Neutral Citation Number: [2023] EWHC 1709 (Admin)

Claim No: CO/4621/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2023

Before:

DAN KOLINSKY KC
(Sitting as a Deputy Judge of the High Court)

- -

Between:

THE KING (ON THE APPLICATION OF WIDDINGTON PARISH COUNCIL)

Claimant

- and –

UTTLESFORD DISTRICT COUNCIL

Defendant

- and –

(1) **MICHAEL TEE and (2) SARAH TEE**

Interested Parties

Ben Fullbrook (instructed by **Richard Buxton Solicitors**) for the Claimant
Nicola Strachan (instructed by **Uttlesford District Council's Legal Department**) for the Defendant
Alex Williams (instructed by **Holmes and Hills LLP**) for the Interested Parties

Hearing dates: 14th and 15th June 2023

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Approved Judgment

This judgment was handed down remotely on 7 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Dan Kolinsky KC (sitting as a Deputy Judge of the High Court):

1. Widdington Parish Council ("WPC") seek judicial review of Uttlesford District Council's ("UDC") decision dated 27 October 2022 to grant planning permission to the Interested Parties ("IPs") for the erection of 4 detached dwellings and associated works at land to the north of Cornells Lane, Widdington ("the Site").

2. Lang J granted permission to proceed with the judicial review claim on 26 January 2023.

3. There are 4 grounds of challenge which raise the following issues:-

    a. UDC's approach to the fall-back position.
    b. Whether heritage impacts were lawfully assessed.
    c. Whether there was a failure to give reasons for departing from the previous refusal of planning permission.
    d. Whether appeal costs were erroneously considered.

4. UDC and the IPs contend that the Court should refuse relief under s.31(2A) of the Senior Courts Act 1981 if any of the grounds are well-founded.

5. This judgment is structured as follows.

    a. In Part A (para 6), I set out the relevant background including the planning history of the Site, the lawful development certificate and UDC's decision making process in granting planning permission.
    b. In Part B (para 30), I consider ground 1 (fall-back). I set out the applicable legal framework and consider the three limbs of this ground of challenge.
    c. In Part C (para 60), I consider ground 2 (heritage). I set out the applicable legal framework and consider the three limbs of this ground of challenge.
    d. In Part D (para 104), I consider ground 3 (consistency).
    e. In Part E (para 112), I consider ground 4 (appeal costs).
    f. In Part F (para 118), I consider the issue of relief and set out my conclusions.

Part A: Background

6. The Site is an undeveloped field in Widdington. Most of the Site is adjacent to (but outside of) the Widdington Conservation Area ("WCA"). A small part of the Site (containing part of the existing access in the south-west corner of the Site) is in the WCA. The Site is close to several grade II listed buildings namely William the Conqueror, Corner Cottage/White Cottage and Martins Farmhouse/Roseley Barn. Cornells Lane, which connects to the existing access track and runs along the southern border of the Site is a non-designated heritage asset and a "protected lane" in the Uttlesford Local Plan.

7. In highway terms, Cornells Lane is an unclassified road.

8. UDC are not able to demonstrate a 5 year housing land supply. This affects the planning balance that applies under the National Planning Policy Framework ("NPPF") as considered further in Part C below.

(1) Planning History

9. The planning history of the Site includes unsuccessful attempts to develop the Site together with other land proposing schemes of 20 dwellings and 15 dwellings respectively.

10. The IPs applied for planning permission for four dwellings ("the Previous Application") which was refused planning permission by UDC (against the recommendation of planning officers) on 18 March 2022. The reasons for refusal were as follows.

> *1. The Proposed Development will result in a significant harmful impact to the character and appearance of the Protected Lane (non designated heritage asset). The need of the development does not outweigh the harm to the historic significance of the site and the protected lane. As such the development is not in accordance with ULP Policy ENV9 and paragraph 203 of the NPPF that considers the balanced judgement required to the scale of any harm or loss of the significance of the heritage asset.*
>
> *2 The Proposed Development will not preserve or enhance the character and appearance of the Conservation Area and will result in harmful impact to the setting of the nearby listed buildings, not in accordance with ULP Policies ENV1, ENV2 and paragraph 199 of the NPPF. The public benefits of the development do not provide sufficient opportunities to enhance their significance or overall outweigh the harm of the proposal, therefore also in conflict with paragraphs 202 and 206 of the NPPF.*
>
> *3 The proposal would represent an inappropriate form of development within the countryside, having an urbanising effect that would be out of context with the existing pattern of development and harmful to the setting and character of the rural location. The proposal is not in accordance with ULP Policy S7 and paragraph 174 (b) of the NPPF in terms of recognising the intrinsic character and beauty of the countryside.*

11. In April 2022, the IPs appealed this refusal of planning permission to the Planning Inspectorate ("PINS"). PINS decided that the appeal would be determined by the hearing procedure. The IPs made a costs application against UDC contending that the refusal of planning permission was unreasonable. UDC resisted that application. As events turned out, the appeal hearing took place in January 2023 but the appeal was withdrawn before any decision was issued. I say nothing further about events after 27 October 2022 (which are subsequent to the decision under challenge in this claim).

(2) The Lawful Development Certificate

12. In May 2022, the IPs applied for a lawful development certificate ("LDC") pursuant to s.192 of the Town and Country Planning Act ("1990 Act").

13. The LDC was granted on 25 July 2022. It certified as lawful "the proposed formation, laying out and construction of a means of access to Cornells Lane, in connection with the use of the Site (up to 14 days per calendar year) for the purposes of the holding of a market".

14. The reason for the LDC was stated to be *"The proposed development meets the criteria of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) ["GPDO"], Schedule 2, Part 2, Class B, and therefore the proposed access that falls under Class B is lawful".*

15. The relevant part of the GPDO (Part 2, Class B of Schedule 2) grants planning permission for:-

> "*The formation, laying out and construction of a means of access to a highway which is not a trunk road or a classified road, where <u>that access is required</u> in connection with the development permitted by any Class in this Schedule (other than by Class A of this Part).*" (emphasis added)

16. The reference to *"market*" within the permitted development classes is within Schedule 2 Part 2 Class B which provides: "*The use of any land for any purpose of not more than 28 days in total in any calendar year, of which no more than 14 days in total may be for the purposes of (a) the holding of a market, (b) motor car and motorcycle racing including trials of speed, and practising of these activities, and the provision on the land of any moveable structure for the purposes of the permitted use".*

17. There has been no challenge to the LDC. The effect of s.192(4) of the 1990 Act is that the lawfulness of the laying out of an access in connection with the use of the Site for the purpose of a market is to be conclusively presumed "*unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness*".

