

**LAND ADJOINING AND WEST OF STONECROFT HOUSE, CLIFTON ROAD,
DEDDINGTON**

OPINION

Introduction

1. I am asked to advise Blue Cedar Homes Limited in respect of a planning application relating to land adjacent and west of Stonecroft House, Clifton Road, Deddington ('the application site'). In particular I am asked in the context of planning decision making to provide my opinion as to how correspondence received from Historic England should be interpreted and what the implications of recent appeal decisions are for the application.

2. I set out below a summary of my understanding of the application and relevant context. In doing so I address the Historic England correspondence and the Appeal Decisions. I then provide some legal guidance of relevance relating to the process of decision making in this case with such matters in mind. It is not my role to undertake planning judgments but I set out my general view on the robustness of the material I have seen.

Planning Context and the Application

3. A detailed planning application for: "The erection of 7 one and two storey age restricted dwellings for older people (60 years) with access, landscaping and associated

infrastructure” to be built on the application site was submitted to Cherwell District Council (‘the Council’) on 1st December 2020 and validated as Application No. 20/03467/F¹ (‘the application’).

4. The village of Deddington is located on the western side of the River Cherwell valley in northern Oxfordshire, roughly 6 miles (10 km) south of Banbury and, to its east, close to the border with Northamptonshire
5. The total area of the application site is approximately 0.46ha. It is an open agricultural field or paddock, lying on the east side of Deddington and immediately south of Clifton Road, and just within the north eastern boundary of Deddington Conservation Area. To its south stands Deddington Castle, a scheduled monument.
6. The Cherwell Local Plan 2011-2031, adopted 2015 (readopted in 2016) at present constitutes part of the development plan². It identifies Deddington as a Category A village where minor development, infilling and conversion will be supported. Deddington, as a Category A village, is categorised as one of the more sustainable villages in the District. The relevant development plan policy context is discussed in the planning report submitted with the application³. There are a number of relevant development plan policies discussed in the documents I have considered.
7. Policy Villages 1 of the CLP 2031 provides a framework for housing growth in the rural areas of the District and groups villages into three separate categories (A, B and C),

¹ NB my Instructions refer to Ref No. 20/03468/F - but I assume it meant 20/03467/F

² And saved policies of the 1996 Local Plan. I note that The Cherwell Local Plan 2011-2031 (Part 1) Partial Review - Oxford's Unmet Housing Need was formally adopted as part of the statutory Development Plan by the Council on 7 September 2020.

³ Section 5

with Category A villages being considered the most sustainable settlements in the District's rural areas which have physical characteristics and a range of services within them to enable them to accommodate some limited extra housing growth.

8. In order to meet the areas housing needs Policy Villages 2 of the CLP 2015 states that:
- "A total of 750 homes will be delivered in Category A villages. This will be in addition to the rural allowance from small site 'windfalls' and planning permissions for 10 or more dwellings as at 31 March 2014".
9. The site is not allocated for development in any adopted or emerging policy document forming part of the Development Plan. Indeed, there is no defined settlement limits in any development plan document for Deddington. Policy Villages 1 and 2 provide a framework for housing to be delivered both inside and outside the built up limits as long as it is concluded that the site sits inside the built up limits of the village given its physical and visual relationship to the existing built form.
10. It is therefore necessary in policy terms to consider the criteria associated with Policy Villages 1 as to whether the site is acceptable for development. Paragraph C.262 of the adopted Local Plan provides a set of criteria amongst which minor development proposals such as the current proposals are assessed. Those criteria are assessed in detail in the planning report that accompanies the application in section 7. The report concludes in that context that the development is of an appropriate scale and is well related to the existing settlement.
11. The preparation of a new⁴ neighbourhood plan for Deddington remains at an early stage and is unlikely to be able to attract material weight in the planning decision making

⁴ An earlier version having been withdrawn – see section 5 of the planning report

process. I understand that the application site has made it through to a second stage following a ‘call for sites’. From the material I have seen⁵ it is in any event plain that the type of housing proposed in the application is the kind of provision for which there is a demonstrable need in Deddington so as to address the needs of an ageing population in the District⁶. National Planning Policy supports the need for such housing to be provided⁷. The specific need for retirement properties which would be met by the proposal is explained in the submitted Retirement Statement.

