Neutral Citation Number: [2021] EWCA Civ 320

Case No: C1/2020/0160

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE WAKSMAN
[2019] EWHC 3437 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2021

Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE PHILLIPS
and
LORD JUSTICE ARNOLD

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Between:

City & Country Bramshill Limited	**Appellant**
- and -	
(1) Secretary of State for Housing, Communities and Local Government	**Respondents**
- and -	
(2) Hart District Council	
- and -	
(3) Historic England	
- and -	
(4) The National Trust for Places of Historic Interest or Natural Beauty	

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James Strachan Q.C. and **Ned Helme** (instructed by **Pinsent Masons LLP**) for the **Appellant**
Guy Williams and **Alistair Mills** (instructed by the **Government Legal Department**)
for the **First Respondent**
Ben Du Feu (instructed by **Historic England Governance and Legal**)
for the **Third Respondent**
Melissa Murphy (instructed by **Sharpe Pritchard LLP**) for the **Fourth Respondent**

Hearing dates: 1 and 2 December 2020

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Judgment Approved by the court for handing down

The Senior President of Tribunals:

Introduction

1. This appeal raises questions on the interpretation and application of policies in the National Planning Policy Framework ("NPPF") against the development of "isolated homes in the countryside" and on the assessment of harm and benefit to "heritage assets".

2. The appellant, City & Country Bramshill Ltd., appeals against the order of Waksman J., dated 20 December 2019, partly allowing and partly dismissing applications and appeals under sections 288 and 289 of the Town and Country Planning Act 1990 ("the 1990 Act") and section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"), which challenged the decisions of an inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, on 33 statutory appeals, under sections 78 and 174 of the 1990 Act, against refusals of planning permission and enforcement notices issued by the second respondent, Hart District Council, relating to development at Bramshill Park in Hampshire. The third and fourth respondents, Historic England and the National Trust, were objectors.

3. The site, which extends to about 106 hectares, lies between the villages of Hazeley and Eversley. It was previously used as a national and international police training college. On it stands a grade I listed Jacobean mansion and various other buildings. It also contains a grade I registered park and garden. The proposed development included the conversion of the mansion to 16 apartments and the adjoining stable block to five (appeal 1), or its conversion to a single dwelling (appeal 2), or to class B1 office space (appeal 3); the construction of 235 houses in place of some of the existing buildings (appeal 4), 14 more to the south-west (appeal 5), and nine to the north of an existing lake (appeal 6); the use of 51 residential units – once occupied by staff employed at the training college – as separate dwellings (appeal 7), retaining those against which the council had taken enforcement action alleging a material change of use without planning permission (appeals 8 to 33).

4. The inspector held a long inquiry into the appeals, which ended in February 2018. In her decision letter, dated 31 January 2019, she allowed appeals 2 and 3, granting planning permission for those proposals. She also allowed appeals 15 and 17 to 33, quashing the enforcement notices in those appeals. She dismissed appeals 1, 4 to 14 and 16. In a separate decision letter dated 14 March 2019 she dismissed City & Country Bramshill's application for costs against the council. City & Country Bramshill challenged her decisions on appeals 4 to 14 and 16, and on the application for costs. Waksman J. upheld the challenges to the decisions on appeals 7 to 14 and 16. He rejected those to the decisions on appeals 4 to 6 and on costs. The appeal before us is against that part of his order. Permission to appeal was granted by Lewison L.J. on 28 February 2020.

The issues in the appeal

5. The grounds of appeal raise four principal issues: first, whether the inspector erred in law in her interpretation and application of the policy against "isolated homes in the countryside" in paragraph 79 of the version of the NPPF published in July 2018 (ground 1); second, whether she erred in her approach to "sustainability" (ground 4); third, whether,

in performing the duty in section 66 of the Listed Buildings Act and applying the corresponding policies in the NPPF, she failed to comply with a "principle" identified by this court in *R. (on the application of Palmer) v Herefordshire Council* [2016] EWCA Civ 1061, [2017] 1 W.L.R. 411 (ground 2); and fourth, whether she erred in her approach to applying development plan policies for the protection of the historic environment, in particular policies CON11, CON12, CON17 and CON18 of the adopted local plan for Hart district (ground 3). It is also contended that the decision on the application for costs was unlawful.

The inspector's "Overall Conclusions" on appeals 4, 5 and 6

6. The inspector's decision letter runs to 433 paragraphs. Her "Overall Conclusions" on appeals 4, 5 and 6 were these (in paragraph 417):

> "417. Appeals 4, 5 and 6 would not provide appropriate sites for development being in an unsustainable location and resulting in isolated housing in the countryside. They would be harmful to the character and appearance of the area and would not preserve the special qualities of the listed buildings, their settings or the [registered park and garden ("RPG")]. These matters are not outweighed by public benefits. They would not be in accord with [local plan] policies GEN1, GEN3, GEN4, T14, CON12, CON17 and national planning policy."

The policy in paragraph 79 of the NPPF

7. Under the heading "Identifying land for homes", paragraph 72 of the July 2018 version of the NPPF stated:

> "72. The supply of large numbers of new homes can often be best achieved through planning for larger scale development, such as new settlements or significant extensions to existing villages and towns, provided they are well located and designed, and supported by the necessary infrastructure and facilities. Working with the support of their communities, and with other authorities if appropriate, strategic policy-making authorities should identify suitable locations for such development where this can help to meet identified needs in a sustainable way. … ."

8. In a passage headed "Rural housing", paragraphs 78 and 79 stated:

> "78. To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. Planning policies should identify opportunities for villages to grow and thrive, especially where this will support local services. Where there are groups of smaller settlements, development in one village may support services in a village nearby.
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> 79. Planning policies and decisions should avoid the development of isolated homes in the countryside unless one or more of the following circumstances apply:
> a) there is an essential need for a rural worker … to live permanently at or near their place of work in the countryside;

b) the development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future use of heritage assets;
c) the development would re-use redundant or disused buildings and enhance its immediate setting;
d) the development would involve the subdivision of an existing residential dwelling; or
e) the design is of exceptional quality …".

Those two paragraphs re-appeared in the version of the NPPF published in February 2019.

9. The previous policy, in paragraph 55 of the original version of the NPPF published in March 2012, was in slightly different terms. It stated:

> "55. To promote sustainable development in rural areas, housing should be located where it will enhance or maintain the vitality of rural communities. For example, where there are groups of smaller settlements, development in one village may support services in a village nearby. Local planning authorities should avoid new isolated homes in the countryside unless there are special circumstances such as: …".

10. The interpretation of the policy in paragraph 55 of the original version of the NPPF was considered by this court in *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610, [2018] 2 P. & C.R. 9. In that case I said (in paragraphs 29 to 32):

> "29. … [Under] this policy, the concept of concentrating additional housing within settlements is seen as generally more likely to be consistent with the promotion of "sustainable development in rural areas" than building isolated dwellings elsewhere in the countryside. In short, settlements are the preferred location for new housing development in rural areas. That, in effect, is what the policy says.
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> …
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> 31. In my view, in its particular context in paragraph 55 of the NPPF, the word "isolated" in the phrase "isolated homes in the countryside" simply connotes a dwelling that is physically separate or remote from a settlement. Whether a proposed new dwelling is or is not "isolated" in this sense is a matter of fact and planning judgment for the decision-maker in the particular circumstances of the case in hand.
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> 32. What constitutes a settlement for these purposes is also left undefined in the NPPF. The NPPF contains no definition of a "community", a "settlement", or a "village". There is no specified minimum number of dwellings, or population. It is not said that a settlement or development boundary must have been fixed in an adopted or emerging local plan, or that only the land and buildings within that settlement or development boundary will constitute the settlement. In my view a settlement would not necessarily exclude a hamlet or a cluster of dwellings, without, for example, a shop or post office of its own, or a school or community hall or a public house nearby, or public transport within easy reach. Whether, in

a particular case, a group of dwellings constitutes a settlement or a "village" for the purposes of the policy will again be a matter of fact and planning judgment for the decision-maker. …"

and (in paragraph 38):

"38. This all seems at one with Lewison L.J.'s observation about the policy – brief as it was – in paragraph 15 of his judgment in [*Dartford Borough Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 141, [2017] P.T.S.R. 737]."

and (in paragraph 42):

"42. … To give effect to the policy in paragraph 55, the inspector was not obliged to ask himself whether the proposed development would be "functionally" isolated as well as "physically". He was required only to consider whether it would be physically isolated, in the sense of being isolated from a settlement. … ."

