Neutral Citation Number: [2015] EWHC 1877 (Admin)

Case No: CO/6070/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2015

Before:

THE HONOURABLE MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN on the application of ANNE-MARIE LOADER	**Claimant**
ROTHER DISTRICT COUNCIL	**Defendant**
- and -	
CHURCHILL RETIREMENT LIVING LIMITED	**Interested Party**

- -
- -

Jenny Wigley and Paul Stookes (Solicitor Advocate) (instructed by **Richard Buxton Environment and Planning Law**) for the **Claimant**
Hugh Flanagan (instructed by **Rother District Council**) for the **Defendant**
No appearance or representation for the **Interested Party**

Hearing date: 18 June 2015

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Approved Judgment

Mrs Justice Patterson:

Introduction

1. This is an application for judicial review of a planning permission granted on 20 November 2014 for the redevelopment for 39 private sheltered apartments for the elderly with associated communal facilities, access, car parking and landscaping, including demolition and replacement outdoor bowls green, indoor rink, club facilities and car park at Gullivers Bowls Club, Knole Road, Bexhill.

2. The claimant is a local resident directly affected by the proposed development. The defendant is the local planning authority. The interested party is the developer who has not appeared nor been represented in these proceedings.

3. The site is about 0.7 hectares of open space within the urban area of Bexhill. The site comprises two open bowling greens, a pavilion, a clubhouse and indoor rink. It is surrounded on three sides by properties in Middlesex Road, Brassey Road and Cantelupe Road. Opposite the site, on the south side of Knole Road, is a substantial terrace of houses known as De La Warr Parade which is Grade II listed. The site is registered as an asset of community value (ACV) under section 88(1) of the Localism Act 2011.

4. The development proposal involves the demolition of the existing bowls club buildings, their replacement with a new clubhouse/pavilion and an indoor rink. The two outdoor greens will be replaced by one new outdoor green and the development of 39 sheltered apartments. The proposed sheltered housing is in the form of a four and three storey block sited directly facing the listed terrace of the Knole Road frontage.

5. Permission was granted by Collins J on 16 February 2015. On 4 March 2015 further permission was granted by Singh J in relation to an amended ground 2(a) concerning the failure to consult.

6. The grounds of challenge are three-fold, namely:

    i) Whether the defendant failed to consult English Heritage and the Victorian Society;

    ii) Whether the defendant failed to properly understand policy in the National Planning Policy Framework (NPPF) and, in particular paragraph 74;

    iii) Whether the defendant failed to take into account the correct designation of the proposed development land as an ACV.

7. There is a considerable planning history to the site to which I now turn.

Planning History

8. On 13 March 2003 the defendant refused outline permission to develop houses, apartments and associated facilities on the application site.

9. On 23 August 2006 the interested party applied for planning permission for the demolition of the existing buildings and the construction of 41 homes, a new outdoor bowling green, an indoor bowling rink, club facilities and associated car park, landscape and access.

10. On 19 September 2006 Dr Kathryn Ferry, Senior Architectural Advisor to the Victorian Society, objected to that development proposal. She said:

> "The open space of the current bowling green (formerly croquet lawns) was enclosed as part of the late Victorian and Edwardian planned development of Bexhill-on-Sea. The street pattern demonstrates how housing was designed around this central green space. Most significantly, on the seaward side, is the imposing Grade II listed terrace with entrance fronts onto Knole Road and equally impressive elevations to De la Warr Parade. The bowling green has always formed an important part of the setting of this Queen Anne style terrace. According to paragraph 2.17 of PPG15 'The setting of individual listed buildings very often owes its character to the harmony produced by a particular grouping of individual buildings (not necessarily all of great individual merit) and to the quality of the spaces created between them.'
>
> The design of the four-storey blocks proposed in this application shows little regard for the late Victorian character of the area and, in the Society's view, would have a detrimental impact upon the setting of the Grade II listed terrace. For this reason we would urge your Council to **refuse** planning permission.
>
> We hope you will find these comments useful. Please contact the Society if we can give any further help over these or amended proposals. We would be grateful to be informed of your authority's determination in the case."