18. How the LDC affects the fall-back issue is the subject of ground 1 below.

(3) <u>The Planning Application</u>

19. The planning application with which this Court is concerned was submitted in August 2022. It was supported by a Planning, Design and Access Statement ("PDAS"). The PDAS stated (at para 4.3) that the development proposal had "*been updated to address the reasons for refusal of the previous planning application and comments of councillors made at the Planning Committee on 17 March 2022*".

20. The changes from the Previous Application were that:-

    a. The dwelling at Plot 1 (which is closest to the WCA and listed buildings) had been changed from a 1.5 storey chalet to a bungalow.

    b. Additional landscaping was proposed around plot 1.

21. The PDAS relied upon the LDC as a fall-back (as discussed in Part B below).

22. WPC objected to the application and made detailed representations.

23. The conservation officer identified that the proposal would cause harm to the conservation area and listed buildings in his consultation responses dated 8 September 2022 and 4 October 2022. His view was that this was less than substantial harm – "*at the low end of the scale*". He observed that the application was "*generally identical to the previously refused application*" and referred to his previous advice dated 6 September 2021 (which had identified harm to the WCA and listed buildings in respect of the Previous Application) as remaining "*fundamentally relevant*".

24. The application was recommended for approval by UDC's planning officer. The relevant parts of the OR are discussed further below.

25. On 19 October 2022, the IPs' planning consultant (Mr Loon) emailed the planning officer (Mr Tyler). That email suggested corrections which could be reported to members by a revised report or addendum. It also raised *"two important matters central to the reasonable/robust decision making in this matter and at the Committee next week*". These are relevant to grounds 1 and 2 below. Mr Loon's email was a call for action by UDC. He envisaged that UDC would supplement the OR to address what he regarded as important gaps in the analysis.

26. This did not happen. No addendum report was produced. Instead, a "*late list*" document was published which reported Mr Loon's email but offered no further analysis from UDC's planning officer. The late list proforma sheet notes that its purpose is to "draw members attention to late changes to the officer's report or late letters/comments/ representations". Mr Loon's email was presented as the latter but it did not facilitate the identification of any changes to the OR. Ms Strachan for UDC fairly accepted that there was no express endorsement of those comments in writing or orally at the planning committee meeting.

27. The planning committee meeting took place on 26 October 2022. Guidance was given orally to members by Mr Tyler (the planning officer) and Mr Brown (development manager). Oral representations were made for and against the proposal (in the available 3 minute slots). A debate about the fall-back position ensued in which members asked questions and Mr Brown gave some oral guidance to members.

28. The decision to grant planning permission was made on the casting vote of the chair after members had been split 4 in favour and 4 against the grant of planning permission.

29. The minutes of the meeting record some of the discussion that took place but do not specifically identify the basis on which planning permission was granted.

Part B: Ground 1: The Fall-Back Position

(1) Legal Approach

30. A "*fall-back*" (i.e. development which an applicant could take without a further grant of planning permission) is capable of being a material consideration in favour of

granting planning permission. The law as to how a decision maker should consider this is well settled. The relevant propositions can be derived from the decision of the Court of Appeal in R (Mansell) v Tonbridge and Malling BC [2019] PTSR 1452 at para 27 and the decision of Dove J in Gambone v SSCLG [2014] EWHC 952 (Admin) at paras 26-28 which draw on earlier cases. The key points (so far as material for present purposes) are:-

a. The applicant has a lawful ability to undertake the fall-back development;

b. The applicant can show that there is at least a *"real prospect"* that it will undertake the "fall back" development if planning permission is refused. In Mansell at §27, Lindblom LJ explained that : *"the basic principle is that "for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice"*.

c. Where a planning authority is satisfied that a fall-back development should be treated as a material consideration, the authority will then have to consider what weight it should be afforded. This will involve:

   i. An assessment of the *degree* of probability of the fall-back occurring. As Dove J observes in Gambone at para 27, the weight which might be attached to the fall-back will vary materially from case to case and will be particularly fact sensitive; and

   ii. A comparison between the planning implications of the fall-back and the planning implications of the Proposed Development: Gambone paras 26-28.

d. The Courts have cautioned against imposing prescriptive requirements as to how and with what degree of precision the fall-back is to be assessed by the decision maker. This is in recognition of the fact that what is required in any given case is fact sensitive. As Lindblom LJ observed in para 27(3) of Mansell, there is no general legal requirement that the landowner or developer set out *"precisely how he would make use of any permitted development rights*". Lindblom LJ continues that *"[i]n some cases that degree of clarity and commitment may be necessary; in others, not*".

(2) The LDC

31. The following points should be noted in respect of the LDC granted on 25 July 2022.

a. First, the application for the LDC (as summarised in the delegated report which granted the LDC) described the proposed use (for which the access was required) as a commercial market (and/or car boot sale) comprising 80-90 pitches and 200 parking spaces.

b. Second, as Mr Fullbrook for WPC submitted, the question of whether the access was required in respect of the contemplated use was tested by reference to the size of the contemplated market. This is borne out by the fact that the delegated report records that the existing narrow access track "*is not suitable for the volume of traffic proposed*".

c. Third, the access drawing which accompanied the application for the LDC was the same as the access proposed for the application for planning permission at issue in these proceeding (and also the same as was proposed for the Previous Application).

d. Fourth, WPC submitted representations in respect of the LDC which included advice from Leading Counsel who had been asked whether UDC were lawfully able to grant an LDC "*for proposed access on a standalone basis independently of any market or car boot sale use*". Leading Counsel's advice was: "*The short answer is "no". The permitted development right to construct a highway access is dependent on that access being "required" in connection with the holding of markets on the site. There is no free-standing permitted development right to construct an access*.". I agree with this conclusion. Dr Williams who appeared for IPs, also accepted it as correct in his submissions to the Court (see paragraph 9 of his skeleton argument).

32. During the process of considering the LDC, issues relevant to the likelihood of holding a market on the Site were raised. A material factor was that Saffron Walden Town Council ("SWTC") is the licenced operator of markets in Saffron Walden (a status protected by Royal Charter and under Local Acts of Parliament). The position, as set out in representations submitted by the clerk to SWTC dated 21 June 2022 was that *"any market held within 6 2/3 miles of [SWTC]'s market can only operate with the express and specific permission of [SWTC]".* The representations indicated that SWTC would not give permission for a rival market. SWTC's market licensing policy was attached to these representations and indicated that market events included "*car boot sales"* (para 3(4)(d)). A more permissive approach is indicated in the policy to community based markets with a strong charitable element emphasising the expectation that they were organised by local communities. These points did not prevent the grant of the LDC but they are relevant to the question of how much weight should be placed on the LDC in the determination of the planning application.