11. Though it was not referred to either in evidence or in argument before the inspector, the decision of this court in *Dartford Borough Council* has been relied upon by City & Country Bramshill in these proceedings. The "sole issue" in that case, as Lewison L.J. said (in paragraph 1 of his judgment), was "the meaning of "previously developed land" … as defined by the glossary" in the NPPF. In his view, the expression "[land] in built-up areas" in the definition could not mean "land *not* in built-up areas" (paragraph 9). And he saw no conflict between that definition and the policy in paragraph 55 of the NPPF (paragraph 14). He said (in paragraph 15):

"15. … [The] definition of previously developed land, in the context of the present case, takes as its starting point that the proposed development is within the curtilage of an existing permanent structure. It follows that the new dwelling within that curtilage will not be an "isolated" home. There will already be a permanent structure on the site. …".

The inspector's conclusions on the location of the proposed development

12. The first of the "main issues" identified by the inspector was "[whether] the proposals would provide appropriate sites for development having regard to planning policies that seek to control the location of new development and their sustainability credentials" (paragraph 23 of the decision letter).

13. She described the site and the buildings on it, noting that it "contains an extensive range of modern buildings … the lawful use … [being] a Residential Institution under Class C2" (paragraph 27). She also described the proposals in each of the appeals, and the relationships between one proposal and another. For example, she noted that the proposal in appeal 4 would provide 235 houses to the north-west of the mansion "utilising some of the existing buildings …" (paragraph 31), that the proposal in appeal 7 sought permission for "the use of 51 residential units on the site as C3 dwelling houses", 26 of which were the subject of the enforcement notices in appeals 8 to 33, and that "[the] buildings concerned are also included in appeal 4 for adaptation/demolition" (paragraph 35).

14. She said the council's reasons for refusal of planning permission for the development in appeals 1, 4, 5 and 6 "[related] to the alleged unsustainable location of the site by virtue of its remote position away from nearby settlements with services and facilities", and in appeal 7 "the provision of new isolated dwellings in the open countryside" (paragraph 54). She referred to the policy in paragraph 103 of the July 2018 version of the NPPF, which, she said, "seeks to focus significant development on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of sustainable transport modes", and the policy in paragraph 110, that "[encouragement] should be given to the effective re-use of land that has been previously developed …" (paragraph 57).

15. On the policy in paragraphs 78 and 79 of the NPPF she concluded (in paragraphs 58 to 61):

> "58. In rural areas, to promote sustainable development housing should be located where it will enhance or maintain the vitality of rural communities. Isolated homes in the countryside should be avoided unless they are to serve one of [the] identified special circumstances including where such development would represent the optimum viable use of a heritage asset or would be appropriate enabling development to secure the future of the heritage assets; or where the development would re-use redundant or disused buildings and enhance its immediate setting. [Here a footnote refers to paragraph 79 of the NPPF.]
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> 59. Although the development plan policies relating to settlement boundaries are out of date, there is no dispute between the parties that the site is located outside any settlement area and is not in the vicinity of the boundary of any settlement. It is in the countryside.
>
> 60. Nonetheless the appellant considers that the proposals would not result in isolated homes in the countryside under the meaning given in paragraph 79 of the [NPPF]. I have taken into account the findings of *Braintree* [Here a footnote refers to the first instance judgment in *Braintree District Council*] which remain relevant to the revised [NPPF] as the text in the revision remains essentially the same. It was held in the judgement that the word isolated should be given its ordinary objective meaning of "far away from other places, buildings or people; remote". A distinction was also made in the judgement between "rural communities", "settlements" and "villages" on the one hand and "countryside" on the other. At the Court of Appeal it was agreed that the [NPPF] does not define a community, settlement or village or that a settlement or development boundary must have been fixed in an adopted or emerging local plan. It was held that it should not necessarily have any services or public transport within easy reach. Whether in any particular case a group of dwellings constitutes a settlement or a village for the purposes of the policy will be a matter of fact and planning judgement for the decision maker. [Here there is a footnote referring to this court's decision in *Braintree District Council*.]
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> 61. In the cases before me, whilst I acknowledge that the site contains existing buildings, it is evidently not a rural community, settlement or village but rather a discrete group of buildings used in the past for a specific purpose as a residential institution centred on a historic house. It is remote from other settlements and villages and surrounded by open countryside. In my assessment residential

development in this location would result in new isolated housing in the countryside."

16. She acknowledged that paragraph 79 of the NPPF "allows for certain exceptions" (paragraph 62). But in the light of her conclusion that the proposals in appeals 4, 5 and 6 did not "represent the optimal viable use of a heritage asset or provide appropriate enabling development to secure the future of the heritage asset", she concluded that "these proposals do not fall under the special circumstances allowed by paragraph 79" (paragraph 63).

17. The development in appeal 4, the inspector said, "would extend beyond what can be considered as the curtilage of previously developed land", and this weighed against its "sustainability credentials" (paragraph 67). The proposals in appeals 5 and 6 did "not comprise the use of previously developed land" (paragraph 68).

18. On "sustainable transport", having considered the distance of the site from services and facilities (paragraphs 69 to 80), the inspector said the section 106 agreement showed "a commitment to measures that would assist in providing alternative transport modes for some of the appeals" (paragraph 81). But there was "no evidence as to how likely these particular measures would be to reduce the use of the private car". They "would provide some choice", but "this would be limited". The proposals did not "offer a genuine choice of transport modes as required by national and local policies" (paragraph 82).

19. Turning to City & Country Bramshill's contention that the development "would represent an improvement in greenhouse gas emissions in comparison to the site's previous use" (paragraph 83), the inspector said (in paragraphs 84 to 87):

> "84. The appellant contends that due to the nature of the trips that were undertaken in association with the previous use (and that could still be undertaken) it is relevant to sustainability to consider how the proposals would result in a reduction in greenhouse gas emissions due to the nature of the trips in the extant and proposed uses. I was not provided with evidence of the comparative greenhouse gas emissions of the previous and proposed uses. I was provided with information on trip rates by both main parties although the appellant acknowledges that it is not possible to define the ultimate origin and destination of trips from the former use. [Here a footnote refers to paragraph 337 of the closing submissions for City & Country Bramshill.] The appellant instead relies on the national and international nature of the former use that is alleged to have resulted in far greater emissions arising from trip lengths and international flights.
>
> 85. The Council claims that the proposals would result in more trips than the former use. This is largely due to the residential nature of the police college which did not generate regular trips off site. The Council did not provide information on trip lengths. I reach no conclusion on whether the existing or proposed uses would generate greater trip numbers as these do not assist in concluding on the relative greenhouse gas emissions arising from each as this would depend on distance and type. In addition it is likely that residents would travel abroad for holidays.

86. The offer of electric charging points to facilitate the use of electric cars would have the potential to assist in reducing greenhouse gas emissions. However, this would be reliant on individual occupants purchasing such cars and I have no evidence before me as to the likelihood or extent of this and the associated effect on greenhouse gas emissions.

87. As such I am unable to conclude that greenhouse gas emissions would be less with the appeal schemes before me as I do not have sufficient information before me. However, even if I did reach such a conclusion, this one factor would not lead me to a conclusion that the schemes would overall comprise sustainable development due to the isolated location of the site and the lack of genuine alternative transport modes."

20. The inspector then returned (in paragraph 88) to the policies of the NPPF bearing on the sustainability of the site's location:

> "88. The [NPPF] should be read as a whole and seeks to direct development to locations which are or can be made sustainable, where services are accessible and where the natural environment is protected. I do not consider that the various measures proposed are of such weight to outweigh the conclusion that the site is in an inappropriate location in the countryside for new residential development, divorced from services and facilities. Appeals 4, 5, 6 and 7 would result in isolated homes in the countryside. Whilst the travel plan and proposals for electric charging points would potentially provide some choice of travel, given the lack of facilities within walking distance of the site, the distance to the bus stops and the unattractive nature of the road network to walk and cycle, the site's location is not one that is or can be made sustainable. The developments would not enhance or maintain the vitality of the local communities or result in strong and vibrant rural communities. I conclude that the site would not be an appropriate and sustainable location for housing development in Appeals 1, 4, 5, 6, and 7-33."

21. In her conclusions on the first "main issue", therefore, the inspector said the proposals in appeals 1, 4, 5, 6 and 7 to 33 "would not provide appropriate sites for housing development in respect of their location and sustainability credentials", and "would not be in accord with … the objectives of national planning policy" (paragraph 91). However, the site in appeal 2 "would be an appropriate site for a single dwelling", and that in appeal 3 "an appropriate site for offices given the fallback position". Both of those proposals were "in accord with local and national policies in this regard" (paragraph 92).

22. Later, when dealing with the ground (c) appeals against the enforcement notices, she considered the lawfulness of the uses to which the notices related (paragraphs 363 to 376).

Did the inspector misinterpret and misapply the policy for "isolated homes in the countryside" in paragraph 79 of the NPPF?

