONB). The northern part of the site lies within the Cuckfield Conservation Area which includes all the areas to the north and east along Courtmead Road, and the area to the west beyond the allotments. There are significant views across the site. In the Neighbourhood Plan it states

> "one of the distinctive features of Cuckfield Village is the visual connectivity with the surrounding countryside from public places. Map 5 shows the locations at the edge of the village where there is direct visual connectivity with the countryside…. these distinctive views combine shorter uncluttered views of the more immediate setting of the village with views across the Low Weald to the South Downs National Park to the south…."

Map 5 shows this site in the foreground of View 10 from the area near the church. Having seen the photographs, it is obvious (and Mr Walton did not seek to argue otherwise) that the views across it from the north are of an open grassed area leading on to the view of the countryside beyond. Those views have policy protection under Policy CNP 5, to which I shall make reference below.

7. It follows that this undeveloped grassed area, formerly used as a play area, lies on the edge of Cuckfield, with undeveloped land on two and a half sides (west, south and the southern end of the eastern side), in the Conservation Area, and in an area identified by part of the Development Plan (the neighbourhood plan) as forming part of the direct visual connectivity between the village and the countryside beyond.

(b) **Planning** and procedural history

8. The site is owned by MSDC. It had been used as a play area for children. In 1994, a **Planning** Inspector, appointed to consider objections to the Haywards Heath Local Plan, reported on an objection to the drawing of the built up area boundary at this point so as to exclude the application site. The Inspector commented that

> "The land is not readily seen looking along Courtmead Road but, along the footpath at the end of the road, it forms a significant part of the open break between the line of houses and the Parish Church to the west giving long views to the countryside to the south. If development were to take place, it would reduce the value of the open gap and bring development closer to the church which is an important building in the Conservation area. Whilst 'Newbury' stands out at the end of the line of houses, a further dwelling would not improve this situation and I am not convinced that a landscaped screen on the western boundary would be guaranteed. The site, together with the allotments and the church grounds, presently blends into the countryside towards the bypass and should be protected by Policy HH2/1."

Accordingly, the Proposal Map was modified to show the built-up area boundary to run along the western boundary of 'Newbury'.

9. In December 2013, MSDC granted itself outline **planning** permission for residential development, but by virtue of Regulation 9 of the Town and Country **Planning** General Regulations 1992 that did not run with the land. In September 2014 an application was made by the Interested Party to develop the land for residential development consisting of one house. That permission was granted in December 2014, but after the Committee had been advised that it was not necessary to consider its value as open space as the grant of the previous permission meant that the loss of open space had been accepted. That permission was challenged by the Claimant way of an application for judicial review, and after Patterson J had granted permission for the Claimant to make the application, MSDC accepted that it had been granted unlawfully (on the basis that the advice concerning open space was in error) and agreed to pay the Claimant's costs pursuant to a Consent Order.

10. A further application was made in March 2015, which was granted on 1st May 2015. Proceedings were issued by the Claimant on 11th June 2015. Dove J refused leave on 27th July 2015. Permission was subsequently granted on grounds 1–2 at an oral renewal hearing. On 23 February 2016 Lewison LJ granted permission to apply under Grounds 3–5 as well.

(c) The Development Plan and the housing land supply position

11. The Development Plan has three elements
    i. The Mid Sussex Local Plan (2004) (MSLP)
    ii. Small Scale Housing Allocations to 2016 (October 2008)
    iii. Cuckfield Neighbourhood Plan (October 2014) (CNP).

12. The process has started which will lead to the adoption of a District Plan. It has reached the stage of a pre submission draft.

13. In the MSLP, the following policies should be noted:
    a. Policy B6 states that

> "proposals for development which would result in the loss of areas of public or private open space of particular importance to the locality by virtue of "recreational, … conservation… or amenity value will not be permitted. Where such open space is to be lost to development, for whatever reason, appropriate alternative provision may be sought elsewhere."

    b. Policy B12 states that

> "The protection of the special character and appearance of each Conservation Area will receive high priority. When determining **planning** applications for development within or abutting the designated Conservation Areas, special attention will be given to the desirability of preserving or enhancing the character or appearance of the area and to safeguard the setting of any Listed Building.

> Circumstances may arise where the importance of open space, including private gardens, is such that development upon it will be resisted in the overall interest of the Conservation Area
> …"

c. Policy B15 states that

> "Development affecting the setting of a Conservation Area should be sympathetic to, and should not adversely affect, its character and appearance. In particular attention will be paid to the protection or enhancement of views into and out of a Conservation Area, including where appropriate the retention of open spaces and trees."

d. Policy R2 states that

> "proposals which would result in the loss of existing formal or informal open space with recreational or amenity value whether privately or publicly owned, will only be permitted where the applicant can demonstrate that a replacement site has been identified and will be developed to provide facilities of an equivalent or improved standard…."

e. Policy C1 applies to development proposals on land outside the built up area boundary, which this site is. It states

> "Outside built up area boundaries…the remainder of the plan area is classified as a Countryside Area of Development Restraint where the countryside will be protected for its own sake. Proposals for development in the countryside, particularly that which would extend the built-up area boundaries beyond those shown will be firmly resisted and restricted to:
> (a)-(g) …."

(Headings (a) to (g) consist of excepted types of development which do not include the development of a house as proposed in this application). I shall refer to its policies on housing in due course.

14. In the CNP the following appear:
    a. Policy CNP 1 reads

> "Design of New Development and Conservation
> New development in accordance with the neighbourhood Plan will be permitted where it:
> (a) Is designed to a high quality which responds to the heritage and distinctive character and reflects the identity of the local context of Cuckfield as defined on Map 3- Conservation Areas and Character Areas, by way of

> i. Height, scale, layout, orientation, design and materials of buildings;
>
> ii. The scale, design, and materials of the public realm (highways, footways, open space and landscape), and

(b) Is sympathetic to the setting of any heritage asset…
(c) – (g) ….

b. Policy CNP 2 deals with the protection of "Areas of Important Open Space" within the Cuckfield Built Up Area boundary. The site is shown on map 4 of the Plan as falling outside that boundary, which abuts it to the east (the curtilage of "Newbury"), and north (Courtmead).
c. Policy CNP 5 reads

> "CNP5 – Protect and Enhance the Countryside
>
> Outside of the Built up Area Boundary, priority will be given to protecting and enhancing the countryside from inappropriate development. A proposal for development will only be permitted where:
> (a) It is allocated for development in Policy CNP 6 (a) and (b) or would be in accordance with Policies CNP 10, CNP 14 and CNP 17 in the Neighbourhood Plan or other relevant **planning** policies applying to the area, and
> (b) It would not have a detrimental impact on, and would enhance, areas identified in the Cuckfield Landscape Character Assessment (summarised in Table 1) as having major or substantial landscape value or sensitivity, and
> (c) It would not have an adverse impact on the landscape setting of Cuckfield, and
> (d) It would maintain the distinctive views of the surrounding countryside from public vantage points within, and adjacent to, the built up area, in particular those defined on Map 5, and
> (e) Within the High Weald Area of Outstanding Natural Beauty it would conserve and enhance landscape and scenic beauty and would have regard to the High Weald AONB Management Plan."