11. On 12 October the Council refused planning permission. Four reasons for refusal were given. Only the third is relevant in that it was a refusal based upon the design of the submitted application.

12. That refusal was appealed and the appeal allowed by an inspector.

13. On 10 June 2008, by consent, the appeal decision was quashed because of the Secretary of State's failure to consider whether to screen the application under the Town and County Planning (Environment Impact Assessment) Regulations 1999. The decision was remitted to the defendant for redetermination.

14. On 7 July 2009 the planning inspectorate, on behalf of the Secretary of State, made a negative environmental impact assessment (EIA) screening direction. On 6 October 2009 the claimant applied for judicial review of that screening direction.

15. On 28 July 2011 the claimant's application for judicial review was dismissed by Lloyd Jones J (as he then was). On 26 June 2012 the Court of Appeal dismissed the claimant's appeal in **R (Loader) v Secretary of State for Communities and Local Government and Others** [2012] EWCA Civ 869.

16. The appeal was then re-determined and, in a decision letter dated 30 January 2013, dismissed. That appeal was based upon the first set of amended plans (submitted in 2009). Of materiality, the inspector recorded that the Council had accepted the principle of redevelopment on the Knole Road frontage with sheltered housing which was a view with which she agreed. Her concerns rested with the quality of the proposed design. She was not satisfied that, upon the plans before her, the design was appropriate and, indeed, found that it would unacceptably harm the character and appearance of the surrounding area, undermine local distinctiveness and cause substantial harm to the setting and significance of the De La Warr Parade as an important heritage asset.

17. On 29 April 2013 the Council registered the site as an ACV. The Head of Regeneration and Estates said:

> "From the appeal decision it is clear that the Planning Inspector considered that the bowls club does provide a local amenity that is of value to the community, and that the principle of maintaining this use is of social benefit:
>
> > '…In the specific circumstances of this appeal site, I am satisfied that the provision of the new bowls club buildings and green would be an important public benefit, maintaining and improving the existing club facility, promoting a healthy community in a sustainable location within a residential setting.'
>
> Whilst this comment was made with reference to the proposed new facilities that formed part of the planning application, it follows that these sentiments could equally be applied to the site as it currently stands.
>
> …
>
> A further issue to consider is whether there are other intangible benefits to be derived from this space as part of Bexhill's 'green infrastructure' that contribute to meeting 'the social wellbeing or social interests of the local community'. In this case the obvious direct benefit is to residents whose properties overlook the site; however there is a case also to argue that there is a wider, less tangible benefit to all those who live in the vicinity."

18. The interested party requested a review of the listing as an ACV. A hearing was held and in a decision dated 16 September 2013 the original decision was upheld. That decision was appealed to the First Tier Tribunal.

19. On 27 January 2014 the interested party applied for planning permission for the currently impugned decision.

20. On 24 April 2014 the First Tier Tribunal dismissed an appeal against the review decision. That decision noted that the bowls club had been a private members' club for about 50 years. It had a membership of 126 and members played on the indoor green as well as the outdoor green. About ten years earlier a decision had been taken to cease to maintain one of the outdoor greens so that although it remained as a mown grass area it was not a bowling green. That disused green accounted for about 37% of the whole site. Notwithstanding the fact that the buildings were old and dilapidated and included asbestos within their structure, the social side of the club had appeared to be lively to the earlier planning inspector. The argument which was whether the site had been wrongly listed as a whole when not all was in active use was dismissed.

21. On 20 February 2014 the defendant emailed heloise@victoriansociety.org.uk as a party interested in the planning application and sought comments. In fact the person to whom the email was addressed had left the Victorian Society and her email address was not active. On 12 January 2015 Sarah Caradec, the Conservation Advisor to the Victorian Society, advised the claimant:

> "Unfortunately Local Councils are only obligated to consult the Victorian Society where an element of demolition to a listed building is proposed. As this was not the case here, they were therefore not obligated to consult with us."