(3) <u>Consideration of the LDC in the Planning Application</u>

33. Substantial reliance was placed on the LDC as crystalising a fall-back position. The PDAS stated (in para 6.57):

> "*The intended purpose of [the LDC application] was to demonstrate that an access from Cornells Lane can be lawfully constructed. Note, however that whilst the access was specifically applied for in connection with the use of the land for holding a market, there are other uses of land which are allowable under the GPDO (without planning permission) which potentially are available and which would also allow (under the GPDO) <u>an identical means of access</u> to be constructed without the need for planning permission*" (emphasis added)

34. Representations were made in respect of the fall-back position by WPC and the IPs. In short summary, these were as follows:-

a. In Gardner Planning's ("GP") letter dated 8 September 2022, WPC contended:-

i. The LDC permitted an access in connection with a market.
ii. It is known that Saffron Walden Town Council "*has a legal veto, which it would exercise, that prevents the use of the site as a market*".
iii. A market would not be financially viable (so was not a "*real prospect*").
iv. There was no realistic prospect of motor car or motorcycle racing occurring.

b. In a letter dated 6 September 2022, Homes & Hills ("HH") solicitors on behalf of the IPs contended:-
i. The construction of the access permitted by the LDC could commence at any time.
ii. It was the IPs "*clear and stated intention to provide the access to enable the holding of the market*".
iii. Wider temporary uses were permitted under the GPDO which would "*undoubtedly require*" a new/improved access to allow equipment to be delivered or installed. Examples of these were listed as follows: "*Family Fun days – to include by way of example only "bouncy castles", games, "petting zoo", displays and other activities"; "war gaming", "paintball", "dog shows", "music concerts", "circus", "car shows, clubs societies and rallies"; "outdoor sports events", "outdoor recreation for clubs/societies"; "boot camp"; "outdoor theatre"; "clay pigeon shooting"; "company days/events"; "charitable events"; "beer festivals" and "fun fair*".

The letter went on to undertake a comparison of the impacts of the claimed fall-back scenarios and the proposed development.

c. In an email dated 14 September 2022, GP made further observations (in response to HH's letter dated 6 September 2022). In respect of the wider GPDO rights referred to, it commented that these suggestions had not been "*seriously scoped*" and "*may be regarded as quite unlikely to materialise*". It also doubted that such alternative uses, would require (or economically justify) the provision of "*such an elaborate access road*".

35. I make the following observations on the contentious issues which emerge from those representations.

a. Both sets of representations correctly focus on the caselaw in respect of fall back uses by considering whether there was a prospect of the use materialising; engaging with the degree of likelihood of potential fall-back uses materialising and, in the case of HH's representations, undertaking a comparative analysis of relevant effects.

b. Both representations, differentiate between what could be done under the LDC and the potential for an access to facilitate other uses permitted under the GPDO.

c. There are stark differences between the representations as to:-

i. How likely the market is to come forward given the position of SWTC.

ii. How likely alternative permitted uses under the GPDO would be to materialise.
iii. What access would be required to facilitate other permitted development uses.

36. The fall-back position was a key contentious issue. As between IPs and WPC, albeit within a common legal framework, there were key factual differences as to the likelihood of the market and the position (in terms of what access would be required and what use was contemplated) under wider permitted development rights.

37. The OR dealt with the fall-back position in a single paragraph. It stated (at para 14.4.18):

> "*A certificate of lawfulness application (UTT/22/1523/CLP) for a means of access, identical to that now being proposed has recently been approved. Therefore, such access could be constructed. This is a fall-back position and material consideration. The approved certificate of lawfulness considering the access to the site is identical in siting, width and visibility splays to the access proposed in the current application (and the refused/appealed application). Furthermore, the gradients shown in the 'certificated' and proposed access incorporate the previously recommended conditions of the Highway Authority*".

38. As Mr Fullbrook submitted, this paragraph did not grapple with the fact that the LDC was linked to provision of a market on the Site. It was silent on the likelihood (or otherwise) of the market occurring (given the position of SWTC and doubts about viability raised in representations). It did not mention reliance on other permitted development uses to establish a fall-back. It offered no comparative analysis of the consequences of fall-back scenario(s) with the position were planning permission to be granted.

39. Mr Loon's email dated 19 October 2022 (on behalf of the IPs) spotted these limitations in the treatment of the fall-back in the OR. The fall-back analysis was one of the "*important matters central to ensuring reasonable/robust decision making*" which he identified needed to be addressed further. He noted that the OR did not:-

a. Explain what weight should be ascribed to the fall-back;
b. Explain how that weight is to be "derived/evidenced"; or
c. Undertake any comparative analysis of impacts.

40. As above, Mr Loon's email did not facilitate the preparation of an addendum report. Rather the late list simply set out the email as a late representation.

41. In my view members were not given a legally adequate direction in written form on how to approach the contentious issue of the fall-back. That position was essentially accepted by Ms Strachan and Dr Williams subject only to the argument faintly advanced that the publication of the late list plugged the gap. I reject that suggestion because (a) the late list was not presented as advice from officers and (b) Mr Loon's point was (correctly) to say that further analysis was needed. Merely reproducing his request for that analysis cannot be said in itself to plug the gap in analysis (given the

range of competing contentions made in the representations as to how the issues he identified should be approached in the factual circumstances of this case).

Oral Advice at the Meeting

42. The Court has to consider whether this gap was filled by the discussion at the meeting of the planning committee. I accept as a matter of principle (as is made clear from the Court of Appeal's decision in R v Selby DC, ex p Oxton (1997) [2017] PTSR 1103 at 1111B (per Judge LJ)) that oral discussions can correct defects (and by necessary implication plug gaps) in officers' reports to committee.

43. I approach the task of reviewing the discussions with the principles for reading officer's reports encapsulated in Mansell at para 42 (by Lindblom LJ) firmly in mind. The approach of *"reasonable benevolence*" applies by analogy to the review of oral advice given at a meeting. The question is whether, viewed as a whole and in context, members were properly directed as to how to approach the fall-back.