12. The site is sustainably located and has convenient access to public transport⁸. The village centre (Market Place) is approximately 500m away and is well served with a wide range of local facilities including a regular farmers' market, several local shops, a post office, library, hotels, restaurants, pubs, church and primary school.

Pre- application

13. I note that there was substantial pre application engagement⁹. Blue Cedar Homes had 2 pre application meetings with the Council and also a further 2 meetings with Historic England. There was also consultation with local residents and locally elected officials. I return in particular to the correspondence received from Historic England in October 2020 below which addressed the pre application position.

⁵ Including reference to the earlier Examiner report into the withdrawn neighbourhood Plan – discussed at paragraphs 5.15-5.19 of the planning report

⁶ Planning Report at section 5

⁷ See especially NPPF paragraphs 60,61,68 and NPPG at 001 – guidance for housing for older people

⁸ See Planning Statement at 2.7

⁹ See section 6 of the planning report which sets this out.

The Application

14. In light of the pre application responses refinements to the proposal were made¹⁰. The application was supported by various application documents¹¹. Having considered the application material it is abundantly clear that the proposal is a carefully considered proposal. In terms of form and appearance the 7 dwellings reflect the low density housing which the material provided to me demonstrates is characteristic of this part of Deddington.

15. As the planning material submitted explains (at 3.2-3.4):

“The style and form of development reflects that of an agricultural courtyard. However, the courtyard form is broken down to both minimise the impact on the view from the castle and align with the neighbouring buildings to create a more informal courtyard.

The form and style reflects the neighbouring Castle Barns. Creating single storey dwellings not only allowed the mass of development closest to the castle to be minimised, but also creates houses suited for their proposed use as retirement dwellings. Towards the north of the site 2 no. two storey dwellings are proposed outside the courtyard one of which would form a feature ‘farmhouse; that would have a more domestic style and mark the entrance to the site.

The agricultural style of the development and barn like architecture of the buildings reflects both the current use of the site and the style of many of the neighbouring buildings. Plot 7, the ‘farmhouse’, is of a more domestic style, a single building in this style is often found within a farm courtyard and would have acted as a home for the farmer and their family.”

¹⁰ See planning report at 6.8

¹¹ <https://planningregister.cherwell.gov.uk/Planning/Display/20/03467/F> : I have considered such documentation.

16. The Planning report sets out the relevant policy context and assesses the overall planning position in light of the detailed material submitted. It identifies a range of benefits provided as part of the proposals in Section 8. The Planning Report concludes as follows:

“ 9.1 This detailed application provides 7 bespoke one and two storey properties for the elderly (60 years plus) together with access, landscaping and associated works.

9.2. There is a recognised and accepted need for elderly persons accommodation in Deddington which is not being met by any existing or proposed residential development. This development is bespoke to provide adaptable living accommodation specifically designed for the elderly.

9.3. Detailed discussions have taken place with Historic England and they have no objection to the proposals. The scheme has less than substantial harm to the setting of the scheduled ancient monument, Deddington Castle and the Conservation Area.

9.4. The site is well related to the settlement form and a proper analysis of the proposal concludes that the development complies with Policy Villages 1 of the adopted Local Plan.

9.5. Detailed analysis of the proposals have been undertaken in terms of landscaping, biodiversity, archaeology, transport, drainage etc. All of these issues can be satisfactorily accommodated and would have no adverse impact on the character or appearance of the area.

9.6. Finally, there are a range of significant benefits attributed to the scheme which are set out in Section 15. These all weigh in favour of granting planning permission for the development.

9.7. In view of the above, it is requested that detailed planning permission be granted.”

Heritage Issues

17. A Heritage Statement¹² identified that there are three designated heritage assets requiring consideration in the context of the application - Deddington Conservation Area (an asset of medium to high significance)¹³, Deddington Castle (a scheduled monument of high significance), and the jointly Grade II* listed Castle End and Monks Court.
18. The Heritage Statement contained a heritage impact assessment which concluded that the proposals within the application are likely to cause slight '*less than substantial*' harm to both Deddington Castle and the Conservation Area viewed as a whole, but would have no effect on the significance of Castle End and Monks Court¹⁴.
19. The Heritage Statement also considered the cumulative effect of the application together with development proposals for a site further east along Clifton Road recently granted outline planning consent at appeal.
20. It concluded that the cumulative harm resulting the two developments together would not reach a tipping point that causes 'substantial harm' to the significance of either Deddington Conservation Area or Deddington Castle¹⁵.
21. It further concluded that the application proposals include positive heritage enhancements to the Conservation Area and Deddington castle. The statement notes that these heritage benefits form part of the wider public benefits that will be delivered