23. For City & Country Bramshill, Mr James Strachan Q.C. argued – as he did before Waksman J. – that in concluding the proposals would create "isolated homes in the countryside" the inspector misinterpreted the policy in paragraph 79 of the NPPF.

24. Mr Strachan made three main submissions. First, the inspector failed to comply with the "principle" stated by Lewison L.J. in paragraph 15 of his judgment in *Dartford Borough Council*, which was binding on her even though that case had not been mentioned at the inquiry. She did not grapple with the fact that the proposed housing would be on "previously developed land" within the curtilage of existing permanent structures, and so would not be "isolated homes in the countryside". As she was reminded in City & Country Bramshill's closing submissions, this was conceded in cross-examination by the council's witness Mr Archibald, and, for the development in appeals 4, 5 and 6, by its witness Mr Stevenson. Secondly, she failed to consider whether there was a "cluster" of dwellings forming a "settlement" on the site, as envisaged in *Braintree District Council*. There were already at least 18 residential units in lawful use as independent dwellings (those in appeals 15 and 17 to 33), and at least 17 more containing staff accommodation, which could also be used as new dwellings. So to describe the proposed new housing as "isolated homes" was not rational. The judge's analysis here (in paragraphs 40 to 42 of his judgment) was incorrect. And thirdly, the inspector also failed to consider how the housing proposed in appeal 4, with or without the additional housing in appeals 5 and 6, could rationally be regarded as the creation of "isolated homes in the countryside". The judge was wrong to suggest (in paragraphs 32 and 44 of his judgment) that the number of houses proposed was irrelevant to the question of whether the proposal was for "isolated homes". It is implicit in this court's reasoning in *Braintree District Council* that a decision-maker should consider whether the number of dwellings proposed would be sufficient to avoid "isolation".

25. Mr Strachan contended therefore that the inspector's conclusion in applying the policy in paragraph 79 of the NPPF was irrational. No reasonable decision-maker could have regarded the proposed housing as "isolated homes in the countryside". But in any event, the inspector's reasons on this "principal important controversial issue", were deficient.

26. Finally, Mr Strachan submitted that having upheld the challenge to the inspector's decision on appeal 7 and having also remitted the decisions on appeals 8 to 14 and 16 for redetermination, the judge should also have quashed the decisions on appeals 4, 5 and 6. Those other decisions had implications for the "isolated homes" issue in appeals 4, 5 and 6. If the inspector had allowed appeal 7, the use of the buildings on the site for 51 dwellings would have been lawful, as well as the residential use of the mansion itself.

27. I cannot accept those submissions. In my view, as Mr Guy Williams submitted for the Secretary of State, there is nothing in the inspector's conclusions to suggest that she misinterpreted the policy in paragraphs 78 and 79 of the NPPF, nor did she misapply it. She clearly adopted the interpretation given by this court in *Braintree District Council*. And she applied the policy reasonably and lawfully to the proposals before her. She made no error of law in either respect, and there is no reason here for the court to intervene.

28. The principles on which the court will act in a challenge to an inspector's decision on a planning appeal are well established (see *St Modwen Developments v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] P.T.S.R. 746, at paragraph 6). The court will not be drawn into an unduly legalistic approach (see *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, [2018] P.T.S.R. 88, at paragraph 50). It will never trespass into areas of planning judgment, except to consider whether such judgment has been exercised lawfully, and it will keep in mind that the inspector appointed by the Secretary of State to make the decision will have

brought his or her own expertise to the task (see *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 W.L.R. 1865, at paragraph 25). Where national or development plan policy is the focus of argument, it must tell apart grounds that genuinely allege a misinterpretation of policy and those presented in that guise, which are, in truth, only a complaint about the way in which the policy has been applied (see *Hopkins Homes Ltd.*, at paragraph 26). It will read the decision letter fairly, with due tolerance for minor imperfections or infelicity. It will not expect elaborate or lengthy reasons for every conclusion, but consider "whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given" (see the speech of Lord Bridge of Harwich in *Save Britain's Heritage v Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153, at p. 167). It will keep in mind that the decision letter is directed to parties familiar with the evidence and submissions in the case (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, [2004] 1 W.L.R. 1953, at paragraph 36). It will not expect every piece of evidence, every concession made in cross-examination, and every submission of counsel to be mentioned. That would be wholly unreal.

29. I would reject the suggestion that the inspector was not entitled to apply the paragraph 79 policy to all the housing proposals before her, and not merely those to which the council was opposed on the grounds of alleged conflict with that policy. She was considering each appeal on its merits, without being confined by the council's reasons for refusal or the reasons it had given for taking enforcement action (sections 78, 79(1) and 174(2)(a) of the 1990 Act). She was entitled to apply the policy in paragraph 79 to each of the housing proposals before her. And it was appropriate to do so when she was considering, as part of her first "main issue", the sustainability of the site's location for housing. Her formulation of that issue put squarely in play, for all of the proposed housing, the policies of the NPPF bearing on the sustainability of the site's location, including the policy in paragraph 79. No unfairness or other illegality arose from proceeding as she did.

30. One must remember that the concept of "isolated homes in the countryside" is not a concept of law. It is a concept of national planning policy. It is not defined in the NPPF. It does not lend itself to rigorous judicial analysis (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at paragraph 26). As with many other broadly framed policies in the NPPF, its application will depend on the facts of the case, and decision-makers will have to exercise their planning judgment in a wide variety of circumstances (see the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3, [2020] P.T.S.R. 221, at paragraph 39). The court's role, therefore, both in interpreting the policy and in reviewing its application, is limited (see *Hopkins Homes Ltd.*, at paragraphs 24 to 26). As Lord Reed said in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983 (in paragraph 18), where decision-makers are required to exercise judgment in applying a policy to a given set of facts, "their exercise of their judgment can only be challenged on the ground that it is irrational or perverse".

31. Fortunately, we are not faced with having to interpret the paragraph 79 policy. That has already been done by this court in *Braintree District Council* – though for the predecessor policy in paragraph 55 of the 2012 version of the NPPF. In *Braintree District Council* the central issue in the appeal was the meaning of the expression "new isolated homes in the countryside". In this case, the contentious phrase – now in paragraph 79 – is simply "isolated homes in the countryside". In substance, however, the policy is unchanged.

32. There is, therefore, no need for any further discussion of what is meant by the concept of "isolated homes in the countryside" in this policy. The essential conclusion of this court in *Braintree District Council*, in paragraph 42 of the judgment, is that in determining whether a particular proposal is for "isolated homes in the countryside", the decision-maker must consider "whether [the development] would be physically isolated, in the sense of being isolated from a settlement". What is a "settlement" and whether the development would be "isolated" from a settlement are both matters of planning judgment for the decision-maker on the facts of the particular case. This understanding of the policy, in its context, is not disturbed by what Lewison L.J. had earlier said in *Dartford Borough Council* (at paragraph 15). His observation was obiter, as was my comment about it in *Braintree District Council* (at paragraph 38). No conflict of authority exists between the decisions in those two cases.

33. To adopt remoteness from other dwellings, instead of remoteness from a settlement, as the test for "isolated homes in the countryside" would seem inconsistent with the Government's evident intention in producing the policy in paragraph 79. It would mean, presumably, that the policy would not apply to a development of housing in the countryside – large or small – on land next to an individual dwelling remote from the nearest settlement, because although the new homes might be "isolated" from the settlement, they would not be "isolated" from existing development. It would prevent the policy from applying to the development of additional dwellings, one or two at a time, on sites next to other sporadic rural housing, again on the basis that they would not then be "isolated". It might even prevent the policy from applying to a proposal for two or more dwellings on a single, undeveloped site in the countryside, because none of them would itself be "isolated" from another dwelling, and the development as a whole would therefore not be "isolated". If this were so, only the development of a single dwelling, on its own, separate from any other dwelling already built or proposed nearby, would engage the policy. This would be hard to reconcile with the Government's aim, as policy-maker, to "promote sustainable development in rural areas".

34. The policy in paragraphs 78 and 79 of the NPPF aligns with that in paragraph 72. Their common theme is the need for the planning system to promote sustainably located housing development. Neither policy favours the unplanned and unsustainable development of housing in the countryside, away from existing settlements. As paragraph 72 indicates, it is for plan-making to achieve the "supply of large numbers of new homes" by "planning for larger scale development, such as new settlements or significant extensions to existing villages and towns, provided they are well located and designed, and supported by the necessary infrastructure and facilities". This is within the remit of "strategic policy-making authorities". It is their job to "identify suitable locations for such development where this can help to meet identified needs in a sustainable way".