44. The express guidance given by officers at the meeting must be assessed in a realistic way. Such advice can draw expressly or by implication on contributions made by others (which are either expressly adopted or where it is reasonable to infer endorsement of earlier contributions in all of the circumstances). The task must be to arrive at a realistic and objectively reasonable assessment of the guidance that members were given.

45. In this case, the minutes of the meeting do not assist with that task. There has also been no evidence put in by UDC as to the basis on which the decision was taken or the advice given. The assessment has to be made from the transcript and with the benefits of submissions and access to the materials which were available to members.

46. The transcript is lengthy and the issue of the fall-back was discussed extensively. The key elements of the exchanges were as follows:-

    a. Mr Tyler's opening comments on p.3 of the transcript contended that there was a likelihood of the access works occurring. He did not explain the basis for that view or relate his analysis to the fact that the LDC had been granted for access required for the purpose of a market.

    b. In his allocated 3 minute speaking slot, Mr Gardner (on behalf of WPC) covered the need to address whether there was a possibility of fall-back uses coming forward. He explained why WPC contended that there was not such a possibility for a market. He noted that in respect of wider GPDO uses, the IPs had not demonstrated what access was required.

    c. In his allocated 3 minute speaking slot, Mr Harman (solicitor on behalf of the IPs) referred to the issue of the likelihood test and contended that we are "*well beyond possibility*". He contended both that there was a likelihood that a market would be held and that *"the construction of an identical access via permitted development is highly probable, if not inevitable*". Mr Loon who followed him, relied on the fall-back position in making his submissions on planning balance.

d. Mr Brown (UDC's development manager) then spoke to "*clarify a few things*" (para 39). He referred to the LDC for the market and stated (para 41):

"What [LDC]s do [is establish] that planning permission wouldn't be required for that access and … it is also inferred from that [LDC] that other temporary uses could also be used…. it doesn't have to be inevitable that it's going to happen, it has to be possible to be happening and it is feasible that it could happen and so – and I don't think Members need to take anything else. But that has weight, but it is down to you as the decision maker to infer what weight that has. Personally, I think that it has significant weight, but that's down to the decision maker to actually make that decision"

e. Later in the debate, Mr Brown advised:-

i. "*They could put the access in tomorrow is the issue and, you know, and so they could put the access in tomorrow to fulfil a role for permitted development rights towards – to the rear of the site. And that's all they're demonstrating and that's all they're doing"* (para 70)

ii. *"The damage [to the protected lane] could be done under the permitted development and it could be done tomorrow and that's not a threat that's the natural impact of the [LDC]"* (para 109)

iii. *"I think the other issue is I think there is an argument that maybe the market was possibly the wrong choice of an indication of what you could do to indicate, but it's… inferred. There [are] other things that you can do under permitted development rights.*

That can be things like, and this will alarm people, you can use it for motocross, you can use it for pigeon shooting, you can use it for gymkhana's, all those type of things and all those type of things you can use it for over a period of years or a combination of those things all the way through the years.

And the market, I think everyone gets preoccupied with the market issue. Maybe the market was the more likely variation of what they want to do, but not –the point they are making is you can do a permitted development access." *(para 112)*

(4) <u>Limbs 1 and 2 of WPC's first ground</u>

47. Mr Fullbrook submits that there are errors in the UDC's approach (which were not corrected in the advice given in the meeting). I will take his first 2 points together.

a. His first point is to submit that UDC failed to consider whether any of the fall-back uses referred to were in fact realistic possibilities and failed to reach a view as to the degree of probability of them occurring.

b. His second point is that there was no separate consideration of whether the access was required in respect of the broader permitted development rights referred to.

48. UDC and the IPs response to these points is to contend that the omission from the OR was cured by the discussion at the meeting. They submitted: (1) Mr Harman's contribution set out the right legal framework; (2) Mr Brown did not contradict this and so (3) he should be taken to have adopted it; (4) members were advised to decide questions of weight for themselves; (5) they had therefore the legal framework and (as Dr Williams put it) "*the inputs*" into that framework from the submissions made on either side of the debate.

49. I disagree that it possible to weave together lawful guidance as suggested by UDC and the IPs. My conclusion is that Mr Brown's guidance to members did not set out for them the framework of issues which they had to consider. In my view there were 3 key defects in the advice that members were given.

50. First, Mr Brown did not make it clear that the LDC was linked to the use of the Site for the purpose of a market. Consequently, members were not encouraged to grapple with the issue concerning how likely the market was to occur. This was a key controversial issue given SWTC's position and the representations made by WPC as to the viability of an elaborate access to support a smaller charity market (given the evidence of the cost of putting in the access was in the region of £50,000 - £100,000).

51. Second, to the extent that members were directed to look beyond the market for a fall-back, it was not explained to them that there were distinct questions for them to consider in respect of other permitted development uses. These include:-

    i. Which permitted development uses were contemplated?
    ii. How likely were they to occur?
    iii. What access would be required in respect of them?

    The answer to these questions was not something that could be "*inferred*" from the LDC (as Mr Brown advised). Potential uses other than the market raised their own factual and evidential issues (for example: how likely were they to occur? and what access would be required to facilitate the use in question?).

52. Third, the advice that the access could be "*put in tomorrow*" advanced by Mr Brown begged a number of questions such as (a) to achieve what use?; (b) what was the evidential basis for saying that such a use might occur? and (c) in respect of permitted development uses not covered by the LDC, what access was required for them? These steps in the analysis were obscured by Mr Brown's shorthand contention that the access could be put in tomorrow. The effect of that advice in my judgment was to conflate the relevant issues into a simple asserted proposition (which did not reveal the thought process behind it). That guidance did not provide members with an adequate framework for considering the competing factual contentions of WPC and the IPs. Moreover, it implied that there was a generic permitted development access which had been established. In my judgment that was a materially misleading legal simplification (without, at the very least, some further explanation as to the factual basis on which that view was based).

53. In my judgment therefore, neither the OR nor the advice given orally to the Committee, gave members legally adequate guidance as to how to approach the fall-back issues in the specific circumstances of this case.

54. The fall-back question (in this case) required assessment of the competing factual contentions which differentiated between the scope of the LDC (access required for the purpose of a market) and reliance on other potential permitted development rights. As I have explained, Mr Brown's advice conflated these issues and, in my judgment, offered an incomplete (and in the light of the representations made, materially misleading) overall assessment.

(5) Limb 3 of WPC's first ground

55. Mr Fullbrook advanced a third limb to ground 1 which was to contend that UDC did not undertake a comparative evaluation of the fall-back and the development to be permitted.