¹² Dated 30.11.20 prepared by 'Heritage Places' – Stephen Bond

¹³ See in particular in the Heritage Statement at sections 2.3, 3.2.2

¹⁴ See at 5.4.6 - it is considered that the application will have little adverse effect – or a 'neutral effect' - on the significance of the listed Castle End and Monks Court, due to the screening effect of Castle Barns in between.

¹⁵ See at 5.4.7 of the Statement

by the proposals within the application and considered that such benefits needed to be considered as part of the planning balance required by the NPPF.

22. I consider that the Heritage Statement is plainly a robust and carefully considered assessment. It considers relevant policy, guidance and law at a local and national level¹⁶. In particular, it addresses the issue of ‘significance’ of relevant assets in detail. The approach taken to the assessment of impacts as explained and applied in the Heritage Statement is in my view legally sound and accords with relevant policy and legislation.

23. The careful analysis sets out reference to heritage-focused development principles discussed with Council officers at the pre application stage¹⁷. The analysis that follows demonstrates that the application will enable the retention of a clear view from Clifton road to the Castle¹⁸ and that the visual connection with agricultural land in views from the Castle will be maintained¹⁹, that the proposal would reflect and respect the built form and grain in its immediate environs²⁰ and that enhancements to the Conservation Area could be secured²¹.

24. Whilst overall conclusions on harm are matters of judgment, I consider the conclusion relating to there being ‘*slight less than substantial harm*’ to the significance of the Deddington Conservation Area as a whole²² is carefully arrived at and explained and

¹⁶ See section 4 of the Heritage Statement

¹⁷ See at section 4.3 & 5.4.3

¹⁸ 5.4.3 (i)

¹⁹ 5.4.3 (ii)

²⁰ 5.4.3 (iii)–(iv)

²¹ 5.4.3 (v) & (vii)

²² 5.4.4

robust. The similar conclusion relating to Deddington Castle is also arrived at with similar care²³.

25. I note that the Heritage Statement has considered expressly the Historic England pre application response to the proposals dated 1st October 2020²⁴. It is evident that Historic England broadly agreed with the assessment found in the Heritage Statement of slight less than substantial harm to the significance of the Castle and Conservation Area.

26. The Heritage Statement also addresses the appeal decisions²⁵ relating to other land south of Clifton Road²⁶ where no effect on the significance of the Castle was identified. I return to those appeals below. For present purposes it can be noted that the potential cumulative effects of such applications with the current application were carefully considered and it was found that the developments would not be experienced in many, if any, single views from the Castle and that the peripheral open/agricultural setting of the Castle experienced in any northward views would not be transformed so adversely that it would no longer be readily legible as such²⁷.

27. The Heritage Statement accordingly identifies a very low level of less than substantial harm to two designated heritage assets. In the context of the balance engaged in paragraph 196 of the NPPF the Heritage Statement (correctly) does not seek to

²³ 5.4.5

²⁴ At 5.4.4 & 5.4.5

²⁵ APP/C3105/W/19/3242236 and APP/C3105/W/20/3247698 – Decisions dated 19th October 2020

²⁶ At 5.3.2 & 5.4.5

²⁷ 5.4.7

undertake that overall balance²⁸ but does identify relevant heritage benefits²⁹ as part of the wider public benefits that would be delivered by the application.

Appeal Decisions

28. On 19th October 2020, two appeals were allowed for the erection of up to 14 and up to 15 residential dwellings together with means of access etc on Land South of Clifton Road, Deddington³⁰.

29. The Inspector identified (at paragraph 8) the main issues in both appeals as: i. The effect of development of the character and appearance of the area including Deddington Castle and the Deddington Conservation Area; and ii. Whether a satisfactory and executed planning obligation exists to deliver infrastructure necessary to support the development.