15. As already noted, Map 5 in the CNP identifies what it refers to as "External Views." View 10 is shown under the reference "Church" and consists of views from location running west along Courtmead from the developed area east of the site, and from the areas around the church. That and other views are referred to as having "direct visual connectivity with the countryside." The Landscape Character Assessment carried out for the purposes of informing the Plan's preparation, and which is referred to within its supporting text (page 31), identifies the site as falling within Area 26 (see page 80 Map 12), which is described on page 31 as "substantial value, substantial sensitivity."

16. There are no policies in either the MSLP or the CNP which seek to restrict the amount of housing. Policy H1 in the MSLP required that provision be made for approximately 2740 dwellings between mid 2002 and mid 2006. It also

contained specific allocations. Policy H3 is a criteria based policy enabling sites to come forward within the built up area. In fact, it is an agreed matter that, when measured against the policy requirements of NPPF, there is a shortfall in the 5 year housing land supply, which is a subject to which I shall return. The CNP, which has a Plan period running from 2011 to 2031 quantifies a housing need totalling 60 dwellings for the Cuckfield area of which 28 fall within 2 years from 2012, 15 within a period of 2–5 years thereafter, and 17 after that. It contains (Policy CNP 6) allocations on 4 sites, but it also contains a policy which is permissive of housebuilding within the built up area (CNP 7).

17. As to housing land supply, the officer's report advised the Committee that the Defendant Council could not demonstrate a five year supply of deliverable sites.

(d) The National **Planning** Policy Framework (NPPF)

18. It is necessary to refer to some parts of NPPF, published in 2012, which set out the Government's **planning** policies for England. I must refer to its policies on housing, and on heritage assets. However, their terms are well known, and for the most part I shall simply refer to the relevant paragraphs without quotation. The one exception I shall make is when I come to deal with the terms of NPPF on the issue of the effect on heritage assets.

19. Paragraphs [6]- [10] deal with the achievement of sustainable development, which includes widening the choice of high quality homes [9]. Applications must be determined in accordance with the Development Plan unless material considerations indicate otherwise [11]. However, while proposals which accord with the development plan must be approved without delay [14], where the development plan is absent, silent or relevant policies are out of date, **planning** permission should be granted unless either the adverse impacts would significantly and demonstrably outweigh the benefits when assessed against the policies in NPPF taken as a whole, or specific policies in NPPF indicate that development should be restricted [14].

20. Paragraph 17 sets out a set of underpinning "core **planning** principles." They include the recognition of the intrinsic character and beauty of the countryside, and the conservation of heritage assets in a manner appropriate to their significance [17].

21. Section 6 ("Delivering a wide choice of high quality homes") informs local **planning** authorities that Local Plans should meet the full objectively assessed housing needs of the areas as far as is consistent with the policies in NPPF [47]. It seeks an identified 5 year supply of specific deliverable sites [47] and a supply of specific developable sites or broad locations for growth for years 6–10, and where possible for years 11–15 [47]. Housing proposals should be considered in the context of "the presumption in favour of sustainable development." Relevant polices for the supply of housing should not be considered up to date in the absence of an identified 5 year supply [49].

22. Paragraph 74 states that existing open space should not be built on unless an assessment shows that the open space is surplus to requirements, or the loss would be replaced by equivalent or better provision, or the development is for sports and recreational provision the need for which clearly outweighed the loss.

23. Chapter 12 (paragraphs 126-141) deals with "Conserving and enhancing the historic environment." A Conservation Area is a heritage asset for the purposes of the policy. It is necessary to set out paragraphs [131] to [134] which set out the

sequential test to be applied to development which is being considered in the context of a heritage asset, and paragraph [138]. I do so mindful of the fact that the policy cannot displace the statutory test in s 72 PLBCAA 1990 , to which I shall turn in due course. The relevant paragraphs read thus:

> "131 In determining **planning** applications, local **planning** authorities should take account of:
>
> • the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
>
> • the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
>
> • the desirability of new development making a positive contribution to local character and distinctiveness.
>
> 132. 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. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 133. …
>
> 134. 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 securing its optimum viable use.
>
> 138. Not all elements of a World Heritage Site or Conservation Area will necessarily contribute to its significance. Loss of a building (or other element) which makes a positive contribution to the significance of the Conservation Area or World Heritage Site should be treated either as substantial harm under paragraph 133 or less than substantial harm under paragraph 134, as appropriate, taking into account the relative significance of the element affected and its contribution to the significance of the Conservation Area or World Heritage Site as a whole."

24. The sequential test in [132]- [134] and its nature were considered in my judgment in *Pugh v Secretary of State for Communities and Local Government & Ors [2015] EWHC 3 (Admin)* at [49]- [50], where I followed the judgment of HH Judge Waksman QC in *R (Hughes) v South Lakeland District Council [2014] EWHC 3979 (Admin)* . Since Pugh , that approach has been followed in *Mordue v Secretary of State for Communities and Local Government & Ors [2015] EWHC 539 (Admin)* per Mr John Howell QC, and by Coulson J in *Forest of Dean District Council v Secretary of State for Communities & Local Government & Anor [2016] EWHC 421(Admin)* .

(e) The **Planning** Officer's Report

25. The officer put a substantial report before the Committee. I shall seek to summarise it, although some passages will have to be set out verbatim.

26. It started with an Executive Summary. Having recited the relevance of the Development Plan in s 38(6) PCPA 2004 it addressed NPPF and referred to the passage in [14] referred to above. In that context it treated Policy C1 of the Local Plan, and CNP 5 of the Neighbourhood Plan as not up to date insofar as either relates to the provision of housing. In the context of NPPF [49] he said that

> "as set out later in the report in relation to open space, this is not a situation where specific policies in NPPF indicate that development should be restricted. The application therefore falls to be determined in accordance with the presumption in favour of development set out in paragraph 14 of NPPF."