56. It is clear from Gambone (paras 26-28) that this is part of the relevant exercise of considering the fall-back. Mr Harman covered the need for this exercise in his oral representations. Mr Loon referred to it in his email which was reproduced in the late list. But there is no indication of UDC carrying out that exercise.

57. However, what is required in any given case will depend on the context. I have already decided that the process by which UDC members were advised that an equivalent access from Cornells Lane had been established as a fall-back was erroneous. I do not consider that there was a separate error of failing to undertake a comparative balancing exercise.

58. The key issue in the planning balance was the creation of an equivalent access on Cornells Lane. The first reason for refusal from the Previous Application had been concerned with the impact on the lane as an undesignated heritage asset. UDC reached the point of its analysis where it had decided that there was an equivalent access in the fall-back scenario (albeit erroneously as I have indicated above). Given this conclusion and the absence of any highway objection to the proposed development, I am not persuaded that there was any additional material error in failing to undertake an overall balancing exercise comparing the fall-back with the proposed development. I do not consider that the wider comparative impacts needed to be spelled out as part of the fall-back evaluation in the specific circumstances of this case. The key issue was the comparative impact on the protected lane.

59. I do not therefore accept that the third limb of Mr Fullbrook's argument on ground 1 establishes any separate error of law. However, for the reasons given, ground 1 succeeds on limbs (i) and (ii) advanced by WPC to the extent indicated above.

Part C: Ground 2: Heritage Impacts

(1) Legal and Policy Context

60. Sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 require decision makers to have special regard to the desirability of preserving listed buildings and conservation areas respectively.

61. Preserving the setting of an asset can be taken to mean leaving the setting unharmed: South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141 (HL), at 150C-E (Lord Bridge).

62. The *"effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building… – are all matters [of planning judgment] for the planning decision-maker"*, meaning the courts should not intervene absent *"some clear error of law in the decision-maker's approach"*: Catesby Estates Ltd v Steer [2019] P & CR 5 (CA), at §30 (Lindblom LJ).

63. There is no single correct approach to determining the harm to an asset: City and Country Bramshill Ltd v Secretary of State for Housing [2021] EWCA Civ 320, at §74 (Lindblom LJ). Despite not being required to do so, a decision-maker may lawfully carry out an internal balance of heritage-related benefits and heritage-related harm in order to determine whether harm exists to the asset *overall*: see §§69-71 and 78-80 (Lindblom LJ).

64. The decision maker must attach *"considerable importance and weight"* to any finding of harm to a heritage asset: Bath Society v SSfE [1991] 1 WLR 1303 and East Northamptonshire DC & Barnwell Manor Wind Energy v Secretary of State [2015] 1 WLR 45 (CA).

65. The discharge of this statutory duty has been described as *"a demanding duty for a decision-maker, whose rigour has been repeatedly emphasised in the case law"*: East Quayside 12 LLP v Newcastle upon Tyne City Council [2023] EWCA Civ 359, §51.

66. The NPPF gives policy guidance as to the identification of impacts and how to weigh them in the balance against public benefit (see paras 199-202).

67. The NPPF also contains material guidance as to how the heritage balance relates to the titled balance (under paragraph 11 of the NPPF) which can come into play where, as here, the planning authority cannot show a 5 year housing supply.

68. Paragraph 11(d) of the NPPF states as follows:

> *11. Plans and decisions should apply a presumption in favour of sustainable development…For decision-taking this means:…*
>
> *d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:*

i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed [footnote 7]; or

ii) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.

Footnote 7 includes *"policies relating to…designated heritage assets"*.

69. The operation of para 11(d) of the NPPF (as it appeared in a previous iteration of the NPPF) was explained in detail by Holgate J in Monkhill v SSHCLG [2020] PTSR 416 at §39. (Holgate J's decision was upheld by the Court of Appeal – see [2021] PTSR 1432). Holgate J noted that the presumption in favour of sustainable development does not displace the statutory obligations of local planning authorities to determine applications in accordance with the development plan unless material considerations indicate otherwise. The two limbs, (i) and (ii), should generally be applied consecutively (see sub-point (9) of para 39). Where heritage policies are engaged, Holgate J held that limb (i) requires the decision-maker to weigh (emphasis added) *"**only** the "less than substantial harm" to a heritage asset against the "public benefits" of the proposal"*. If this produces a clear reason for refusal, it is not necessary to go on to consider limb (ii), which is often known as the "tilted balance" (see sub-point (13) of para 39). If limb (i) is not satisfied then the "tilted balance" should be applied and the decision maker will have to consider whether any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits. However, even in this situation, the decision maker will be under a statutory duty to afford *"considerable importance and weight"* to any heritage harm at all stages (see sub-point (14) of para 39).

(2) The basis of challenge

70. In this case, three issue arise in respect of UDC's approach to heritage impacts.
    a. First, whether UDC made a material error of fact as to whether the site was in the conservation area.
    b. Second, whether UDC erred in its conclusion as to the extent of harm to listed buildings.
    c. Third, whether members were misled as to the operation of para 11(d) of the NPPF.

71. I address these points in turn.

(3) Limb 1 of ground 2

72. The legal basis on which limb 1 is advanced is that UDC made a material error of fact.

73. It is common ground that the legal framework for approaching this issue is that derived from the decision of Carnwath LJ (as he then was) in E v Home Secretary [2004] QB 1044 at para 66 ; which has been applied in a planning context for example in R (Watt) v Hackney [2017] JPL 192 at para 49). The steps in the analysis are: (1) that there must be a mistake as to an existing fact, (2) the fact must be established in the sense of being uncontentious or objectively verifiable; (3) the claimant must not be responsible for the

mistake and (4) the mistake must have played a material (not necessarily decisive) part in the decision maker's reasoning.

74. Mr Fullbrook submits that all of these stages are satisfied. He contends that UDC was erroneously advised that the Site was outside the WCA. He contends that this is clear from a fair reading of OR, from the conservation officer's comments 4 October 2022: ("*access abutting the conservation area*"; which differed from his comments on 8 September 2022 "*access to the site location from within the Conservation Area*") and from comments made by Mr Brown at the committee meeting. The second and third stage of analysis are not contentious. A small part of the site (where part of the existing access is located) is in the conservation area. No one suggests that the WPC are responsible for any error that occurred. Mr Fullbrook submits that correctly understanding the boundary of the conservation area affects the application of s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the planning judgment reached as to whether the proposal was consistent with para 206 of the NPPF.