35. In this case the inspector's application of the policy in paragraphs 78 and 79 was, in my view, impeccable. It shows that she understood those policies correctly. Her relevant conclusions sit within her assessment of the appropriateness and sustainability of the proposed development in this location. To get the full sense of those conclusions, one must read her assessment on this first "main issue" in its entirety. When this is done, no error of law emerges in her handling of the policy in paragraphs 78 and 79.

36. In dealing with appeals 1, 4, 5 and 6, she began by identifying the basic objection underlying the relevant reasons for refusal in the council's decision notices, namely that the

proposed development was in an "unsustainable location … by virtue of [the site's] remote position away from nearby settlements with services and facilities" (paragraph 54 of the decision letter). She then referred to the general policy background for sustainable development, including paragraphs 103 and 110 of the NPPF, which emphasise, respectively, the importance of "[focusing] development on locations which are or can be made sustainable …" and "[encouraging] … the effective re-use of land that has been previously developed …" (paragraph 57). It was with these principles in mind that she went on to apply the policy in paragraphs 78 and 79.

37. She summarised the policy accurately (paragraph 58). She recorded, as the parties had agreed, that the site was "located outside any settlement [,] … not in the vicinity of the boundary of any settlement [, and] in the countryside" (paragraph 59). She then dealt with the assertion that "the proposals would not result in isolated homes in the countryside". She confirmed that she had taken into account both the first instance judgment and the decision of the Court of Appeal in *Braintree District Council*, setting out the court's basic conclusions on the interpretation of the policy. In the light of the Court of Appeal's decision, she directed herself, rightly, that the question of "[whether], in a particular case, a group of dwellings constitutes a settlement or a village for the purposes of the policy will be a matter of fact and planning judgement for the decision maker" – a reference to paragraph 32 of the judgment (paragraph 60). It is clear, therefore, that she had in mind what had been said about the possibility of a "cluster of dwellings" being a settlement, which appears in the same paragraph of the judgment. She understood that it was for her to determine whether the group of buildings on the site was or was not a settlement.

38. She stated her findings of fact on the relevant questions, and the conclusion she had come to in the exercise of her planning judgment. The salient facts were that the site "contains existing buildings"; that it was "evidently not a rural community, settlement or village", but "a discrete group of buildings used in the past … as a residential institution centred on a historic house"; and that it was "remote from other settlements and villages and surrounded by open countryside". None of these findings are attacked in these proceedings. The conclusion based on them, as a matter of planning judgment, was equally clear: that "residential development in this location would result in new isolated housing in the countryside" (paragraph 61). And it was later repeated (in paragraphs 87 and 88). It is invulnerable in a legal challenge. Mere disagreement is not enough to unseat it.

39. Rightly, the inspector went on to consider, for each appeal, whether the proposal fell within any of the specified exceptions in the policy. Once again, she exercised her own planning judgment, concluding that no valid exception was demonstrated for the proposals in appeals 4, 5 and 6 (paragraph 63). There is no error of law in those conclusions.

40. The inspector's reasons are clear and complete. They express and explain the findings and conclusions required of her under the policy. She did not have to record all the evidence and submissions she had heard, or set out the concessions made by particular witnesses and the submissions of counsel in the light of those concessions. She had to set out her main findings of fact on the evidence before her, and state her conclusions. That is what she did.

41. It is not a valid criticism of her that she made no mention of *Dartford Borough Council*. City & Country Bramshill did not rely on that case at the inquiry, and no one else seems to have referred to it. She was aware of it – because it is touched upon in the judgment in

Braintree District Council, which she had obviously read. But she did not have to say anything about it, for it established no "principle" relevant to her assessment.

42. In summary, therefore, the findings of fact and conclusion in paragraph 61 of the decision letter were lawful findings and a lawful conclusion in the application of the paragraph 79 policy, on its true interpretation. So too were the inspector's findings and conclusions on the possible exceptions to the policy.

43. Her conclusion in paragraph 61 of the decision letter was clearly intended to apply to each of the proposals for housing, and to each dwelling proposed. It does not depend on the number of dwellings in any single part of the total scheme, or any of the permutations possible within that scheme, or the total number of dwellings capable of being provided if all the appeals were allowed. It goes for all of them, individually and together. It relates simply to "residential development in this location". Such development would, as the inspector put it, "result in new isolated housing in the countryside" – because each and all of the dwellings proposed were, as she had found, "isolated" from any settlement.

44. Each of the proposals for housing was, in her planning judgment, objectionable for that reason. From this it follows that a successful challenge against one or more of her decisions in the relevant appeals on some other ground does not invalidate her conclusion on this issue, or her decision, in any of the others. It is therefore wrong to contend, as Mr Strachan did, that the judge, having decided to quash some of the decisions, ought therefore to have quashed others as well on the basis that the outcome on this issue might have been different if the inspector had allowed those other appeals. That is a misconception.

45. Implicit in the inspector's conclusion in paragraph 61 of the decision letter is that the proposed new housing, when added to the remaining buildings on the site, would not form a settlement. This is put beyond doubt in her conclusions on the site's lack of sustainability. Despite the various measures proposed, she did not accept that the scheme would "overall comprise sustainable development" – because of the site's "isolated location … and the lack of alternative transport modes" (paragraph 87). She found that "[appeals] 4, 5, [and] 6 … would result in isolated homes in the countryside", that "the site's location is not one that is or can be made sustainable" and that "[the] developments would not … result in strong and vibrant local communities". And she concluded that "the site would not be an appropriate and sustainable location for housing development in Appeals … 4, 5 [and] 6 …" (paragraph 88) and that those proposals did not accord with "the objectives of national planning policy" (paragraph 91). It would be difficult to imagine any firmer conclusion that those proposals were in conflict with the policies of the NPPF for the location of housing development, including the policy in paragraph 79.

46. It cannot be said that in applying the paragraph 79 policy the inspector neglected the presence of the existing buildings on the site and the existing residential uses, or did not have in mind what the different consequences would be if some of the appeals succeeded and others failed. When describing the site, she referred to the "extensive range of modern buildings [,] … the lawful use … [being] a Residential Institution under Class C2" (paragraph 27). She acknowledged that it contained a "discrete group of buildings" once used as a "residential institution" and "centred on a historic house" (paragraph 61). It was on this basis that she considered whether, in its present state, the site was a settlement. She was also aware of the extent of "previously developed land" on the site, the existing residential uses, the status of those uses, and the "fall-back" on which City & Country

Bramshill relied. She referred several times to the areas of "previously developed land" (paragraphs 65, 66, 67, 68 and 89). She had regard to "the site's previous use" (paragraphs 83 and 84), and to the "extant" or "previous" or "former" uses, in contradistinction to the uses "proposed" (paragraphs 83 and 84). She referred to the "fallback position" of the extant class C2 use (paragraph 92). And when dealing with the ground (c) appeals against the enforcement notices, she had to consider the lawfulness of the uses enforced against (paragraphs 363 to 376). That she had the "fall-back" well in mind is indisputable.

47. In these circumstances it is, I think, impossible to suggest that her findings and conclusions in the application of the policy in paragraphs 78 and 79 of the NPPF were flawed because she had somehow overlooked the relationship between various proposals, or, in particular, the relationship between appeals 4 and 7 and the potential consequences of either or both of those appeals, or any others, succeeding.

48. Nor can it be suggested that if she had not gone wrong when determining appeal 7 – as the judge held she did – and had allowed that appeal, her conclusions in applying that policy might have been different. In considering the effect of the policy on the proposals, she explicitly took account of the buildings already on the site, regardless of whether they were still in active use, and this necessarily included the buildings in appeal 7 (paragraph 61). She assumed that the buildings on the site remained in place, not that any of them had been removed or replaced by new development. And when considering whether any of the proposals qualified as an exception to the policy, she referred to individual buildings on the site, including buildings that were now "disused", such as those in appeal 7 (paragraph 64). Her approach was consistent, and in my view perfectly sound.

Was the inspector's approach to sustainability unlawful?

49. Mr Strachan argued that the inspector erred in her approach to the sustainability of the development in the appeals she dismissed – in particular, by failing to take proper account of the accepted "fall-back" use of the site as a residential institution. The judge was wrong to reject this argument (in paragraphs 152 to 155 of his judgment).