It then addressed the three dimensions of sustainable development in NPPF. It concluded that the proposal would contribute to the economic role of sustainable development. There would be an economic benefit from the construction phase, and a modest economic benefit from the additional residential unit and the spending of the occupier, plus new homes bonus funding, and Council tax receipts. It concluded that the site was in a sustainable location, being close to the village centre and its amenities. It regarded the addition of one dwelling to the District's land supply as "a small but useful contribution to the district's housing supply" which would help meet the identified need for housing.

27. So far as the effect on the Conservation Area is concerned, it concluded that

> "some limited harm may arise from this proposal as a result of the loss of panoramic views out of and across the site to the south. However, the views into/across the site are only one component of the Conservation Area as a whole.
>
> Whilst there will be some impact on the character of the conservation are through the development of this site it is considered that the overall character and appearance of the conservation area will be preserved."

Having considered that the loss of open space would be acceptable, it considered that the

> "limited impact generated by this proposal by the loss of the panoramic views across the site to the south is significantly outweighed by the benefits of the proposal. For these reasons, taking into account the advice set out within the NPPF it is felt that this application should be granted"

and went on to recommend that the application be granted.

28. I do not propose to do more than summarise the main report, save for the passages dealing with the issue of the effect of the proposed development on the Conservation Area.

29. Having identified the site, described the application and summarised the representations received, the report then set out a list of relevant Development Plan policies. It also referred to NPPF, including its advice at [185] that the Neighbourhood Plan took precedence over non-strategic Local Plan policies for the neighbourhood concerned, should there be a conflict. It referred also to the test in s 38(6) PCPA 2004 , and to s 70(2) of the TCPA 1990 .

30. It advised the Committee that the scheme would conflict with the countryside policies of the MSLP (Policy C10) and with the CNP (Policy CNP5) because it proposed a new house outside the built up area. It was therefore contrary to the Development Plan. It identified NPPF as a material consideration. Having referred to [49] (summarised above) it went on to advise the Committee that the Council could not demonstrate a five year supply, because there was no agreed requirement against which the supply could be considered. It said that in numerous appeals policy C1 of the MSLP had been held to be out of date so far as it related to the provision of housing, and that the same reasoning should apply to policy CNP 5 of the CNP.

31. It then addressed NPPF [14]. It advised that as policy C1 was not up to date, the Council should grant **planning** permission

> "unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the polices in the Framework taken as a whole or specific policies in the Framework indicate development should be restricted."

That is of course the test in NPPF 14 if the Development Plan policies are out of date. However the Report went on in these words

> "As set out later in the report in relation to open space, this is not a situation where specific NPPF policies indicate that development should be restricted.
>
> The approach that should be taken is that the development is assessed against the policy criterion set out in paragraph 14 to see whether any adverse impacts the scheme would have would significantly and demonstrably outweigh the benefits."

It then reiterated the officer's advice that MSP policy C1 and CNP policy CNP5 should be given diminished weight on the basis that they were out of date for the purposes of NPPF [49].

32. Having referred to a decision letter from Buckinghamshire, it concluded that, given the fact that the proposal was for one house, it would not be reasonable to argue that a conflict with CNP5 amounted to a substantial adverse impact in this instance. It then sought support from the fact that a **planning** permission for a house already existed on the site. It then assessed the proposal against the three dimensions of sustainable development in NPPF. In the case of the first two dimensions (the economic role and the social role) it concluded that:

a. the LPA would receive a "New Homes Bonus" for a new dwelling;
b. it would make a positive but marginal contribution to the building industry in the area;
c. it would add to the Council's housing stock, albeit only marginally;
d. the land had been bought for allotments in 1938. Permission to appropriate the land to housing was obtained in 1987 from the Secretary of State and remained extant. The Council did so in December 2013 (i.e. 26 years later). The site was then padlocked to prevent any public access to it. It was therefore considered that it was no longer open space so that policy R2 and NPPF [74] were not engaged;
e. it considered what the case was if even if the land were to be regarded as open space and the appropriation had not taken place. It said that because the Council had granted permission for housing development in December 2013, albeit for a scheme only it could implement, the loss of open space had been accepted. An Open Space assessment had shown that there was adequate provision of open space in Cuckfield, and that alternative sites were well distributed in and around the village. The test in NPPF [74] had therefore been met. There was also no conflict with MSLP policies B6 and R2, nor with policy DP 22 of the emerging District Plan.

33. The Report then turned to the third dimension, the environmental role. In doing so, it also addressed the effect of the proposal on the street scene, the character of the Conservation Area, its effect on the nearby Grade 1 Listed Building (the church), views into and out of the village, access and parking, neighbour amenity, and ecology. It is necessary to refer to what it said directly in the case of some parts of that assessment. It includes the following passages:

> "Impact on the Character of the Conservation Area
>
> As noted above, the northern part of the application site falls within the Cuckfield Conservation Area. This Conservation Area excludes the allotments to the immediate west of the application site, and the southern half of the application site, but extends along the entire length of Courtmead Road, and encompasses the Holy Trinity Church and yard to the west of the allotments along with an extensive area of the village centre and surrounds.
>
> Policy B12 of the Mid Sussex Local Plan and Policy CNP1 of the Neighbourhood Plan seeks to protect the special character and appearance of each Conservation Area with special attention given to the desirability of preserving or enhancing the character and appearance of the area and to safeguard the setting of any Listed Buildings.
>
> Section 72 of the **Planning** (Listed Buildings and Conservation Areas) Act 1990 states that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area by the decision maker.
>
> Cuckfield Conservation Area Appraisal published in 2006 subdivides the designated Conservation Area into 'character areas' and the Courtmead Road area is noted for its detached dwellings set in spacious grounds, with the road and building line dictating the placement of the houses. It is noted that at the western end of Courtmead Road the properties are predominantly designed by Turner following the traditional form and detailing of historic Wealden vernacular.
>
> The Comments of the Council's Conservation Officer are summarised at the start of the

committee report and set out in full in the appendix (she refers to her previous comments on application 14/03388/FUL). The Conservation Officer states:

> "The proposed development is thus not typical of Courtmead Road and it will result in some degree of harm to the existing spatial characteristics at the western end of the street. However, the area in which the damage will be experienced is limited to the western end of Courtmead Road. While affecting this particular component of the conservation area, the new development will not result in substantial harm to the special character of the designated heritage asset as a whole."

Paragraph 134 of the NPPF states that '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 securing its optimum viable use.'