30. The Appeal Decisions are relatively recently made, consider in part at least a similar policy context and village context and whilst each case must be considered on its own merits it are plainly of some broad relevance to the matter at hand.

31. In particular, in my view they are relevant in the current decision making context not as a precedent³¹, but as a material consideration for the current application in that:

- (i) The Decisions confirm, in my view, that the development plan does not include a limiting spatial dimension (see Policy Villages 2 of the Local Plan and paragraph

²⁸ See at 5.5

²⁹ 5.4.3 (v), 5.4.5 & 5.5

³⁰ APP/C3105/W/19/3242236 and APP/C3105/W/20/3247698

³¹ That is not the role of other Appeal Decisions and in any event that is made clear in paragraph 23 of the AD

17 of the Appeal Decision) so that in principle development can be delivered both within and outside of built-up limits.

- (ii) The Decisions confirm that so long as development has at least some relationship with the village and its pattern of development it would be *'be permitted in principle subject to the criteria set out in the policy'*. In the context of those Decisions the Inspector held that 15 dwellings were acceptable in the context of Deddington.
- (iii) There are both similarities and differences between the proposals considered by the Inspector and the application. The current application site is well related to the existing built up area and the evidence submitted with the application supports the proposition that the proposal would be in keeping with the character and form of the village. Moreover the current application is properly to be considered a 'minor' form of development.
- (iv) In the Appeal Decisions, having considered the contribution made by setting to the significance of the scheduled monument, Deddington Castle, and the part played by views to and from the Castle within that, the Inspector concluded (paragraph 15) that, in contrast to views out to the north: *'Only when looking south or east from the castle, and away from the [appeal] site, would views take on the appearance of a truly rural character associated with the open countryside.'* The Inspector also observed (paragraph 19) that: *'The visual differentiation [between the village core and less dense development at its edges and peripheral clusters] is important to preserve, and the high density nature of the village core should not be allowed to sprawl outward to lower density locations such as the peripheral cluster [around the appeal site].'* In that regard, the Inspector stated (paragraphs 22 and 23) that: *'The prevalence of other field parcels that would remain interspersed amongst development along Clifton Road would guard against ribbon development, and*

even with the loss of the site to the development the proportion of unbuilt vs built form would remain low density...Consequently, this area of Clifton Road could maintain its low density and peripheral nature (through a combination of layout and landscaping approaches and the preservation of other field parcels) and still be easily discernible from the relatively high density nature of the village core. The development should not be considered to form a precedent, there are sufficient numbers of remaining field parcels that preserve the peripheral feel of the area and any future development proposals would need to account for the subsequent and cumulative loss of any field parcels and any consequential effects.' The Inspector found (paragraph 24) that the effect of the development proposals in the two outline applications would be that: '*...the settings of both Deddington Conservation Area and Deddington Castle would...be preserved. I note that Historic England raised concerns about the loss of the field parcel in and of itself, but in my view the setting of the castle should be taken as a whole, not in isolation, and by this measure it would be preserved.'*

- (v) I do not consider that such findings of the Inspector weigh against the proposal once the material submitted with it (which carefully assesses the impacts in visual, landscape, heritage and other terms) is considered. In my view the real relevance of the Appeal Decisions is that they indicate that in a – in some regards - similar context a larger scale of development was acceptable. The Inspector in fact found that the larger proposed developments there would have no effect on the significance of the Castle. As I have made clear, each case is fact specific. Nevertheless it is plain from the Appeal Decisions (as a material consideration) that the extant planning policy context for Deddington when faced with a proposal in a

similar context is not one which should preclude in principle the kind of proposal in the current application.

Historic England

32. The applicant had sought the pre-application advice of Historic England on the submitted development proposals and this was provided in a letter dated 1st October 2020. Historic England advised that the proposal would cause less than substantial harm to the Castle and to the Conservation Area. Importantly that letter placed the scale of less than substantial harm as ‘*minor*’ in the case of the Castle and ‘*minor to moderate*’ in the case of the Conservation Area. Such identification of harm is not dissimilar to that identified in the Heritage Statement.