50. Mr Strachan submitted that the inspector failed to see the significance of the "fall-back" for her consideration of sustainability, traffic movements and the reduction in greenhouse gas emissions (in paragraphs 82 to 87 of the decision letter). Even if she was unable to find the proposed development superior to the "fall-back" in terms of traffic congestion and greenhouse gas emissions, she should have had regard to the "fall-back" when considering whether it was "locationally unsustainable". To ignore the "fall-back" was irrational. To say she was "unable to conclude that greenhouse gas emissions would be less with the appeal schemes" because she did not have "sufficient information" was wrong. There was, in fact, a good deal of evidence on this issue, which was referred to in City & Country Bramshill's closing submissions, including Mr Archibald's concession that both the police college use and an alternative Class C2 use would be less sustainable in its generation of greenhouse gas emissions than the proposed development. The inspector gave no adequate reasons for disagreeing with relevant expert evidence. Her reference (in paragraph 87) to the "isolated location of the site" was based on her misunderstanding of NPPF policy on "isolated homes". She ought to have considered whether the perceived "lack of genuine alternative transport modes" could properly be an objection here – not only because this could also be said of the "fall-back" but also because the policy for "sustainable transport"

in paragraph 103 of the NPPF was directed to reducing congestion, which was not in issue, and greenhouse gas emissions, on which she came to no firm conclusion.

51. That argument is not cogent. I need not repeat what I have said on the previous issue, though it is also relevant here. The inspector was not legally at fault in her understanding and application of national planning policy for the location of housing development. Nor did she err when considering whether the site was "locationally sustainable".

52. Her assessment on "sustainable transport", which resulted in her conclusion (in paragraph 82 of the decision letter) that the proposed development would not provide a "genuine choice of transport modes as required by national and local policies", betrays no legal error. As the judge concluded (in paragraph 155 of his judgment), she was entitled to take the view – as she plainly did – that the reliance placed by City & Country Bramshill on its commitment to providing "alternative transport modes" did not support a different conclusion (paragraphs 81 and 82 of the decision letter). This was a reasonable and lawful exercise of planning judgment.

53. As I have said, it is clear that the inspector took account of the "fall-back" when assessing the locational sustainability of the proposed development. One sees this in her conclusion on the assertion that the development would reduce greenhouse gas emissions "in comparison to the site's previous use". She dealt with this issue even though she had concluded, applying the policy in paragraph 103 of the NPPF, that the development would not provide a choice of transport modes to reduce congestion and emissions (paragraph 83 of the decision letter). She referred to the "trips … undertaken in association with the previous use (and that could still be undertaken) …". And in assessing "sustainability", she compared greenhouse gas emissions generated by the "extant and proposed uses". But this exercise was impeded by the lack of evidence on the "former use", largely because, in spite of the "national and international nature" of that use (paragraph 84), it was not possible to ascertain the origins and destinations of trips to and from the site and calculate "relative greenhouse gas emissions" (paragraph 85), or to conclude that they would now be "less" (paragraph 87) (my emphasis). That she had the "fall-back" well in mind is also confirmed by her conclusions on the office use proposed in appeal 3. Here she twice referred to the "fall-back", comparing it with the appeal proposal. She concluded that "given the fallback position of the extant C2 use of the site … which includes B1 uses that would be comparable to the proposed use", the latter "would not be unacceptable on the grounds of its location or sustainability credentials" (paragraph 90). The site was "appropriate … for offices given the fallback position" (paragraph 92).

54. Nor can it be said that she neglected the evidence given by the council's witness Mr Archibald on which Mr Strachan relied in his closing submissions. She attached a footnote to paragraph 84 of her decision letter, referring to paragraph 337 of those submissions, which is in a passage where Mr Strachan emphasised concessions made by the council's witnesses in response to his questioning. To suggest she did not have in mind all the relevant evidence, including that given in cross-examination, and the submissions based upon it, simply because she did not refer to it all, is, I think, impossible.

55. It is quite clear, therefore, that the inspector did not ignore the existence of the "fall-back", nor did she overlook relevant evidence and submissions. She considered the "fall-back", with as much help as the parties could give her. Her references to the "previous use … that could still be undertaken" and to the "extant" and "former" use are obviously to the "fall-

back" use of the site as a residential institution. On the evidence before her, she sought to compare that use with the proposals for residential development in the appeals. Doing the best she could, she was unable to come to a reliable view on the relative effects on greenhouse gas emissions. This was a conclusion reasonably open to her, as a matter of planning judgment. It is nowhere close to irrational.

56. And anyway it was not decisive. The inspector's critical conclusion on the first "main issue" was that the site was inherently unsustainable as a location for housing. As she said, even if it had been shown that the proposed development would generate lower levels of greenhouse gas emissions than the "fall-back", this would not have led her to conclude that it "would overall comprise sustainable development due to the isolated location of the site and the lack of genuine alternative transport modes" (paragraph 87 of the decision letter). This too, as a matter of planning judgment, was a wholly reasonable conclusion.

The section 66(1) duty and relevant policy for "heritage assets"

57. Section 66(1) of the Listed Buildings Act provides:

> "66. (1) In considering whether to grant planning permission … for development which affects a listed building or its setting, the local planning authority or … the Secretary of State 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."

58. In chapter 16 of the NPPF, "Conserving and enhancing the historic environment", paragraph 190, under the heading "Proposals affecting heritage assets", urged local planning authorities to "identify and assess the particular significance of any heritage asset that may be affected by a proposal …", and to "take this into account when considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal". The "Glossary" defined "Conservation (for heritage policy)" as "[the] process of maintaining and managing change to a heritage asset in a way that sustains and, where appropriate, enhances its significance". Paragraphs 193 to 196 stated:

> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:
> …
> b) assets of the highest significance, notably … grade I and II* listed buildings, grade I and grade II* registered parks and gardens … should be wholly exceptional.

195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
[Four considerations were then set out, which are not relevant in this case.]

196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use."

59. Policy CON11 of the local plan states that "[development] that would adversely affect a Scheduled Ancient Monument, other site of archaeological importance or its setting will not be permitted". Policy CON12, "Historic Parks and Gardens", states:

> "… DEVELOPMENT THAT WOULD ADVERSELY AFFECT HISTORIC PARKS AND GARDENS OR THEIR SETTINGS … WILL NOT BE PERMITTED."

Policy CON17, "Listed Buildings and Buildings of Local Interest – extension or alteration", states:

> "… PROPOSALS FOR THE EXTENSION OR ALTERATION OF LISTED BUILDINGS OR BUILDINGS OF LOCAL INTEREST, WILL NOT BE PERMITTED UNLESS:
> (i) The scale of the building is not materially changed;
> (ii) Design is appropriate to the character and setting of the building."

Policy CON18, "Listed Buildings or Buildings of Local Interest – Change of Use", states:

> "IN ORDER TO ENSURE THE PRESERVATION OF THE BUILT STRUCTURE, THE CHANGE OF USE OF A LISTED BUILDING … WILL ONLY BE PERMITTED IF IT IS IN KEEPING WITH THE BUILDING AND WILL NOT MATERIALLY AFFECT FEATURES OF HISTORIC OR ARCHITECTURAL IMPORTANCE."

60. There is ample case law on the section 66 duty. In *Barnwell Manor Wind Energy Ltd. v East Northamptonshire District Council* [2014] EWCA Civ 137, [2015] 1 W.L.R. 45 Sullivan L.J. said (at paragraph 22) that the judgment of Glidewell L.J. in *The Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303 was "authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"". This conclusion was, he said (in paragraph 23), "reinforced" by a passage in the speech of Lord Bridge of Harwich in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 A.C. 141 (at p.146E-G). He added (in paragraph 28) that the "general duty" in section 66(1) "applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance". *South Lakeland District Council* was a case concerning the statutory requirement – now in section 72(1) of the Listed Buildings Act – that "special attention

shall be paid to the desirability of preserving or enhancing [the] character or appearance [of a conservation area]". Lord Bridge (at p.150B-E) endorsed the observation of Mann L.J., in this court, that "[the] statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved".

61. In *Jones v Mordue* [2015] EWCA Civ 1243, [2016] 1 W.L.R. 2682, Sales L.J. said (at paragraph 28):

> "28. … [The] express references by the Inspector to both Policy EV12 and paragraph 134 of the NPPF [as originally issued in 2012] are strong indications that he in fact had the relevant legal duty according to section 66(1) of the Listed Buildings Act in mind and complied with it. … Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs … which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions … then – absent some positive contrary indication in other parts of the text of his reasons – the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. … ."

62. In *Palmer* it was argued that the local planning authority had failed to consider likely harm to the setting of a listed building by noise and smell from the proposed poultry sheds. Lewison L.J. said (in paragraph 5 of his judgment) that giving "considerable weight" to harm to the setting of a listed building "does not mean that the weight that the decision-maker must give to the desirability of preserving the building or its setting is uniform". It "will depend on, among other things, the extent of the assessed harm and the heritage value of the asset in question: [*Barnwell Manor*, paragraph 28; *R. (on the application of Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin), [2015] J.P.L. 22, paragraph 49]". He went on to say (in paragraph 29) that the "clear thrust" of the officers' relevant advice to the planning committee had been that "if the [proposed] mitigation measures were put in place there would be no adverse effect on the setting of the listed building". He continued:

> "29. … I would accept … that where proposed development would affect a listed building or its setting in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting. That is what the officers concluded in this case. … ."