These comments have been taken into account by your officer. Your officer agrees with the Conservation Officer that any impacts will be limited to the western end of Courtmead Road and certainly amounts to less than substantial harm. The public benefits of the proposal (such as providing an attractive family dwelling in a sustainable location and the economic benefits of constructing a new dwelling in this sustainable location) clearly outweigh the less than substantial harm to a small component of the heritage asset.

Overall it is your officer's view that whilst there will be some impact on the character of the conservation area through the development of this site it is considered that the overall character and appearance of the conservation area will be preserved. The application therefore complies with policy B12 of the MSLP and policy DP33 of the emerging District Plan and policy CNP1 of the Neighbourhood Plan.

The rear (southern) part of the application site is outside of the conservation area boundary. Paragraph 4.54 of the preamble to policy B 15 which relates to the setting of conservation areas states "Particular attention will also be given to the impact of development located outside but adjacent to a Conservation Area. Such development, if constructed unsympathetically, could have a seriously detrimental impact on the character and appearance of a Conservation Area by affecting its setting and thus views into and out of the area." As the proposed house, driveway and access are within the conservation area the correct approach is to assess this application against policy B 12 of the MSLP.

With regards to policy B15, as the southern part of the site is a grassed area of land and this would become part of the rear garden of the proposed house, there would be little material change to the appearance of this area. As such the setting of the conservation area would be preserved.

Impact on the Setting of the Listed Building

As outlined above, the Holy Trinity Church, a Grade I listed building is located some 110 metres to the direct west of the application site. The proposed dwelling would appear in views to the east from this listed building. The intervening shrubbery will provide some screening to the new dwelling and it will of course be seen against the existing backdrop of trees, shrubbery and occasional buildings.

Section 66 of the (PLBCAA 1990) states that in considering whether to grant **planning** permission for development which affects a listed building or its setting, the local **planning** authority shall 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.

It is considered that the new dwelling will be unlikely to stand out as an individually intrusive element and due to the distance between the site and the Holy Trinity Church (some 110m) it is not considered that the proposal affects the setting of the designated heritage asset i.e. the listed church will be preserved.

English Heritage has not objected to the application, confirming that the decision should be made in accordance with national and local policy guidance, and on the basis of the LPA's specialist conservation advice.

The application therefore complies with policy B 10 of the MS LP and policy DP32 of the emerging District Plan.

Impact on the Views into/out of the Village

When the earlier outline application was considered it was highlighted that the main impact of the proposed development would be on the character of the immediate vicinity through the loss of panoramic views to the south. Construction of the dwelling will obstruct long views from the western end of Courtmead Road, from the public footpath abutting the northern boundary and from within the site itself. The views across open countryside to the distant South Downs are a distinctive feature of the southern edges of the Cuckfield conservation area and they engender a particularly strong sense of place. Loss of these views will diminish an important quality of this part of the designated area and as a result this weighs against the favourable recommendation of the application proposals.

However, the area in which the diminution will be experienced is limited to the western end of Courtmead Road, the public footpath and from within the site itself. From elsewhere in the southern fringes of the conservation area, similar panoramic southerly views will remain. Thus, while there is damage to a component of the heritage asset i.e. the conservation area, the special character of the conservation area as a whole will be preserved. As such there is no conflict with policy B12 of the MSLP.

Access/Parking

…

Neighbour Amenity

…

Ecology

…"

34. It then passed to its conclusions:

> "Conclusions
>
> **Planning** applications must be determined in accordance with the development plan unless other material considerations indicate otherwise. The site lies outside the built up area boundary of Cuckfield as defined in the MSLP and the CNP. As such the scheme would conflict with policy C1 of the MS LP and policy CNP5 of the CNP, both of which indicate that development should be restricted in this location.
>
> It has however been established in numerous appeals that policy C1 in the MSLP is not up to date insofar as it relates to the provision of housing. It is considered that the same reasoning applies to policy CNP5 of the now made CNP as this is also a policy that restricts the supply of housing on land that is not within the built up area of the CNP.,
>
> In light of the Council's lack of a five year supply of housing, para's 47 — 49 of the NPPF are engaged and as such the application needs to be considered in the context of paragraph 14 of the NPPF. This paragraph sets a presumption in favour of sustainable development. Therefore the development should only be refused if any adverse impacts would significantly and demonstrably outweigh the benefits of the development, when assessed against the NPPF as a whole, or specific NPPF policies indicate development should be restricted.
>
> The application site, whilst falling outside of the built up area as defined by the CNP and MS LP, lies immediately adjacent the built up area boundary and is within close walking distance of the village centre and all its amenities. It is therefore deemed to be in a sustainable location. It is considered that the development constitutes sustainable development.
>
> The proposed dwelling is considered to be suitably designed to reflect the character of the surrounding area, and will not appear as an overdevelopment of this generous plot. Whilst it is accepted that the dwelling is substantial in size, it is considered that the character and appearance of the conservation area will be preserved and the setting of the Holy Trinity Church will not be affected. Whilst there is some limited harm to a small component of the conservation area this certainly amounts to less than substantial harm. Overall it is your officer's view that taken as a whole character and appearance of the conservation area will be preserved.
>
> The loss of the open space has been considered in relation to policy R2 of the MSLP, policy DP22 of the emerging District Plan and paragraph 74 of the NPPF. It is considered that it has been demonstrated that there is not a need for the site to be retained as open space nor is there a need for its replacement elsewhere.
>
> It is considered that the limited harm generated by this proposal is not sufficient to outweigh its benefits. It is also material that **planning** permission has already been granted for a residential development on this site. For theses reason, taking into account all relevant development plan policies as well as the advice set out within the NPPF it is felt that this application should be approved."

35. Conditions were also recommended. It is not necessary to refer to them here.

(f) Mr Sharland's submissions for the Claimant

36. Before turning to Mr Sharland's legal submissions, I should say something about the evidence filed by the Claimant. It was thought appropriate for evidence to be filed that

a. suggested that a relative of the Leader of the Council was connected with the Interested Party, and that there was some significance in the Interested Party having been referred to by its initials only;

b. that the Committee considered the **planning** application in haste, which "gives rise to a clear expectation that the Council's **Planning** Committee (would) approve the …. application, whatever the objections."

Neither allegation went to any ground argued in the Grounds, or in the case put before me by Counsel for the Claimant. The evidence should not have been included, and those conducting the case for the Claimant should have ensured its removal.

37. However just as I shall ignore that evidence as supporting the arguments of the Claimant, so shall I set aside any prejudice against her case because of the unwise decision to include it.