22. There is no record of further consultation with the Victorian Society. The Society confirmed to the claimant in a further email, dated 1 April 2015 that, "if we had objected to an application we would expect to be re-consulted by the Council if the application was resubmitted by the developer."

The Officer Report

23. The planning application was reported to the Planning Committee on 19 June 2014. The report began with a section entitled 'Policies'. Within that section the National Planning Policy Framework (NPPF) was referred to including paragraphs 70 to 77.

24. The site was described as laying to the east of Bexhill town centre conservation area and forming part of the setting of the splendid listed terrace to the south known as De La Warr Parade. The proposal was outlined and the next section entitled consultations. Within that, at 5.8, the Victorian Society was recorded with "no comments received." There was then a summary of the 28 letters of objection that had been received from the public.

25. Section 6 was entitled 'Appraisal'. Within that the planning history was reviewed, including the previous appeal decision where the inspector had concluded that the design of that proposal would cause substantial harm to the setting of the De La Warr Parade and to the character and appearance of the surrounding area.

26. The ACV was noted to be a material consideration at paragraph 6.3.4. The report then went on to summarise the design matters and the amended plans.

27. At 6.8 under a subheading 'Asset of Community Value' the following was recorded:

> "6.8.1. Since the determination of the previous application by appeal an application has been made by the 'Cantelupe Community Association' to the Council to list the Bowls Club as an Asset of Community Value ('ACV'). The application was accepted and the whole site has been listed as an ACV by Rother DC. A recent appeal against the listing to the First Tier Tribunal by Gullivers Bowls Club has recently been dismissed.
>
> 6.8.2. The listing of a site/facility as a Community Asset is not a block on development but it is open to the local planning authority to decide whether it is a material consideration in the determination of a planning application. In considering this, all the circumstances of the case should be taken into account.
>
> 6.8.3. At present the Bowls Club benefits from a rather run down club house, an indoor rink which is of some age and 2 outdoor greens, one of which has been disused for a number of years because of the costs involved in its upkeep. The proposal would result in a new club house and indoor rink building to modern standards and one new repositioned outdoor rink. The net change in available facilities would be the loss of one outdoor rink (currently disused) and the present planning proposal if granted will have the effect of ensuring the continuation of a Bowls Club on the site. It is important to acknowledge that the Bowls Club support the redevelopment to deliver new facilities.
>
> 6.8.4. The Localism Act 2011 requires local authorities to keep a list of assets of community value on the basis that they further the social wellbeing or social interests of the local community. The effect of listing is that when a listed asset is to be sold, local community groups will have the chance to raise finance and prepare a bid for it (known as the 'Community Right to Bid'). In the First Tier Tribunal decision the judge considered the Council's decision to list the Bowls Club as an ACV and concluded that the current use of the site as a whole (notwithstanding that there is a disused bowling green) furthered the social wellbeing or social interests of the local community. He did make comment, however, that in considering the future condition of the site, consideration could be given to 'imaginative partnership schemes, perhaps using section 106 money which conserve substantial parts of a site for community use.'
>
> The site has also been valued for its visual openness with public views of the greens. This was an issue touched upon at the appeal to the First Tier Tribunal and it was stated in the appeal decision:

> 'Another issue which I need not explore is Dr Stookes' proposal that both greens were a visual amenity for the local community and this furthered its social wellbeing. He pointed out that some residential care homes overlooked both greens. I would be doubtful about this. It may be wrong to say that something which is merely looked at can never satisfy the test for listing. It is conceivable, for example, that a mural or a statue might do so. In the circumstances of this case, however, I am doubtful whether as a matter of fact I would describe the care home residents overlooking the bowling greens as being a 'use' of them; and if it were, it would surely be ancillary.'

> Nevertheless, visual permeability from Knole Road to the bowls green was a point that the planning appeal Inspector considered desirable (Paragraph 20) but an open frontage was as much a result of the sporting use of the site as of any historical intention (Paragraph 15). Hence, in redesigning the proposal it has been seen as desirable to facilitate views both through the building with areas of glazing and across the car park unobstructed by solid fences or ancillary buildings. This is regarded as an acceptable balanced approach to maintaining awareness of the open space to the rear."