The inspector's conclusions on the likely effects of the development on "heritage assets"

63. The inspector's third "main issue" was "[whether] the works and development would preserve the listed buildings and registered park and garden or their settings, or any features of historic interest which they possess" (paragraph 23 of the decision letter). In a footnote she recited section 66(1) of the Listed Buildings Act, and paraphrased paragraphs 193 and 194 of the NPPF.

64. At the inquiry, the council accepted that the local plan policies for protecting the historic environment were not wholly consistent with the corresponding policies in the NPPF. The inspector noted that there was "disagreement on the weight to be applied to policies CON11, CON12, CON17 and CON18"; that the council agreed with City & Country Bramshill that these policies were "inconsistent with the [NPPF] due to the absence of consideration of the public benefit balance where harm is identified"; but that the council, the National Trust and Historic England said they "should be given moderate weight given that their primary objective is the preservation of designated assets which is in accordance with the [NPPF] and [the Listed Buildings Act]" (paragraph 45). She continued:

> "46. Whilst the [NPPF] sets out a clear balancing exercise to be undertaken and which is absent in the relevant development plan policies, the statutory requirement … relates to the special regard the decision maker should have to the desirability of preserving the building, its setting or its special features. Whilst I find policies CON11-CON18 to lack the balancing requirement of the [NPPF], they contain the statutory requirement. Given this, I find that the policies should be given significant weight."

65. She confirmed that in considering the effects of the development on the listed buildings she had had regard to section 66(1) of the Listed Buildings Act, which, she said, "requires special regard to be had to the desirability of preserving buildings or their settings or any features of special architectural or historic interest which they possess" (paragraph 121). Although the registered park and garden did not have the same statutory protection, it was, she said, "recognised as a heritage asset" in the NPPF (paragraph 122). She described the relevant policies of the NPPF, including those in paragraphs 193 to 196:

> "122. … The [NPPF] recognises such assets as an irreplaceable resource, and states that they should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations. Chapter 16 of the [NPPF] sets out the approach in determining applications (or appeals) in respect of such assets. It states that when considering the impact of a proposed development on the significance of a designated heritage asset great weight should be given to the asset's conservation with the more important the asset the greater the weight [should] be. Any harm or loss should require clear and convincing justification. The [NPPF] sets out the criteria to be considered where either substantial or less than substantial harm are identified."

She referred (in paragraph 123) to a difference of approach in the relevant evidence:

> "123. Historic England and the National Trust provided their evidence on the basis that paragraphs 195 and 196 of the [NPPF] would always be engaged where any element of harm was identified. The appellant held that this was not the correct approach based on the findings of *Palmer*. The appellant's case is that an "internal heritage balance" should be carried out where elements of heritage harm and heritage benefit are first weighed to establish whether there is any overall heritage harm to the proposal. Paragraphs 195 and 196 would only be engaged where there is residual heritage harm. This should then be weighed against the public benefits of the scheme."

She then (in paragraph 124) quoted the passage I have mentioned in paragraph 29 of Lewison L.J.'s judgment in *Palmer*, and went on to say (in paragraphs 125 to 127):

> "125. In my assessment the judgement does not necessarily bring me to a conclusion that an internal heritage balance should be carried out in the manner that the appellant advocates. The case clearly involved a wholly different context and set of circumstances and the conclusions relating to harm were based on avoidance through mitigation measures rather than any assessment of whether the benefits of the development outweighed any harm. However, the judgement clearly does reinforce that a balancing exercise needs to be carried out but it does not direct the decision maker to only one method by which that should be done.
>
> 126. I note the cases that have been drawn to my attention, some of which do follow the approach advocated by the appellant and some do not. These are clearly cases where alternative approaches have been taken based on the particular circumstances of each case. Nonetheless, irrespective of these decisions, the statutory duty to preserve the building should be given considerable importance and weight when the decision maker carries out the balancing exercise, consistent with [the judgment in *Barnwell Manor*].
>
> 127. The cases before me are complex with multiple works involved. Some of the benefits to the assets are not proposed with the individual developments themselves but are put forward as a part of other developments subject to separate decisions. In this context, I have adopted a straightforward application of paragraphs 190 and 193-196 of the [NPPF]. I have firstly identified the significance of the assets. I have then assessed whether each development proposal would, of its own doing, lead to substantial or less than substantial harm to that significance. Subsequent to making this assessment of harm, I have then considered whether this harm is outweighed by the public benefits of the individual proposal and provided in other proposals subject to other decisions. Paragraph 20 of the Planning Practice Guidance "Conserving and enhancing the historic environment" (the PPG) explains what is meant by public benefits (which may include heritage benefits) and that all types of public benefits can be taken together and weighed against harm."

66. In her conclusions on appeal 4 the inspector considered the likely effects of the development on the registered park and garden and on "the setting of the various listed buildings" (paragraph 199). She concluded that it would be "harmful" both to "the visual appearance, planned design and function of the RPG" (paragraph 211) and to "the setting of all the listed buildings within the ensemble by virtue of the harm that would arise to the RPG" (paragraph 214). She considered "the harm to the significance of the setting of the listed buildings … less than substantial", and "weighed that harm against the public benefits of the proposal" (paragraph 215). There was "no dispute between the parties that the removal of modern buildings and parking areas and the re-instatement of the original link between the house and garden by re-aligning Reading Avenue would be of benefit to the RPG and the setting of the listed buildings" (paragraph 217). The college buildings were "clearly harmful to the RPG's form, layout and characteristics and to the setting of the listed buildings". The "removal of the buildings and the restoration of the park and garden would clearly be in the public interest". She gave these matters "considerable

weight". But the "dispute" lay in "the weight to be attributed to that benefit given the alternative development proposed" (paragraph 218). She judged "[the] benefits in removing buildings and re-aligning Reading Avenue … not … sufficient to outweigh the alternative and greater harm caused by developing this unspoilt part of the RPG". The "permissive path" would be "of benefit in providing access into the Bramshill estate …" (paragraph 221). The proposed "site wide management plan would be in the public interest" (paragraph 222). An appropriate "landscape and habitats management plan" would be "of clear benefit to the overall restoration of the RPG and wider ecological interests". But she did "not find that this would outweigh the harm that … would arise from the proposed development" (paragraph 223). She concluded (in paragraph 226):

> "226. I find that appeal 4 would be harmful to the RPG and the setting of the listed buildings and would not preserve their special qualities. This harm would not be outweighed by public benefits. It would not be in accord with Local Plan policies CON12, CON17 and national planning policy."

67. A similar exercise followed for appeal 5. The inspector referred to the harm that would be caused by extending development into "open parkland", which "would result in most of the parkland being developed" (paragraph 228). The development would "intensify and extend the harms" she had identified in appeal 4. It would be "an inappropriate development … harmful to the RPG and the setting of the listed buildings". This would be "less than substantial" harm, but "at the higher end of the scale" (paragraph 229). She considered the "public benefits" in the funding of repair works to the mansion and other listed buildings and curtilage buildings. But she concluded (in paragraph 235):

> "235. … [The] public benefits of appeal 5 do not outweigh the harm that I have identified. The proposal would not preserve the RPG or the setting of the listed buildings. It would not be in accord with Local Plan policies CON12, CON17 and national planning policy."

68. In appeal 6, her approach was the same. The development would be located to the north-west of the lake, which was, she said, "one of the major features of the RPG", had "largely [survived] in its original form" and was "of historic aesthetic and architectural significance" (paragraph 236). Though it would "not destroy or remove the presence of the lake and island …", and would "not interfere with the ability of those using the RPG to continue to go on a journey along the embankment and walks that were part of the Jacobean layout of the garden" (paragraph 240), the development would "reduce the aesthetic significance of the feature and wider RPG …", and "result in the engineered embankment being less legible and thus reduce its significance". The harm would be "less [than] substantial but of the highest order" (paragraph 241). The "public benefit" would be the funding of £2 million for repairs to the mansion. As there was "an acceptable use for the mansion … which would not require cross-subsidy", the inspector saw "no justification for allowing appeal 6 with its associated harm" (paragraph 243). She concluded:

> "243. … [The] public benefits arising from appeal 6 would be clearly outweighed by its resulting harm. The proposal would not preserve the RPG or the setting of the listed buildings. It would not be in accord with Local Plan policies CON12, CON17 and national planning policy."

Did the inspector err in performing the duty in section 66(1) of the Listed Building Act and applying the policies for "heritage assets" in the NPPF?