38. Mr Sharland's case for the Claimant had 5 grounds:

(1) The officer's report had misinterpreted NPPF [14];

a. misinterpretation of a policy (NPPF) was an error of law;

b. the Development Plan had to be considered as a whole, including policies B6 and R2 (which related to open space), B12 and B15, which related to development within a Conservation Area or affecting its setting. The proposal was in breach of all of those policies.

c. if policies CNP 5 and C1 were out of date, that did not mean that the other polices were. The Council has wrongly interpreted NPPF [14] as meaning that if one or more relevant policies were out of date, then they all were;

d. although a version of the argument had been advanced and rejected in Cheshire East BC v Secretary of State for Communities and Local Government [2016] EWHC 694 [45]- [67] (Patterson J) it had not been put as now argued;

e. the policies in NPPF at [74] on open space, and those at [17] (protection of countryside and heritage assets) [134] (heritage assets), [185] (neighbourhood plans), and [198] (neighbourhood plans) were all specific policies for the purposes of [14]. The Council had acted unlawfully in failing to have regard to them; see Forest of Dean DC v Secretary of State for Communities and Local Government [2016] EWHC 421 (Coulson J).

(2) MSDC has misinterpreted NPPF [49];

a. the original Grounds at [31]- [37] argued that the officer's report was wrong to treat policy CNP 5 as out of date. Since the Grounds were served, the Court of Appeal had given judgement in *Suffolk Coastal DC v Hopkins Homes Ltd [2016] EWCA Civ 168* . This ground was not therefore advanced before me, but the right to advance it on appeal was reserved;

b. alternatively, the Council had failed to apply the advice in NPPF [198] about the status of Neighbourhood Plans, that where there was a conflict, **planning** permission should not normally be granted. The approach in Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Holgate J) that [198] gave no status different to that of any Development Plan policy under s 38(6) PCPA 2004 was noted, but only reflected a concession.

(3) The approach to the effect of the proposal on the Conservation Area was flawed;

a. S 72 PLBCAA had not been applied. It was not enough to conclude that the harm was limited to one part of the Conservation Area, or that the fact that harm would not be done to it overall met the test in s 72 ;

b. the policy on the effect of development on heritage assets in paragraphs [129]- [134] of NPPF had not been applied, nor reasons given not to apply it. The test to be applied in [132] — [134] of NPPF is now well settled (see R(Hughes) v S Lakeland DC [2014] EWHC 3979 (HH Judge Waksman QC), Pugh v Secretary of State for Communities and Local Government [2015] EWHC 3 (myself), Mordue v Secretary of State for

Communities and Local Government & Ors [2015] EWHC 539 (John Howell QC), Forest of Dean DC v Secretary of State for Communities and Local Government [2016] EWHC 421 (Coulson J). Weight still has to be given to the effect on the heritage asset at the stage of the balancing exercise in [134];

c. given the conclusions reached on the fact of harm to the Conservation Area in the vicinity of the site, the conclusion that there is no conflict with Policy B15 was not open to the Committee.

(4) The report failed to consider the fact that allocations for the construction of 155 dwellings were made in the CNP, which exceeded known levels of need;

a. the identified contribution by Cuckfield to housing needs in the District was expressed as 130 dwellings in the Plan period;

b. the identified local housing needs were for 68 dwellings (20 market housing and 40 affordable dwellings);

(5) The Report's approach to the loss of open space was unlawful;

a. the application described it as amenity open space land;

b. MSDC had previously accepted in the officer's report of November 2014 that the development of the site would amount to a loss of open space in breach of Policy R2, and nothing had changed since they had done so;

c. it was common ground that no replacement site had been provided. It follows that there was a breach of policy R2.

(g) Mr Walton's submissions for MSDC

39. He made the following submissions on the grounds argued by the Claimant:

(1) where there is no 5 year supply shown, the policies relating to housing are to be regarded as out of date (NPPF [49]) and the policy in NPPF [14] therefore applies. Relevant policies are not thereby disapplied. The purpose of NPPF [14] and [49] is to increase the supply of housing. As to the argument that specific policies in NPPF applied here to disapply the presumption in [14]:

a. as to [17] MSDC lawfully concluded that the site did not consist of open space;

b. as to [134] MSDC lawfully concluded that the character, setting and appearance of the Conservation Area would be preserved;

c. as to [185] (precedence of Neighbourhood Plan) nothing in [185] suggests that development is to be restricted;

d. as to [198] cannot be read as disapplying NPPF [14] where the relevant CNP policies are out of date;

e. as to [17] (Core principles), they cannot be read as disapplying NPPF [14] as otherwise the policy in NPPF [14] could never apply;

(2) the first element must fail in the light of the judgement in Suffolk Coastal . The second must also fail, given what is said in Woodcock Holdings . Given that the fact that CNP 5 is out of date for the purposes of NPPF [14] one cannot read [198] as then restoring weight to it despite what is said in [14];

(3) MSDC concluded that there would be no harm caused to the Conservation Area. Thus, this is an argument by the Claimant that the conclusion was irrational. The hurdle is a high one, and has not been overcome here. Reference was made to *R (Newsmith Stainless Ltd) v Secretary of State for Environment Transport and the Regions [2001] EWHC Admin 74* , *Tesco Stores ltd v Sec of State for the Environment [1995] 1 WLR 759* (at 780 per Lord Hoffman), *R v Sec of State for Home Dept ex p Hindley [1998] QB 751* and *R (Cherkley Campaign Ltd) v Mole Valley DC [2014] EWCA Civ 567* at [48] per Richards LJ;

(4) as to the CNP, the Claimant's case that MSDC took no account of it is misconceived. It did so in terms;

(5) as to the issue of open space:

a. the applicant's description of the land cannot determine its proper description;

b. given the fact that the land had since been closed, and appropriated, circumstances had changed since the previous decision;

c. MSDC was lawfully entitled to conclude that R2 was not engaged, but in any event specifically held that if R2 applied, there would be no conflict, given the findings of the Open Space Assessment.

(h) Discussion and Conclusions

40. I shall set out the legal principles to be applied, and then turn to the individual grounds.

41. It was common ground between the parties that it was appropriate to look to the officer's report as the way in which MSDC had approached the determination of the application. The law is helpfully summarised by Hickinbottom J *R (Trashorfield Ltd) v Bristol City Council & Ors [2014] EWHC 757 (Admin)* at [13] and by Stewart J in *Obar Camden Ltd v The London Borough of Camden [2015] EWHC 2475 (Admin)* at [6]. However, given the fact that MSDC accept that one may look to the report, it is unnecessary in this case to take that discussion further.