75. In response UDC and IPs submit that there was no error when the material is read fairly and as a whole. It is also contentious whether any error is material.

76. The key parts of OR are as follows:

> "*14.4.19 In terms of the designated Heritage asset, this includes the Conservation Area and a number of listed buildings. However, it is noted the application site is outside of the Conservation Area. I first consider the impact development has to the Conservations [sic.] Area; due consideration is made to ULP Policy ENV1 and S72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 in relation to the preservation or enhancement to the character and appearance of the Conservation Area.*
>
> *14.4.20 The proposed development would inherently alter the rural setting of the application site with the introduction of built form, however this it [sic.] is considered this will however this [sic.] would not be appreciable from within the vast majority of the conservation area, including in views from the High Street. A small section to the southwest of the application site would result in a small change to the conservation area, through re-surfacing of part of the access road which will include a sympathetic appearance.*" (emphasis added)

77. In my judgment, these paragraphs fall to be read together. The underlined text in the second paragraph illustrates the officer's understanding both that the Conservation Area includes a small part of the Site and that the Conservation Area would encounter some development (resurfacing).

78. The OR then continues to assess the impact of the proposal on the Conservation Area, including in relation to NPPF §206 (see OR paras 14.4.22-14.4.27 and 14.4.40-14.4.41)**.** The most relevant paragraph is para 14.4.27 which states:-

> "*Paragraph 206 of the NPPF advises Planning Authorities should look for opportunities for new development within Conservation Areas to*

enhance or better reveal their significance……The proposal will provide a permissive footpath [from] the south east corner to the south west corner of the site. This will [create] a safe walking environment providing views of the Conservation Area which will better reveal its significance."

79. My conclusion is that neither stage 1 nor stage 4 of the test for an error of fact is satisfied. Read as a whole, I consider that OR correctly described the relationship of the Site to the WCA. The correct position was that most of the site was outside the WCA (including all of the plots on which the dwellings would be constructed and the entirety of the proposed new access). A very small section of the Site was within the WCA. Paragraph 14.4.27 of the OR sets out the basis of the planning judgment that the permissive footpath within the Site would help better reveal its significance. That path was in small part within the WCA but in the most part outside of it. I do not accept the demarcation of a small part of that path in the WCA was material to the planning judgment expressed in para 14.4.27.

80. I do not consider that the conservation officer's written comments or the oral discussions at the meeting displaced this analysis in the OR. I therefore do not consider that this first part of ground 2 is well founded.

(4) Limb 2 of ground 2

81. The second part of this ground of challenge concerns the identification of the impact on listed buildings in the OR.

82. WPC's argument is in essence that the OR is not internally consistent in respect of its approach to harm to listed buildings. The legal basis of this argument is that a report which proceeds by way of flawed logic is unlawful (as a species of irrationality – see R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 at 244). WPC emphasise the importance of this issue given the statutory framework, the fact that heritage harm (including harm to listed buildings) formed one of the reasons for refusal for the Previous Application and the conservation officer's assessment that there would be harm to the listed buildings.

83. The passages of OR which are said to be internally inconsistent are as follows:

a. OR identified that there will be some less than substantial harm to the setting of Corner Cottage/The White Cottage, but then found that the Proposed Development will have no impact on the significance of the listed building (§14.4.31).

b. OR stated, in respect of William the Conqueror, that *"these slight changes within the setting of the listed building will have high level of harmful impact on the significance of the William the Conqueror or the ability to appreciate its significance"* (§14.4.35). Mr Loon (the IPs' planning agent) had suggested a correction to this – i.e. that it should read *"low level of harmful impact"* in his email which was published in the late list document. There is no evidence of this being accepted by officers or communicated to members as accepted.

Moreover, even assuming that this harm was corrected to a "*low level of harmful impact*", there would still be heritage harm to listed buildings which was not accounted for in the planning balance.

c. OR stated at §14.4.39 *"it is not consider the [sic] proposal will have an urbanising effect that will result in significant level of harm to the…setting to designated or non-designated heritage assets"*

d. OR concluded at §14.4.42 that *"as assessed above the significance of* all listed buildings potentially affected by the Proposed Development will be preserved" (i.e. that there would no harm to listed buildings).

84. The short point which Mr Fullbrook makes is that the conclusion at para 14.4.42 does not follow from the preceding analysis. It appears that the harm identified to Corner Cottage/The White Cottage and William the Conqueror (even if corrected to low level of harm) was left out of account. He submits that the OR offers no internally consistent analysis for reaching a different view from the conservation officer (who had indicated that there would be harm to listed buildings) or the reason for refusal for the Previous Application which identified harm to listed buildings.

85. Ms Strachan and Dr Williams submitted that a correct reading OR showed that there was no harm to the listed buildings. There may have been impacts but they did not affect significance and the overall conclusion of the analysis was that there was no harm.

86. I will discuss each listed building in turn.

87. In relation to the William the Conqueror listed building, they submit that the correct way to read the OR is as follows:

a. The discussion at OR/§§14.4.32-14.4.35 evidences a balanced and lawful approach to the question whether the development will cause overall harm to the setting of the asset. The officer notes that the proposal will have a "*limited visual impact"* caused by the construction of the new access proximate to the building but notes that the impact *"will not diminish the ability to appreciate and experience its significance"*. He refers to additional planting creating visual separation from the listed buildings. The thrust of the analysis is that there will be no overall harm to the setting or significance of the asset.

b. As to the sentence of OR/§14.4.35, which states that *"These slight changes within the setting of the listed building will have high level of harmful impact on the significance of the [sic.] William the Conqueror or the ability to appreciate and experience its significance",* UDC and IPs contend that the language is imprecise but the remarks need to be read with the underlying analysis in the preceding paragraphs in the OR. The analysis itself provides no warrant for the suggestion that there is a *"high level of harmful impact"* to the asset. The concluding remarks are attempting to convey that there would be no harmful impact on the asset at all. They contend that this is supported by the underlying analysis and follows naturally from the second half of the sentence, which discusses impact on the significance of the asset itself *"or the ability to appreciate and experience its significance"*. The use of the word *"or",* rather

than *"and",* implies that the first and second parts of the sentence were intended to refer to an *absence*, not a presence, of harm.