33. Given the pre application stage of such advice it is important to consider what Historic England have subsequently advised. In a letter dated the 28th January 2021 Historic England have indicated:

“The proposal would cause less than substantial harm to the scheduled monument Deddington Castle and to the Deddington Conservation Area. There is no formal scale for less than substantial harm, but on a simple scale of minor, moderate and major I assess the harm in this case as being minor. In determining this planning application your local authority should balance this harm against any public benefit from the development, as required by the National Planning Policy Framework (NPPF), paragraph 196. Paragraphs 193 and 194 of the NPPF require that great weight should be given to the conservation of a designated asset, irrespective of the level of harm, and that any harm should be fully justified”

34. It is important to note that Historic England, having considered the changes made to the proposal have now reduced the level of harm to the conservation area from moderate to ‘minor’. The author noted:

“There is no formal scale for less than substantial harm but on a simple scale of minor, moderate and major (severe) I advise that it would be minor. In considering the level of harm I have taken into account the courtyard design of the development and its use of appropriate materials (ironstone, wood and slate). I have also considered the proposed enhancements discussed above. Without these the level of harm would be higher. I would note that the applicant engaged with Historic England at an early stage and has worked to reduce the harm in comparison with earlier versions of the scheme”

35. The level of harm now identified by Historic England in relation to both the conservation area and the castle is ‘*minor*’. In relation to the significance of the castle it is clear that Historic England now assess that the impact on the open agricultural setting of the castle will be ‘*small*’ and that the impact on the separation of the castle from the village can only be described as ‘*small*’.

36. In short, the harm identified is at the lowest level of harm in the scale used by Historic England. It seems to me that Historic England, in referring to the Appeal Decision from 2015 (APP/C3105/A/14/2228558) – where the appeal had been dismissed – were making a direct contrast with the current application. In that earlier appeal the situation appears to have been quite different with a much more ‘*significant*’ heritage harm identified. Historic England appear to be reporting- by contrast - that the current application is not anything like as harmful.

37. Historic England do not offer any overall view on the planning application. It is not its role to do so. It is however correctly pointed out in the January 2021 letter that a paragraph 196 NPPF balance should be considered along with relevant development plan policy.

Approach to Decision making

38. The general approach to decision making is no doubt well understood. The well known statutory test in s.38(6) of the Planning and Compulsory Purchase Act 2004 (PCPA)³² is as follows:

“(6) If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

39. The requirement to make the determination *“in accordance with the plan unless material considerations indicate otherwise”* is often referred to as a presumption in favour of the development plan. It is one of the central statutory provisions in English planning law.

40. In *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, the House of Lords considered the effect of the Scottish equivalent to s.54A (s.18A of the Town and Country Planning (Scotland) Act 1972, enacted by s.58 of the Planning and Compensation Act 1991).

³² Note too that other legislation requires that regard be had to the development plan in determining planning applications (s.70(2) TCPA 1990)

41. Lord Hope explained the purpose of the provision³³, noting that:

- (i) Its purpose was to “*enhance the status*” of the development plan in the exercise of the planning authority’s judgment³⁴.

- (ii) Nonetheless, the development plan does not have “*absolute authority*” and may be departed from³⁵.

- (iii) In particular, the development plan’s “*provisions may become outdated as national policies change*” and in that case: “*the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.*”³⁶

³³ At pp.1449H–1450H

³⁴ At p.1450A-B.

³⁵ p.1450B-C.

³⁶ p.1450D-E

- (iv) The presumption is, in essence, “*a presumption of fact*” and primary responsibility lies with the decision-taker. In that sense, it is unhelpful to regard the presumption in favour of the development plan as either “*governing or paramount*”.³⁷

42. In a well know passage, Lord Clyde explained that the presumption leaves the assessment of facts and the weighing of considerations in the hand of the decision-maker, including the development plan, noting that:

"In the practical application of [section 38(6)] it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of

³⁷ p.1450F.

*such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse.*³⁸"

43. Subsequent cases have affirmed that approach. From such case law (which is extensive) I highlight, by way of summary, the following propositions of law most relevant to the current context:

- (i) The effect of s.38 (6) is to enhance the status of the development plan, or to give it “*priority*”. However, while the development plan is under section 38(6) the starting-point for the decision-maker (and in that sense there is a “*presumption*” that it is to be followed), it is not the law that greater weight is to be attached to it than to other considerations³⁹: For example, policy may overtake a development plan.