42. In determining a **planning** application, an LPA must

a. have regard to the statutory Development Plan (see s 70(1) TCPA 1990);

b. have regard to material considerations (s 70(1) TCPA 1990);

c. determine the proposal in accordance with the Development Plan unless material considerations indicate otherwise (s 38(6) PCPA 2004);

d. consider the nature and extent of any conflict with the Development Plan: *Tesco Stores Ltd v Dundee City Council [2012] UKSC 13* at [22] per Lord Reed;

e. consider whether the development accords with the Development Plan, looking at it as a whole- see R(Milne) v Rochdale MBC (No 2) [2000] EWHC 650 (Admin), [2001] JPL 470, [2001] Env LR 22, (2001) 81 P & CR 27 per Sullivan J at [46]- [48]. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. It must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it; per Lord Clyde in City of Edinburgh Council v. the Secretary of State for Scotland [1997] UKHL 38, [1997] 1 WLR 1447, 1998 SC (HL) 33 cited by Sullivan J in R(Milne) v Rochdale MBC (No 2) at [48];

f. apply national policy unless it gives reasons for not doing so- see Nolan LJ in Horsham District Council v Secretary of State for the Environment and Margram Plc [1993] 1 PLR 81 following Woolf J in *E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment [1987] 54 P & CR 86* and see Lindblom J in *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government [2011] EWHC 97 (Admin), [2011] JPL 887* at [50].

g. if the proposal lies within a Conservation Area, special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area PLBCAA 1990 s 72(1) .

43. The last principle was the subject of some discussion in *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council & Ors [2014] EWCA Civ 137 [2015] 1 WLR 45 [2014] JPL 731 [2014] 1 P &CR 22* , at [19]-[21] per Sullivan LJ, where he was considering the authorities of *The Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303* , *South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141* , and *Heatherington (UK) Ltd. v Secretary of State for the Environment (1995) 69 P & CR 374* ;

> "19 When summarising his conclusions in Bath about the proper approach which should be adopted to an application for **planning** permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the **Planning** Act , and the duty under (what is now) section 72(1) of the Listed Buildings Act . Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay "special attention" should be the first consideration for the decision-maker (p. 1318 F-H). Glidewell LJ continued:
>
> > "Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight… As I have said, the conclusion that the development will neither enhance nor preserve will be a

> consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that."

20 In South Lakeland the issue was whether the concept of "preserving" in what is now section 72(1) meant "positively preserving" or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:

> "There is no dispute that the intention of section [72(1)] is that **planning** decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of **planning** permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary **planning** criteria."

21 In Heatherington , the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the **Planning** Act (since repealed and replaced by the duty under section 38(6) of (PCPA 2004) However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the Bath case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383)."

I shall in due course consider also the effect of the section of NPPF which deals with heritage assets.

44. If it is shown that the decision maker had regard to an immaterial consideration, or failed to have regard to a material one, the decision will be quashed unless the Court is satisfied that the decision would necessarily have been the same: see *Simplex GE (Holdings) Ltd v. Secretary of State for the Environment [1988] 57 P & CR 306* .

45. Given the arguments in this case it is necessary also to consider authorities on the proper application and interpretation

of NPPF. In doing so, I start with some observations on the effect of the judgment of Lindblom LJ in *Suffolk Coastal District Council v Hopkins Homes Ltd & Anor [2016] EWCA Civ 168* . I will also refer to his judgment at first instance as Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin)* .

46. NPPF was very relevant to the determination of this application. But it was so because, as a statement of Government Policy, it was a material consideration; no more and no less. While the arguments there were directed towards paragraph 49 of NPPF, it is important to note what Lindblom LJ said in Suffolk Coastal at [42] and [43] about NPPF generally:

> "42 The NPPF is a policy document. It ought not to be treated as if it had the force of statute. It does not, and could not, displace the statutory "presumption in favour of the development plan", as Lord Hope described it in *City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447* at 1450B-G). Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, government policy in the NPPF is a material consideration external to the development plan. Policies in the NPPF, including those relating to the "presumption in favour of sustainable development", do not modify the statutory framework for the making of decisions on applications for **planning** permission. They operate within that framework – as the NPPF itself acknowledges, for example, in paragraph 12 …. It is for the decision-maker to decide what weight should be given to NPPF policies in so far as they are relevant to the proposal. Because this is government policy, it is likely always to merit significant weight. But the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the Wednesbury sense.
>
> 43 When determining an application for **planning** permission for housing development the decision-maker will have to consider, in the usual way, whether or not the proposal accords with the relevant provisions of the development plan. If it does, the question will be whether other material considerations, including relevant policies in the NPPF, indicate that **planning** permission should not be granted. If the proposal does not accord with the relevant provisions of the plan, it will be necessary to consider whether other material considerations, including relevant policies in the NPPF, nevertheless indicate that **planning** permission should be granted."

47. I refer also to paragraphs [46] – [47] which deal with what must now be seen as the inappropriate application and consideration of NPPF, including to some extent judicially:

> "46 We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make "out-of-date" policies for the supply of housing irrelevant in the determination of a **planning** application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 WLR 759* , at p.780F-H). Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect.

> 47 One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local **planning** authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of **planning** permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of **planning** judgment (see paragraphs 70 to 75 of Lindblom J.'s judgment in Crane , paragraphs 71 and 74 of Lindblom J.'s judgment in Phides , and paragraphs 87, 105, 108 and 115 of Holgate J.'s judgment in *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council [2015] EWHC 1173 (Admin)*).

48. I respectfully suggested in *Dartford Borough Council v Secretary of State for Communities and Local Government & Anor [2016] EWHC 649 (Admin)* in South Oxfordshire District Council v Secretary of State for Communities and Local Government & Anor [2016] EWHC 1173 and in Cawrey Ltd v Secretary of State for Communities And Local Government & Anor [2016] EWHC 1198 that Suffolk Coastal has laid to rest several disputes about the interpretation of NPPF, both as to the particular paragraphs it addressed, but generally. Before Suffolk Coastal it had been striking that NPPF, a policy document, could sometimes have been approached as if it were a statute, and as importantly, as if it did away with the importance of a decision maker taking a properly nuanced decision in the round, having regard to the development plan (and its statutory significance) and to all material considerations. In particular, I would emphasise the passage in Lindblom LJ's judgment at [42]- [43], which restates the role of a policy document, and just as importantly how it is to be interpreted and applied. NPPF is not to be used to obstruct sensible decision making. It is there as policy guidance to be had regard to in that process, not to supplant it.