69. Before the judge, City & Country Bramshill argued that the inspector had erred in failing to carry out a "net" or "internal" heritage balance. Only if "overall harm" emerges from the weighing of "heritage harms" against "heritage benefits" must the "other public benefits" of the development be weighed against that "overall harm" under the policy in paragraph 196 of the NPPF. Support for this submission was to be found in paragraph 29 of the judgment of Lewison L.J. in *Palmer*. The inspector should have given "great weight" to the "heritage benefits", to reflect the "great weight" that paragraph 193 of the NPPF requires to be given to the "conservation" of a designated heritage asset. This argument, however, did not impress Waksman J.. In his view, the decision in *Palmer* "did not impel [the inspector] to undertake an internal initial balancing exercise under paragraph 193". Indeed, he "would have regarded that as an error of law" (paragraph 120 of the judgment). The balancing exercise itself was "a classic application of planning judgment" (paragraph 121).

70. Mr Strachan repeated the same argument before us. Relying on the first instance decision in *Safe Rottingdean v Brighton and Hove City Council* [2019] EWHC 2632 (Admin), he submitted that the *Palmer* "principle" applies both to the statutory obligation in section 66(1) and to relevant policies in the NPPF and the development plan. The inspector failed to see this. Paragraph 193 of the NPPF required "great weight" to be given to the "conservation" of a heritage asset, including enhancement of its significance. Paragraph 196 required the likely effect on the significance of the heritage asset to be assessed, which could only be done by weighing any harm to that significance against any benefits to it. If there was no "net harm", the policy in paragraph 196 was not engaged. The definition of "Conservation (for heritage policy)" in the NPPF did not exclude "countervailing benefits". It implied that "great weight" must attach both to any harm to the significance of the heritage asset and to any enhancement of it – such as the appeal proposals would achieve. The judge was wrong (in paragraph 112 of his judgment) to distinguish *Palmer* on the basis that the "principle" relates not to "separate benefits" but only to "mitigation measures to negate the adverse effects which would otherwise arise". The "principle" in *Palmer* extends to cases in which there are separate elements of harm and benefit to the significance of a heritage asset.

71. Like the judge, I cannot accept those submissions. It is not stipulated, or implied, in section 66(1), or suggested in the relevant case law, that a decision-maker must undertake a "net" or "internal" balance of heritage-related benefits and harm as a self-contained exercise preceding a wider assessment of the kind envisaged in paragraph 196 of the NPPF. Nor is there any justification for reading such a requirement into NPPF policy. The separate balancing exercise for which Mr Strachan contended may have been an exercise the inspector could have chosen to undertake when performing the section 66(1) duty and complying with the corresponding policies of the NPPF, but it was not required as a matter of law. And I cannot see how this approach could ever make a difference to the ultimate outcome of an application or appeal.

72. Section 66 does not state how the decision-maker must go about discharging the duty to "have special regard to the desirability of preserving the building or its setting …". The courts have considered the nature of that duty and the parallel duty for conservation areas in section 72 of the Listed Buildings Act, and the concept of giving "considerable importance and weight" to any finding of likely harm to a listed building and its setting.

They have not prescribed any single, correct approach to the balancing of such harm against any likely benefits – or other material considerations weighing in favour of a proposal. But in *Jones v Mordue* this court accepted that if the approach in paragraphs 193 to 196 of the NPPF (as published in 2018 and 2019) is followed, the section 66(1) duty is likely to be properly performed.

73. As was submitted by Mr Williams, and by Mr Ben Du Feu for Historic England and Ms Melissa Murphy for the National Trust, one does not find any support for Mr Strachan's argument in those paragraphs of the NPPF. The concept in paragraph 193 – that "great weight" should be given to the "conservation" of the "designated heritage asset", and that "the more important the asset the greater the weight should be" – does not predetermine the appropriate amount of weight to be given to the "conservation" of the heritage asset in a particular case. Resolving that question is left to the decision-maker as a matter of planning judgment on the facts of the case, bearing in mind the relevant case law, including Sullivan L.J.'s observations about "considerable importance and weight" in *Barnwell Manor*.

74. The same can be said of the policies in paragraphs 195 and 196 of the NPPF, which refer to the concepts of "substantial harm" and "less than substantial harm" to a "designated heritage asset". What amounts to "substantial harm" or "less than substantial harm" in a particular case will always depend on the circumstances. Whether there will be such "harm", and, if so, whether it will be "substantial", are matters of fact and planning judgment. The NPPF does not direct the decision-maker to adopt any specific approach to identifying "harm" or gauging its extent. It distinguishes the approach required in cases of "substantial harm … (or total loss of significance …)" (paragraph 195) from that required in cases of "less than substantial harm" (paragraph 196). But the decision-maker is not told how to assess what the "harm" to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting.

75. This understanding of the policies in paragraphs 193, 195 and 196 reflects what Lewison L.J. said in *Palmer* (at paragraph 5) – that the imperative of giving "considerable weight" to harm to the setting of a listed building does not mean that the weight to be given to the desirability of preserving it or its setting is "uniform". That will depend on the "extent of the assessed harm and the heritage value of the asset in question". These are questions for the decision-maker, heeding the basic principles in the case law.

76. Identifying and assessing any "benefits" to weigh against harm to a heritage asset are also matters for the decision-maker. Paragraph 195 refers to the concept of "substantial public benefits" outweighing "substantial harm" or "total loss of significance"; paragraph 196 to "less than substantial harm" being weighed against "the public benefits of the proposal". What amounts to a relevant "public benefit" in a particular case is, again, a matter for the decision-maker. So is the weight to be given to such benefits as material considerations. The Government did not enlarge on this concept in the NPPF, though in paragraph 196 it gave the example of a proposal "securing [the heritage asset's] optimum viable use".

77. Plainly, however, a potentially relevant "public benefit", which either on its own or with others might be decisive in the balance, can include a heritage-related benefit as well as one that has nothing to do with heritage. As the inspector said (in paragraph 127 of the decision letter), the relevant guidance in the PPG applies a broad meaning to the concept of

"public benefits". While these "may include heritage benefits", the guidance confirms that "all types of public benefits can be taken together and weighed against harm".

78. Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.

79. One must not forget that the balancing exercise under the policies in paragraphs 195 and 196 of the NPPF is not the whole decision-making process on an application for planning permission, only part of it. The whole process must be carried out within the parameters set by the statutory scheme, including those under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and section 70(2) of the 1990 Act, as well as the duty under section 66(1) of the Listed Buildings Act. In that broader balancing exercise, every element of harm and benefit must be given due weight by the decision-maker as material considerations, and the decision made in accordance with the development plan unless material considerations indicate otherwise (see *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447).

80. Within that statutory process, and under NPPF policy, the decision-maker must adopt a sensible approach to assessing likely harm to a listed building and weighing that harm against benefits. Lewison L.J. was not suggesting anything else in *Palmer*. He was not seeking to establish any principle. He was saying that, in circumstances such as he was considering, a decision-maker, having considered both "positive" and "negative" effects on a listed building and its setting, "may legitimately" find there would actually be no harm. He was not saying that a decision-maker must go about the balancing of harm, if harm is found, against benefits in any particular way. There is no "*Palmer* principle" of the kind suggested by Mr Strachan. The court was simply endorsing the pragmatic and lawful approach taken by the local planning authority in the circumstances of that case. An "internal" balancing exercise was appropriate because the apprehended "harm" could be avoided through the mitigation measures proposed, and there would be "no overall adverse effect on the listed building or its setting" (paragraph 29 of Lewison L.J.'s judgment).

81. But as Waksman J. recognised here (at paragraph 111 of his judgment), "[this] is quite different from balancing an admitted or found adverse impact . . . against separate beneficial effects …". The inspector grasped this. Having correctly identified the statutory duty in section 66(1) (in paragraph 121 of the decision letter) and the relevant provisions of national policy in the NPPF (in paragraph 122), she described the parties' dispute on the correct approach (in paragraph 123). She referred (in paragraph 124) to Lewison L.J.'s judgment in *Palmer*. As she said, that case involved "a wholly different context and set of circumstances". It was a case of "avoidance [of harm] through mitigation measures". She acknowledged that "a balancing exercise [needed] to be carried out", but she also recognised that there was not "only one method by which that should be done" (paragraph 125), and there were cases "where alternative approaches have been taken based on the particular circumstances of each case". She then reminded herself that in any event "the statutory duty to preserve [a listed building] should be given considerable importance and

weight when the decision maker carries out the balancing exercise, consistent with [the judgment in *Barnwell Manor*]" (paragraph 126). All of that was correct.