88. Dr Williams's written and oral submissions on this point were forcefully made. However, I do not consider that the degree of re-writing of the language used in the OR which his submissions urge upon the Court is appropriate even applying a benevolent approach to reading such reports. Specifically, I find that to change the meaning of "high level of harm" to "no harm" is beyond what is appropriate. I agree with Mr Fullbrook's submission in reply that members could not be taken to have understood this as the obvious meaning of the OR when the suggested correction made by Mr Loon had been to change *"high level of harm*" to "*low level of harm*" (not "*no harmful impact*" as IPs urge it should be understood).

89. It is unfortunate that clarification on the key issue of harm to listed buildings was not provided given the internal contradictions in OR (which had, at least in part, been flagged by Mr Loon). On a fair reading of the OR, I do not consider that there is an internally consistent analysis which supports the conclusion set out in para 14.4.42 that there would be no harm to William the Conqueror (because its significance would be preserved). That conclusion differed from the reason for refusal for the Previous Application which identified harm to listed buildings and was contrary to the conservation officer's detailed analysis (in his consultation response dated 4 October 2022). The OR did not provide members will an internally coherent analysis as to why it was concluded that there was no harm to the grade II listed building William the Conqueror.

90. In relation to Corner Cottage/White Cottage, UDC and the IPs submit that the OR's conclusion is that the asset will suffer no overall harm whether in terms of its setting or significance. Properly understood, it is said that the earlier reference to *"less than substantial harm by virtue of development within their setting"* (in para 14.4.31 of OR) is not a firm finding of harm but a finding of *impact*, which is then taken in the round and considered according to other, beneficial, factors (screening and a reinforced sense of enclosure) in order to arrive at an overall conclusion on whether setting/significance are affected.

91. This analysis similarly asks the Court to look behind the objective meaning of the language used. I do not consider that this can be done when the OR was not corrected. I do not consider that members would have reasonably understood the reference to "*less than substantial harm*" in para 14.4.31 to have a meaning that akin to no overall harm. The thought process advanced in submissions by Dr Williams is coherent but it is not what the OR in fact says (or can be read as saying applying a benevolent approach to interpretation).

92. UDC and IPs also contend that the reference in para 14.4.39 to *"significant level of harm"* in the final sentence should read *"discernible harm"* given the officer's underlying analysis. Again I follow the logic of this submission but I do not consider that the objective meaning of the language used can be re-written in that way.

93. I agree with WPC that the conclusion in OR para 14.4.42 that there is no harm to listed buildings does not follow from the preceding analysis in the OR. I consider that there is flawed logic within OR in respect of the analysis of harm to listed buildings which

was not corrected before planning permission was granted. The second limb of ground 2 therefore succeeds.

(5) Limb 3 of ground 2

94. The third limb of ground 2 concerns the relationship between the heritage balance and the titled balance for the purpose of para 11 of the NPPF.

95. The section of the OR dealing with planning balance refers to the lack of a 5 year housing supply (para 14.11.2) and states that *"increased weight should be given to housing delivery when considering the planning balance in line with the presumption in favour of sustainable development set out in NPPF (paragraph 11)*".

96. Various benefits of the proposal are identified in paras 14.11.4-14.11.6. Paragraph 16.3 of the OR states that the level of harm to the designated and non-designated heritage assets is considered low. The benefits have been weighed against this. Paragraph 14.11.7 of OR states: "*the proposal will result in limited low level harm to the character and appearance of the rural site and both designated and non-designated heritage assets. The harm caused by the proposed development is not considered to significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole (NPPF para 11d(i))*".

97. Mr Fullbrook submits that there is an error in the approach to the titled balance. Nowhere is it recognised that heritage impacts need to be weighed against the public benefit as a prior step (in para 11d(i)) before the titled balance comes into play.

98. In Mr Loon's email dated 19 October 2022 (published on the late list), he observed as follows:

> "*Paragraph 14.11.7 sets out the "tilted balance" test under NPPF para 11 but the report (before getting to this stage) should specifically undertake the para 202 test in advance*".

He suggested an addendum is prepared to do this and stated:

> "*Please can you consider this and act as appropriate*".

99. As indicated above, no addendum report was prepared to show how the judgment as to impact of heritage asserts related to the application of the titled balance (as set out in para 11 of the NPPF and as explained by Holgate J in Monkhill para 39).

100. This error was also not corrected at the meeting. Rather Mr Tyler's opening address to the committee stated: "*It's considered that the low level harm to the character and appearance of the area, the low level of harm to designated and non-designated heritage assets does not significantly or demonstrably outweigh the benefits of the proposal when assessed against the policies in the NPPF*". His oral remarks repeated the application of the titled balance as set out in para 14.11.7 without consideration of the discrete step under para 11(d)(i).

101. UDC and IPs relied on 2 points in the discussions at which Mr Brown referred members to para 202 of the NPPF (para 41 and 117 of the transcript). However, I do not consider that these comments provided members with a correct understanding of how the titled balance related to the weighing of heritage impacts against heritage harm.

102. I consider that the effect of OR (reiterated by Mr Tyler's introductory remarks) failed to provide members with a proper understanding of how their judgment, as how to weigh the adverse impact of the proposal on designated heritage assets against public benefits, was capable of affecting whether the titled balance applied. This was, in my judgment, an error of law. The third limb of ground 2 also therefore succeeds.

103. I find that ground 2 succeeds on the second and third limb advanced by WPC.

Part D: Ground 3 – Consistency/reasons

104. WPC's third ground of challenge contends that UPC did not give reasons for departing from the decision (to refuse planning permission) in respect of the Previous Application.

(1) Legal Principles

105. The legal basis for this part of the challenge relies on the application of the principle of consistency of previous decisions in the context of challenges to Inspectors' decisions arising from the decision of the Court of Appeal in North Wiltshire DC v Secretary of State for the Environment (1992) 56 P&CR 137 at 145 in which Mann LJ stated:

> "*Consistency is self-evidently important to both developers and development control authorities. But is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An Inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and give his reasons for departure from the previous decision*".

106. In R (Irving) v Mid Sussex DC [2019] EWHC 3406 (Admin), Lang J confirmed (§75) that it *"is now well-established that a local planning authority ought to have regard to its previous similar decisions as material considerations, in the interests of consistency. It may depart from them, if there are rational reasons for doing so, and those reasons should be briefly explained."*

107. It is important however to recognise the limitation of this general principle. In North Wiltshire, Mann LJ made it clear that (at 146): "*an inspector is under no obligation to manifest his disagreement with other decisions which are distinguishable. That indeed would be a gratuitous and pointless exercise"*.