49. There are three aspects of NPPF which arise for discussion here;
   a. The meaning and effect of paragraphs [14] and [49] in the context of this claim;
   b. The meaning and effect of the section on heritage assets;
   c. The meaning and effect of the passages relating to Neighbourhood Plans.

50. As to the interpretation and application of paragraphs [14] and [49] of NPPF in the officer's report, although a contribution of a single dwelling to the housing land supply is plainly not as a substantial as the effect of many permissions, the officer gave reasons why it was important for MSDC to maximise its housing land supply in the context of an admitted shortfall for the purposes of paragraph [49]. The policies C1 and CNP 1 were certainly capable of being policies relevant to housing (see Suffolk Coastal at [32]- [41]). If it is the case that MSDC has to find more housing land, it is a matter for it as the decision maker to consider whether that renders the policies out of date.

51. I am however concerned about the treatment of policy CNP 5 of the CNP. That does deal with the principle of building outside the built up area boundary, but it also deals in terms with the specific locations identified on Map 5. While

it may follow that the existing built up area boundary of Cuckfield cannot be maintained on its current line, it does not follow that it is devoid of weight so far as its specifically protective effects at locations identified at CNP 5(d) and Map 5. It is hard to see how the fact that the Plan is not up to date in some respects means that all policies relevant to the site in question are rendered out of date.

52. So far as the policy in NPPF is concerned, the questions are then whether there are adverse impacts which would significantly and demonstrably outweigh the benefits, or whether specific policies in NPPF indicate that development should be restricted, as per NPPF [14]. But two riders must be added. Firstly, as Suffolk Coastal makes clear, the statutory test in s 38(6) PCPA 2004 is not supplanted by NPPF, although plainly the application of the policy test in NPPF is a material consideration to which the decision maker is entitled to give significant weight. But it would be wrong (for example) to set aside Development Plan policies on heritage assets simply because NPPF also addresses that topic. Secondly, one cannot use the NPPF [14] test, or the effect of the policy in [49] to override or supplant the statutory test in s 72 PLBCAA 1990 on the tests to be applied to development in Conservation Areas.

53. So far as the policy in NPPF on heritage assets is concerned, there is a sequential approach to consideration of the effects. This passage from my judgement in Pugh v SSCLG at [49]- [50] sought to set it out

> "49 … Thus, the value and significance of the asset, whatever it may be, will still be placed on one side of the balance. The process of determining the degree of harm, which underlies paragraph 132 of NPPF, must itself involve taking into account the value of the heritage asset in question. That is exactly the approach that informed the Addendum Assessment upon which Mr Harwood relies. The later assessment also addressed the value of the asset, and then the effect of the proposal on that value. Not all effects are of the same degree, nor are all heritage assets of comparable significance, and the decision maker must assess the actual significance of the asset and the actual effects upon it.
>
> 50. But one must not take it too far so that one rewrites NPPF. It provides a sequential approach to this issue. Paragraphs 126-134 are not to be read in isolation from one another. There is a sequential approach in paragraphs 132-4 which addresses the significance in **planning** terms of the effects of proposals on designated heritage assets. If, having addressed all the relevant considerations about value, significance and the nature of the harm, and one has then reached the point of concluding that the level of harm is less than substantial, then one must use the test in paragraph 134. It is an integral part of the NPPF sequential approach. Following it does not deprive the considerations of the value and significance of the heritage asset of weight: indeed it requires consideration of them at the appropriate stage. But what one is not required to do is to apply some different test at the final stage than that of the balance set out in paragraph 134. How one strikes the balance, or what weight one gives the benefits on the one side and the harm on the other, is a matter for the decision maker. Unless one gives reasons for departing from the policy, one cannot set it aside and prefer using some different test."

54. So the Council in this case had to do the following;
    a. to comply with s 72 PLBCAA 1990 , it had to ask whether the development would cause harm to the character or appearance of the Conservation Area. If the answer is that it would, it had to give significant weight to the fact that harm would be caused;
    b. if NPPF is to be addressed properly, then if it had found that harm would be caused, the value of the asset and

> the degree of harm must both be addressed. If the level of harm is substantial, then consent should be refused under [133] unless the harm or loss is necessary to achieve substantial public benefits that outweigh the harm or loss, or one of the four bullet points apply (none of which were suggested here). If the level of harm is less than substantial, then any benefits must be weighed against the degree of harm- see paragraph [134].

55. If the effect on the heritage asset was such that the tests in NPPF [132]- [134] were not met, then the rider in NPPF [14] applied. It would also mean that the development would not be sustainable in terms of the environmental dimension under NPPF [54].

56. I turn now to the specific grounds. I start with Ground 3 . Here the officer's report found that there would be a harmful effect on the character and appearance of the Conservation Area, but sought to look at it in the context of the Conservation Area as a whole. It is sensible to consider this in the context that the site lies within an area of undeveloped land over which the public get one of the long views which it is Development Plan policy to retain and protect. That was the view of the 1994 Inspector, and is clear from the officer's report:

> "…. the main impact of the proposed development would be on the character of the immediate vicinity through the loss of panoramic views to the south. Construction of the dwelling will obstruct long views from the western end of Courtmead Road, from the public footpath abutting the northern boundary and from within the site itself. The views across open countryside to the distant South Downs are a distinctive feature of the southern edges of the Cuckfield conservation area and they engender a particularly strong sense of place. Loss of these views will diminish an important quality of this part of the designated area and as a result this weighs against the favourable recommendation of the application proposals."

57. However the next paragraph states that

> "However, the area in which the diminution will be experienced is limited to the western end of Courtmead Road, the public footpath and from within the site itself. From elsewhere in the southern fringes of the conservation area, similar panoramic southerly views will remain. Thus, while there is damage to a component of the heritage asset i.e. the conservation area, the special character of the conservation area as a whole will be preserved. As such there is no conflict with policy B12 of the MSLP."

58. In my judgement that approach cannot be supported. If there is harm to the character and appearance of one part of the Conservation Area, the fact that the whole will still have a special character does not overcome the fact of that harm. It follows that the character and appearance will be harmed. While I accept that the question of the *extent* of the harm is relevant to consideration of its effects, it cannot be right that harm to one part of a Conservation Area does not amount to harm for the purposes of considering the duty under s 72 PLBCAA 1990 .

59. On the facts there set out, it follows that the development would cause harm to the character and appearance of the Conservation Area. That must attract significant weight as a disadvantage of the development, as a matter of law, as the approach set out in Bath (per Glidewell LJ) Heatherington (per the future Keene LJ) and Barnwell (per Sullivan LJ) shows. NPPF paragraphs [132]- [134] and [138] cannot be read as diminishing the effect of that clear line of authority, emanating from three of the most distinguished judges in this field.