28. Under 'Other Matters' 6.9.1 reads:

> "6.9.1. Consideration has been given to the loss of the disused bowls green and it is concluded that this should not be a factor that weighs heavily in the determination of the application. The applicants Leisure Assessment concludes that there is already a surplus of bowls greens locally compared to the national average, that the new facilities will be an improvement and that there is no evidence of under provision for any other sport suited to the modest area in question. Sport England has objected on the basis that the needs of other bowls clubs have not been canvassed. However, Sport England did not raise this issue in connection with the earlier appeal, when the Inspector accepted that the site was not well suited to other sports (Paragraphs 43 – 46). In the consideration of the current application the Councils' Community and Economy (Sport and Recreation) Officer raises no objection to the loss of the disused bowls green and is not aware of any demand from within the town to utilise this green. It is concluded therefore that Local Plan Policy CF2 would not be compromised by acceptance of the scheme."

29. An update to the report was done for the committee meeting. Within that comments made by the applicant's agents were summarised:

> "The applicants' agent has provided comments upon the published report provided by their QC; summarised as follows:

> 1) Section 38(6) of the 2004 Act requires decisions to be made in accordance with the Development Plan unless material considerations indicate otherwise.
>
> 2) At para 6.4.4 of the report it is acknowledged that the design does not adversely affect the setting of the listed building. That invites the conclusion that as a result of the requirement of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to preserve the setting of the listed building has been achieved.
>
> 3) Para 74 of the NPPF (policy applicable to development of recreational open space). Bearing in mind what is said at paras 6.1.2 and 6.9.1 of the report it can reasonably be concluded that the first bullet point of NPPF para 74 has been satisfied.
>
> 4) Attention is drawn to the attached letter from the Dept. Communities and Local Government; It is pointed out the proposal delivers improved facilities for the Bowls Club."

30. The minutes of the meeting simply record the resolution to approve the application after notification from the Secretary of State on EIA Screening. They record also the fact that three councillors wished it to be recorded that they had voted against the application.

31. An officer attended the meeting and the notes that she took of the discussion were typed up and appear within the trial bundle. Within those notes the value of the site as green space was clearly raised by certain councillors. The chairman pointed out that the green space was not totally destroyed. Comments made by Andy Rowland, the Major Applications and Appeals Manager, were recorded on whether there would be a loss of an asset. He made it clear that the bowls club would remain with new facilities. Listing as an ACV was done under separate legislation. Another officer, Tim Hickling, pointed out that the fact of an ACV can be a material consideration but the planning application enabled the bowls club to remain on the site. The new design was deemed to be acceptable and officers did not think that design was a reason for refusal that could be fully supported. The new proposal addressed the concerns of the inspector. Later in the discussion there was some exchange about how much an appeal would cost and Mr Hickling gave the figure of approximately £150,000.

32. Planning permission was granted on 20 November 2014.

Ground 1: Was there a Failure to Consult with (i) English Heritage and (ii) the Victorian Society?

English Heritage

33. Although English Heritage had been known as Historic England from April 2015 as, throughout the relevant period of the application and up to the grant of planning permission, they remained English Heritage that is how I shall refer to them in this judgment.

34. Under the Planning (Listed Buildings and Conservation Areas) Regulations 1990, which were in force until 30 September 2014, regulation 5A prescribed publicity for applications affecting the setting of listed buildings. Where relevant it reads:

> "(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority and the authority think that the development would affect the setting of a listed building or the character or appearance of a conservation area."
>
> (2) The local planning authority shall–
>
> (a) publish in a local newspaper circulating in the locality in which the land is situated a notice indicating the nature of the development in question and naming a place within the locality where a copy of the application, and of all plans and other documents submitted to it, will be open to inspection by the public at all reasonable hours during the period of 21 days beginning with the date of publication of the notice;
>
> (b) for not less that 21 days display on or near the said building a notice containing the same particulars as are required to be published in accordance with sub-paragraph (1); and
>
> (c) for not less than 21 days publish on a website maintained by the local planning authority the following information–
>
> (i) the address or location of the development in question;
>
> (ii) the nature of the development;
>
> (iii) the date by which any representations about the application must be made, which shall not be before the last day of the period of 21 days beginning with the date on which the information is published;
>
> (iv) where and when the application may be inspected; and
>
> (v) how representations may be made about the application.
>
> (3) The local planning authority shall send to the Commission a copy of each notice under paragraph (2).
>
> (4) The application shall not be determined by the local planning authority before each of the following periods have elapsed, namely–