Application to this case

108. In this case, Mr Fullbrook submits that the differences between the present application and the Previous Application were very limited. He stresses that the conservation officer had stated in their consultation response that the 2 schemes were "*widely identical*". He also relies on a view expressed in debate by one of the members of the committee during the course of deliberations that "*two and a half of the original reasons could still apply*".

109. In response, UDC and the IPs stress that the schemes were not identical and rely on the explanation in the PDAS that the current scheme was a response to concerns expressed by members in discussing the Previous Application. Dr Williams in his oral submissions charted a course through the OR which demonstrated, he submitted, that the OR contained a scheme specific analysis which identified the differences in respect of plot 1 (smaller building and greater landscaping). He submitted that this was not a like for like case and therefore fell outside of the range of cases to which the North Wiltshire principle applied.

110. I do not accept Dr Williams' broader submission that the principle in North Wiltshire is not applicable. It seems to me that the current application and the Previous Application were sufficiently similar that it is necessary to be able to identify UDC's reasons for taking a different view.

111. That said, I do not consider Mr Fullbrook has established any separate error of law under this ground of challenge. Rather, I consider that UDC's decision is explained by a combination of the following factors: (a) the refusal of the Previous Application was against officer advice; (b) there were differences between the schemes which were relevant to the reasons to refusal (especially the heritage issues); (c) the fall-back position was a key difference which made a significant difference to the overall decision. I do not consider that there is any separate error in a failure to give reasons. The reasons are apparent from the OR supplemented by the discussion of the fall-back at the meeting (albeit that I have found above that there were legal errors in respect of the approach to fall-back and parts of the analysis of heritage impacts).

Part E: Ground 4 -approach to appeal costs

112. WPC's fourth ground of challenge alleges that UDC wrongly took account of the risk of appeal costs in deciding to grant planning permission.

113. This is not a matter mentioned in OR but Mr Fullbrook relies on the discussions during the meeting. In particular, he contends:-

    a. Mr Brown advised the Committee that if the Permission were to be granted the applicant would withdraw the Appeal (§106 of the transcript)

    b. Mr Brown also stated: *"I think if Members deferred making a decision, especially as an attempt to try to address the refusal reasons, I would suggest that the – any Inspector would see that as unreasonable behaviour"* (§89)

c. Committee members who are well-versed in planning matters would have understood that the reference to *"unreasonable behaviour"* was a reference to the test for the making of a costs award in a planning appeal.

114. Mr Fullbrook submits that members were being urged to rely on an immaterial consideration and moreover they were not told that UDC were defending the costs application that had already been made in the appeal in respect of the Previous Application.

115. In response, UDC and IPs contend that the reference to costs is understood as relating to the procedural point that it would be unreasonable to decline to defer determination of the application because an appeal was outstanding.

116. Having considered the parts of the transcript which mentioned costs, I accept UDC and the IP's submission. I consider that members were being told that they could not succumb to the invitation made to them to adjourn the application. It was being said to them that such an approach would be unreasonable behaviour. I consider that was lawful and relevant guidance in the context of members being specifically urged by some of the objectors to decline to make any decision.

117. For this reason, I reject ground 4.

Part F: Relief and Conclusions

118. I have concluded that ground 1 (limb 1 and 2 to the extent indicated above) and ground 2 (limb 2 and 3) succeed but grounds 3 and 4 do not.

119. That leaves the issue of relief.

120. UDC and IPs submit that relief should be refused pursuant to s.31(2A) of the Senior Courts Act 1981. The Court must refuse relief if it appears to the Court to be highly likely that the outcome for WPC (i.e. the grant of planning permission notwithstanding their objections) would not have been substantially different if the conduct complained of had not occurred.

121. As set out in para 63 of UDC's detailed grounds of claim, the relevant submissions as to relief are:-

a. That the LDC remains in force and UDC's assessment of the weight to be given to the fall-back position would be the same.

b. UDC's assessment in terms of heritage matters would be the same in that there was a finding of the lower end of less than substantial harm to heritage assets. In relation to paragraph 11(d)(ii) it is highly likely that UDC would come to the same conclusion in respect of paragraphs 202 and 206 of the NPPF (i.e. that the public benefit of the proposal outweighed such heritage harm).

122. Helpful guidance is contained on the question of relief in the decision of Kate Grange KC (sitting as a Deputy Judge of the High Court) in R (Cava Bien) v Milton Keynes Council [2021] EWHC 3003 (Admin) at para 52. Distilling the key points from the guidance which apply for present purposes, I emphasise:

a. The burden is on the Defendant and Interested Parties – see (i)

b. The highly likely test sets a high hurdle – see (ii) and (iii)

c. The Court must undertake an objective assessment of the decision making process – looking back at the situation at the date of the decision – see (v), (ix).

d. The Court should be cautious about straying into the forbidden territory of assessing the merits of the planning decision under challenge – see (xi) and (xiii).

123. Applying this approach, I do not consider that this is a case where relief should be refused for the following reasons.

a. The approach to fall-back was an important issue in the members' deliberation. The effect of the errors which I have identified was that members were presented with an unduly simplistic analysis of what could be achieved without a grant of planning permission. The decision to grant planning permission was granted on the casting vote of the Chair. The transcript of the meeting indicates that some members may have felt boxed in by the fall-back position that was presented to them. I express no view on how members should have weighed the fall-back based on a more nuanced evaluation of the possible permutations. That is a matter for them. However, I am not satisfied that it was highly likely that their decision would have been the same had they been given lawful guidance on the nuances of the fall-back position in this case.

b. As to the impacts on listed buildings and the relationship of the public benefit balance to the titled balance, it is relevant that such heritage concerns were part of the reasons for refusal of the Previous Application and that the conservation officer considered that the differences between the schemes were minimal. The statutory scheme and guidance require considerable weight to be placed on adverse heritage impacts in the planning balance. In a case such as this, where there is a shortfall against the 5 year housing supply requirement, the tilted balance is designed to be a powerful consideration in favour of the grant of planning permission. I therefore consider that, in the context of a decision made on a casting vote, it cannot be said that it would be highly likely that the same decision would be made if members had been told that the titled balance may not apply depending on how they assessed heritage harm against public benefit. I express no view on how they should do so – only that the high threshold for refusing relief is not met in the circumstances of this case.

124. For these reasons, I am not satisfied that relief should be refused. The claim succeeds on grounds 1 (limbs 1 and 2) and ground 2 (limbs 2 and 3). My conclusion is that the appropriate relief is that the decision of UDC to grant planning permission should be quashed.

125. I conclude by expressing my gratitude to all Counsel for their helpful and focussed submissions in writing and orally.