- (ii) It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations

³⁸ pp.1458B–1459A

³⁹ See in particular Glidewell LJ’s dictum in *Loup v Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186 cited by Lord Clyde in *Edinburgh* and also *Secretary of State for Communities and Local Government v West Berkshire District Council* [2016] 1 W.L.R. 3923, Laws LJ at [20]

indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan: *R. (Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 W.L.R. 2367, per Richards LJ at [28]⁴⁰.

- (iii) That inevitably means that the decision maker has to identify and understand the relevant policies and has to establish whether the proposal accorded with the plan, read as a whole. A failure to understand the policies might be liable to be fatal to the decision. However, as long as the decision-maker understands them, their application was a matter for his planning judgement with which a court will not readily interfere: a proposition reaffirmed recently by Lindblom LJ in *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] EWCA Civ 669 at paragraphs 21-24⁴¹. The important distinction highlighted in such case law is that between understanding/interpreting the meaning of policy (which is a matter of law) and then applying policy (which often involves the making of planning judgments).
- (iv) Subject to the limits of rationality, it is for the decision-maker to judge the matters to be taken into account in applying planning policy (see the judgment of Lord Carnwath

⁴⁰ See also *Medway Council v Secretary of State* [2018] EWHC 2083 (Admin) where the court pointed out that it was usually necessary to understand how the decision maker viewed compliance with the development plan in the overall balance

⁴¹ See also *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13: Lord Reed at [19] on the approach to Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. See more recently *R. (on the application of Asda Stores Limited) v Leeds City Council, Commercial Development Projects Limited* [2021] EWCA Civ 32: Lindblom LJ at [35].

in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] P.T.S.R. 221, at paragraphs 30 to 32, and 39).

- (v) The weighing of the development plan, and other material considerations (including national policy) and the weight to be accorded to such matters is a matter for the decision-maker – the often referred to exercise of planning judgment.

- (vi) In particular, it is for the decision-maker to weigh any conflict with the development plan against “*other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied*”.

- (vii) Material considerations which may suggest a different result to that led by the development plan may include whether the development plan has become outdated “*as national policies change*”, or might include emerging development plan policy and more up to date evidence as to housing need.

- (viii) It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to

policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: “*is this proposal in accordance with the plan?*”. The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. As was made clear by Sullivan J in *R. v Rochdale MBC Ex p. Milne (No.2)* [2001] Env. L.R. 22⁴²:

“..Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies....

For the purposes of section [38(6)] it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein”.

44. In *R. (on the application of William Corbett) v The Cornwall Council v Stephen Tavener* [2020] EWCA Civ 508, the Court of Appeal re affirmed the correct approach where some policies were complied with and some were not as follows:

⁴² Paragraphs 48-50

“Under section 38(6) the members' task was not to decide whether, on an individual assessment of the proposal's compliance with the relevant policies, it could be said to accord with each and every one of them. They had to establish whether the proposal was in accordance with the development plan as a whole. Once the relevant policies were correctly understood, which in my view they were, this was classically a matter of planning judgment for the council as planning decision maker.” (Lindblom LJ at para 45).

45. In that regard the comment by LJ Lindblom at the end of his judgment in *Corbett* is of note when he indicated:

“It is worth recalling what Baroness Hale of Richmond said about decision-making by local planning authorities in R. (on the application of Morge) v Hampshire County Council [2011] UKSC 2; [2011] 1 W.L.R. 268 (at paragraph 36): that "in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities", who "go about their decision-making in a different way from courts", aided by "professional advisers who investigate and report to them", and it is "their job, and not the court's, to weigh the competing public and private interests involved".

46. Pausing there, in my view there is strong evidence in the above legal context to suggest that the proposal accords with the development plan properly construed and viewed as a whole. I consider the submitted planning report to be robust in that regard. Indeed, it is plain that the proposal would provide a much needed form of development that would provide significant material benefits.

47. Because a minor level of less than substantial harm has been identified the NPPF provisions relating to the historic environment require careful regard.

48. In the planning decision making context, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other ‘*material considerations*’ to be weighed in the balance: *BDW Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State* [2017] P.T.S.R. 1337 at [21] per Lindblom LJ.