60. The conclusion about policy B12 also cannot be sustained. That policy, it should be recalled, reads

> "The protection of the special character and appearance of each Conservation Area will receive high priority. When determining **planning** applications for development within or abutting the designated Conservation Areas, special attention will be given to the desirability of preserving or enhancing the character or appearance of the area…."

61. On the facts and arguments advanced in the report, the development would undoubtedly harm the character and appearance of it. I would take that view whether or not this particular part of the Conservation Area had the particular importance ascribed to it by the Development Plan, and set out above. But it must also be taken as conflicting with the specific protection given by the development plan in CNP 5(d) and Map 5 of the CNP. While it is true that the report identifies a breach of CNP 5 it does so on the basis that the house would be outside the built up area, and not on the basis that it would obstruct landscape views of importance and sensitivity, which the Development Plan set out to protect.

62. Those breaches of policy also mean that the approach of the report, which failed to identify it as a breach, must be reassessed in the light of s 38(6) of PLBCAA 2004 .

63. One then turns to the arguments advanced for the benefits outweighing the harm. It is very hard to understand how it is said that the construction of one house (albeit an attractive one in a location close to facilities) at this location can amount to substantial public benefits of the kind contemplated in paragraph [132] of NPPF, but even if that is a rational view, it is expressed in the context of an approach where the assessment of harm is flawed, for the reasons already given.

64. I therefore find that MSDC failed to apply the tests in either s 72 PLBCAA 1990 or NPPF [132]-[134] in a proper manner. It follows also that even if one took the NPPF [14] test or that in [149] this proposal was in breach of a policy in NPPF at paragraphs [132]-[134].

65. As to Ground 1 , I agree that there was a breach of Policy B12 of the Local Plan, for the reasons given above under Ground 3. Given the fact that the officer's report approached the matter on the basis that there was no breach of B12, the report had not considered all relevant breaches when determining the degree of conflict with the Development Plan for the purposes of s 38(6) PCPA 2004 . There was also a breach of CNP 5(d) which has not been addressed.

66. However so far as Policy C1 is concerned, and the *generality* of CNP 5 it was a matter for the **planning** judgement of the Council whether the policy was out of date.

67. I also agree that there was a breach of the NPPF paragraphs [132]- [134]. I do not consider that there was an additional breach of the core principles in NPPF [17]. As to the passages in NPPF on Neighbourhood Plans in [17], [185] and [186], they are actually surplusage, because the effect of s 38(6) PCPA 2004 is to the same effect as NPPF [198], as pointed out by Holgate J in Woodcock Holdings . Similarly, NPPF [185] does no more than state the effect of s 38(5) of that Act whereby the last plan approved takes precedence. NPPF [17] encourages LPAs to have genuinely plan led **planning**, with up to date local and neighbourhood plans "setting out a positive vision for the future of the area." While it is noteworthy that the CNP is actually less than two years old, but is still regarded by the LPA as out of date, it was matter for its **planning** judgement whether it is out of date, albeit that it must exercise that judgement logically and with regard to relevant considerations.

68. For the same reason Ground 2 is unarguable.

69. As to Ground 4 MSDC did take account of the CNP. In the absence of any policy in the CNP restricting the level of housing development to the allocations, it is hard to see how this advances the Claimant's case.

70. As to Ground 5 I have some sympathy for the Claimant. There is little difficulty in understanding that the appropriation and ending of the role of the site as open space was related to the Council seeking to maximise the value of its asset. But be that as it may, the Council has put forward reasons why it did not regard the loss of open space as significant. The fact is that it is not actually public open space, and the Open Space assessment has shown that it is not required. In my judgement, the Council was entitled to form the **planning** judgement that the land should not be treated as recreational open space. Accordingly Ground 5 fails.

71. Finally, I have considered whether this is a case for the application of section 31(2A) of the Senior Courts Act 1981 as amended by Criminal Justice and Courts Act 2015 or whether the Simplex test applies. In other words, would the decision have been the same had the officer approached the Conservation Area issue properly? I am by no means persuaded that it would have been. For had the Council been properly advised, it would have had to approach the case on the basis that:

a. there would be harm caused to this part of the Conservation Area, to which it should attach significant weight (Barnwell , Bath);
b. it could not be offset by the lack of harm to the rest of the Conservation Area;
c. that being so, could the construction of one house, with the financial advantages that brings to the Council, as identified in the officer's report, outweigh that harm?

72. That is not the approach it followed. I am not persuaded that, had it done so, it would have been bound to grant permission for a single house at this location given its significance in the Development Plan. It follows that I uphold grounds 1 and 3, and quash the grant of permission.

Ruling on application for permission to appeal

73. Mr Walton has submitted that I should grant permission to appeal. It is resisted by Mr Sharland. Both put their submissions on the point in writing after my draft judgement was circulated.

74. On Ground 3 Mr Walton contends that the Court has reached the unsustainable conclusion that harm to one part of the Conservation Area " must equate as a matter of law/principle to harm to the significance of the heritage asset, which is an unsustainable conclusion." He also contends that I have made a finding that the scheme would cause harm to the character and appearance of the Conservation Area.

75. That submission as drafted does not address the effect of NPPF, which regards harm to the character and appearance of a Conservation Area as harm to the significance of the heritage asset- see paragraphs [126] and [131]. In this case the report expressly held that there would be harm to the appearance and character of the Conservation Area, without identifying any compensatory change.

76. In any event that submission does not address directly the conclusion of the Court about the effect of section 72 PLBCAA 1990 on the effect of harm to one part of the Conservation Area.

77. On Ground 1, Mr Walton submits that I have not dealt with the Claimant's principal case, and that it was truly an irrationality challenge.

78. In fact allowed Ground 1, but not only in relation to the points about NPPF. The application for permission nowhere addresses the approach of the Council to Policy B12.

79. There is one arguable point lying behind Mr Walton's submissions, but obscured by them, and which is the kernel of the case: namely whether, when one is considering if there would be harm to the character and appearance of a Conservation Area for the purpose of s 72 (or NPPF or Policy B12), one can approach the question on the basis that there would not be harm to it overall. If one can do so, then the report approached this fundamental issue in the case properly. If one cannot, it did not do so. As I remarked in argument I am unaware of any reported authority on the matter. I grant permission on that ground alone.

80. Mr Sharland has submitted that I make the permission to appeal subject to the application of the Aarhus costs caps. While I see the force of that, the costs of any appeal are a matter for the Court of Appeal to address.