82. The inspector adopted a methodical approach to the proposals before her, which, as she said, were "complex with multiple works involved", and with "benefits" to heritage assets "not proposed with the individual developments themselves but … put forward as a part of other developments subject to separate decisions". She conscientiously applied the policies in paragraphs 190 and 193 to 196 of the NPPF, first identifying "significance"; then assessing whether each proposed development would, "of its own doing", lead to "substantial" or "less than substantial harm" to that significance; then considering whether that harm was "outweighed by the public benefits", not only of the "individual proposal" itself but also "provided in other proposals subject to other decisions", bearing in mind the broad scope of "public benefits" in the relevant guidance (paragraph 127).

83. That approach cannot be faulted. In the circumstances of this case, it was the most realistic. It gave full credit to benefits that might potentially outweigh any harm likely to be caused to the heritage assets affected by the proposals. The inspector recorded her relevant findings and conclusions for each of those heritage assets. Her conclusions were based on a sequence of legally impeccable planning judgments. They reflected both a correct understanding and a lawful application of the NPPF policies, including the policy in paragraph 196. She plainly had those policies in mind, properly directed herself on them, worked through the requirements in them, and in this way – as Sales L.J. envisaged in *Jones v Mordue* (at paragraph 28) – succeeded in discharging the duty in section 66(1). Whether she could have taken another approach to performing that duty, or to applying the corresponding policies in the NPPF, is not the issue here. We need only be satisfied that the approach she did take was lawful. In my view, it clearly was.

84. I also reject the submission that the inspector failed to attach lawful weight to the benefits for heritage assets, contrary to the concept of "conservation" in the NPPF. Her approach to the question of weight, in paragraph 122 of the decision letter, was faithful to NPPF policy, and consistent with the principles in the case law. She expressly directed herself, as a general principle applicable to all the heritage assets she was dealing with, that she had to give "great weight … to the [designated heritage] asset's conservation". It was with this general self-direction in mind that she went on to undertake a proper weighting of both harm and benefits to each of the heritage assets she had to consider.

85. Having directed herself impeccably on the law and on the relevant policies, she was entitled to exercise her own planning judgment in attributing appropriate weight to the particular benefits of the proposals before her, including their benefits for heritage assets. And she did so. In paragraph 218 of the decision letter, for example, when considering appeal 4, she said she gave "considerable weight" to the removal of existing buildings and the restoration of the park and garden. She was not constrained – by statute, authority or policy, including the definition of "Conservation (for heritage policy)" in the NPPF – to give more weight than she did to any of the heritage-related benefits of the proposals, or to any other benefit. None of the conclusions she reached on heritage-related benefits was unlawful. None of them was inconsistent with the lawful performance of the section 66(1) duty, or with the reasonable and lawful application of the relevant policies in the NPPF, including the definition of "Conservation …".

Did the inspector misapply development plan policies for the historic environment?

86. The argument on this issue was that the inspector erred in giving "significant weight" to policies CON11, CON12, CON17 and CON18 of the local plan, despite it being agreed at the inquiry that they were inconsistent with NPPF policy on heritage assets because they did not provide for "public benefits" to be balanced against harm. City & Country Bramshill had said they should carry "little" weight; the council, Historic England and the National Trust, "moderate weight". No one suggested "significant weight". Mr Strachan submitted that it was unfair for the inspector to depart without warning from the parties' understanding of the issue between them. They should have had the opportunity to deal with this question knowing that she disagreed with both sides. She also misapplied the local plan policies. Those policies do not match the section 66(1) duty, or national policy. The words "will not be permitted" in policy CON12 and "will not be permitted unless …" in policy CON17 do not reflect the statutory language or the policies in the NPPF. The judge was wrong (in paragraph 129 of his judgment) to conclude that the inspector was "essentially … applying" NPPF policy when she found conflict with policies CON12 and CON17. She acknowledged (in paragraph 46 of the decision letter) that the "balancing requirement" in the NPPF was absent from those policies. But she failed to carry out any balancing exercise when considering whether the proposals were contrary to them.

87. I do not find those submissions persuasive. The absence of an explicit reference to striking a balance between "harm" and "public benefits" in the local plan policies does not put them into conflict with the NPPF, or with the duty in section 66(1). Both local and national policies are congruent with the statutory duty. The local plan policies are not in the same form as those for "designated heritage assets" in the NPPF. They do not provide for a balancing exercise of the kind described in paragraphs 193 to 196 of the NPPF, in which "public benefits" are set against "harm". But they do not preclude a balancing exercise as part of the decision-making process, whenever such an exercise is appropriate. They do not override the NPPF policies or prevent the decision-maker from adopting the approach indicated in them. They are directed to the same basic objective of preservation.

88. In performing the duty under section 66(1), the inspector was free to give such weight to the local plan policies as she reasonably judged appropriate. Indeed, she was obliged to do so. She was not bound to a particular conclusion by the evidence and submissions she had heard. The parties had a reasonable opportunity to deal with the matter at the inquiry, and they took that opportunity. No unfairness arose. The inspector acknowledged the disagreement between them on weight (in paragraph 45 of the decision letter), and she clearly had regard to their competing views when forming her own conclusion. She did not have to declare her view – or provisional view – on weight and give the parties a chance to address it, simply because she disagreed with both sides. Fairness did not compel that (see *Secretary of State for Communities and Local Government v Hopkins Developments Ltd.* [2014] EWCA Civ 470, [2014] P.T.S.R. 1145, in particular the judgment of Jackson L.J. at paragraphs 62(iv) and 75, and the judgment of Beatson L.J. at paragraphs 88 and 97).

89. The inspector's conclusion on weight, though it was not urged on her by either side at the inquiry, was nonetheless a lawful conclusion. This was a matter of planning judgment for her as decision-maker. Her conclusion was rational, and adequately reasoned. To attach "significant" weight to the local plan policies, as she did (in paragraph 46 of the decision letter), was not unreasonable. She acknowledged that those policies lacked the "balancing requirement" of the NPPF, but added that "they contain the statutory requirement". By this

she clearly meant that they embodied the objective of preserving listed buildings and their settings, in accordance with the duty in section 66(1). She was not saying she interpreted them as shutting out the balancing exercise under paragraphs 195 and 196 of the NPPF. She went on to apply that balancing exercise in the assessment that followed, and she did so meticulously. Her assessment culminated in paragraph 417 of the decision letter, with the conclusion that the harm to the listed buildings and their settings and the registered park and garden were "not outweighed by public benefits."

90. In short, the inspector did not fall into error in discharging the decision-maker's duties under section 38(6) of the 2004 Act, section 70 of the 1990 Act, and section 66(1) of the Listed Buildings Act. Her approach was not contrary to any relevant case law, including this court's decision in *Palmer*. She did not misinterpret or misapply either the local plan policies or the policies in paragraphs 193 to 196 of the NPPF. Her conclusions in applying both development plan and national planning policy for heritage assets – that the proposals in appeals 4, 5 and 6, did not accord with either – are unimpeachable.

The inspector's decision on the application for costs

91. On the application for costs made by City & Country Bramshill against the council, the inspector said (in paragraph 14 of her decision letter of 14 March 2019):

> "14. A large part of this … application is concerned with the case put to the Inquiry in respect of the merits of the proposals and the view that the position taken by the Council was unreasonable with reference to various events. I have not considered the respective positions on merits again here as a difference of view on compliance with policy or the weight to be given to material considerations are not for the costs regime. The substantive issue is whether the Council acted unreasonably at appeal, and in particular whether it defended its position on each reason for refusal with evidence, whether it acted contrary to well-established case law, and reviewed its case following the lodging of the appeals."

She went on to reject every contention of unreasonable conduct (paragraphs 15 to 21).

Should the inspector's decision on the application for costs be quashed?

92. Mr Strachan submitted that in making her costs decision the inspector relied on her decisions in the appeals. Though she did not address the merits again, her consideration of the reasonableness of the council's stance at the inquiry inevitably depended on her conclusions in the appeals themselves. Some of her decisions were quashed by the judge; others are now the subject of appeal to this court. Her errors of law in those decisions undermine her decision not to award costs to City & Country Bramshill.

93. I cannot accept those submissions. I see no reason to upset the inspector's decision on costs. She approached the application in the conventional way. Her decision did not depend on the grounds the council had relied upon in opposing the appeals having succeeded or failed when considered on their merits, but on whether they could reasonably be advanced. The decision is unsurprising. And it is also legally sound. It is not invalidated by the

outcome of these proceedings in the court below, nor cast into doubt by any of the issues raised in the appeal to this court. It was, and remains, a perfectly lawful decision.

Conclusion

94. For the reasons I have given, I would dismiss this appeal.

Lord Justice Phillips

95. I agree.

Lord Justice Arnold

96. I also agree.