49. In the context of the application of the NPPF and in particular paragraph 196⁴³ (as a material planning consideration) - paragraph 196 of the NPPF requires an initial establishment of the extent and nature of the harm that a proposal would cause to the significance of designated heritage assets.

⁴³ Viewed in the context of NPPF section 16 generally and the NPPF as a whole

50. At that initial stage, any suggested beneficial impact on the significance of the heritage assets is, in broad terms, left out of account⁴⁴. Once the level of heritage harm has been fixed – and para 196 contemplates the position where there is less than substantial harm identified - the decision-maker should take into account any effect on the assets that would properly be considered as a ‘public benefit’, in assessing the balance in para 196 NPPF.
51. ‘Public benefits’ as a concept within the meaning of para 196 can incorporate anything that flows from the proposals which delivers economic, social or environmental objectives as set out in the NPPF (section 8). Guidance on the meaning of such benefits is provided in the NPPG. They might include heritage specific benefits as are delivered by this application or more general benefits such as providing a much needed form of housing for the elderly. In this case the benefits are extensive and consist of specific heritage benefits and other more general benefits as identified in section 8 of the planning report.
52. The balance under para 196 does not of course incorporate the consideration of other harms beyond heritage ones. If the balance in paragraph 196 is not met then it is implicit that the application may not be acceptable so far as the NPPF is concerned. The heritage harm identified will need to be weighed together in the overall planning balance stage with any other harms in the context of the statutory decision making tests found in s 38(6) and s 70(2).

⁴⁴ As explained by Dove J in Kay [2020] EWHC 2292 (Admin) at [34]

53. It is important also to appreciate that in the context of s 72 (1) of the Listed Building Act 1990 Act (which is engaged here) the courts have made it clear that Parliament's intention in enacting s72 was that decision-makers should give "*considerable importance and weight*"⁴⁵ to the desirability of preserving or enhancing the character and appearance of a conservation area when carrying out the decision making balancing exercise. In that context it would be wrong to treat 'less than substantial harm' (as referred to in the NPPF) as equating to a less than substantial objection to a grant of planning permission. However, that importance can only relate to the level of harm identified – which in this case is minor.
54. The courts have confirmed that relevant considerations mirroring such duties are found in the NPPF section 16 [see especially para 192-6 NPPF], although it must be remembered that the statutory duties are distinct and constitute legal duties rather than material considerations.
55. Whilst there is not always a particular need to identify sub categories of harm within the less than substantial or substantial harm NPPF categories it will often be material to do so – as has been done in this case by the Heritage Statement and by Historic England.
56. These statutory duties and balances are to be considered alongside the relevant decision making duties in s 70 and s 38(6). The development plan policies of relevance relating to heritage remain the statutory starting point in this regard.
57. In light of that legal decision making context in my view the Council as a decision maker will have, as part of the decision making exercise, to balance the 'minor' level

⁴⁵ Barnwell Manor case [2014] EWCA Civ 137 – referred to in the EM proof at p.16

of harm identified as against the benefits of the scheme. This exercise will form part of the required decision making process. It will need to be carried out in light of the statutory tests I have identified and consider all the relevant considerations. The evidence submitted with the application explains why the development is of an appropriate scale and is well related to the existing settlement.

58. It is also explained that the proposals are specifically meeting an identified need for retirement properties (as set out in the submitted Retirement Statement). I am instructed that the proposal has significant local support including from the Parish Council. The level of harm to designated heritage assets has been confirmed as being of a ‘minor’ nature. That level of harm will need to be balanced as against the benefits of the proposal and judgments will need to be formed as to overall compliance with development plan policy.

59. I note in conclusion the following points. First, I do not consider that the latest Historic England correspondence weighs against the proposal being granted planning permission when the matter is considered in the round. Indeed, it identifies a very limited form of harm and does not seek to assess such harm against the undoubted benefits of the proposal. It offers no overall planning conclusion. Nor do I consider, for the reasons I have expressed above, that the more recent appeal decisions in October 2020 weigh against the proposal. In my view such decisions have the potential to be a material consideration which weighs in support of the proposal although it must always be recognised that each case is in the end fact specific.

Tom Cosgrove QC

22nd February 2021

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