> (a) the period of 21 days referred to in paragraph (2) above; and
>
> (b) the period of 21 days beginning with the date on which the notice required by that paragraph to be displayed was first displayed; and
>
> (c) the period of 21 days beginning with the date on which the information required by sub-paragraph (c) of the said paragraph (2) was first published,
>
> and in determining any application for planning permission to which this regulation applies, the local planning authority shall take into account any representations relating to the application which are received by them before each of those periods have elapsed."

Those regulations were amended on 15 April 2015. The format of notifying English Heritage, by then Historic England, on receipt of the application remained but under paragraph 3(a) the wording was altered so that it reads:

> "The Local Planning Authority shall send to the Commission a copy of each notice under paragraph 2 in the following circumstances:
>
> (a) where paragraph 1(a) applies the listed building is classified as Grade I or Grade II*…"

35. The claimant submits that regulation 5A(3) of the amended version did not apply to applications that were considered before 15 April 2015. When the instant application was submitted the duty upon the Local Authority under the Regulations then in force was to notify English Heritage.

36. Under Table 1 of the National Planning Practice Guidance (NPPG) requirements for notification and consultation with English Heritage were set out. Where relevant it reads:

> "The development that would affect the setting of a listing building – Regulation 5A(3) of the Town and Country Planning (Listed Building Conservation Areas) Regulations 1990."

37. The claimant submits that issues of impact of the setting of the De La Warr Parade were very much in play. Paragraph 24 of the appeal decision of 30 January 2013 found that the previous design of the proposed sheltered housing building would cause substantial harm to the setting and significance of De La Warr Parade as an important heritage asset.

38. Diane Russell, the Conservation and Design Officer with the defendant, emailed English Heritage on 12 February 2015, saying that she had spoken to one of the legal team at English Heritage about the issue of Regulation 5A(3) and that the person that she had spoken to:

> "…confirmed that this requirement is still extant, and is separate and additional to the consultation requirements for applications set out in Circular 01/2001 (which require statutory consultation for planning applications affecting the setting of Grade I or II* listed buildings). Our legal team have asked me to ask you if, separately from formal consultations you receive as required by Circular 01/2001 you at the South East Office receive copies of adverts under Reg 5A(3) from other Local Authorities, or if it is not an established practice for such notifications to be sent i.e. if Local Authorities do not send EH copies of such notices in Grade II (unstarred cases)."

39. English Heritage replied on the same day saying:

> "I have made enquiries in our office and we do not generally receive copies of adverts under Reg 5A(3) from other Local Authorities."

40. On 10 March 2015 Kate Barnes, the Principal Solicitor (Planning) with the defendant, emailed Alma Howell, the Assistant Inspector of Historic Buildings and Areas, Sussex and Surrey, pointing out that regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 applied where a Local Planning Authority thought that the development would affect the development of a listed building. It did not distinguish between grades of listed buildings. The regulation required the Planning Authority to send to English Heritage a copy of the publicity notices of the application which she did. Ms Howell replied on 13 March 2015 in the following terms:

> "Thank you for sending us a copy of the notices publishing the above application in accordance with regulation 5A(3) of the Planning (Listed Buildings and Conservation Areas) Regulations 1990. We note that the proposal does not fall within the category for statutory notification under Circular 01/01 and that the application has been decided but is now subject to legal proceedings. I confirm that we do not wish to make any comment on this application."

41. In its detailed grounds of resistance the defendant relied upon the provisions of Circular 01/01 issued by the Secretary of State in 2001 under section 67(4) of the Planning (Listed Buildings and Conservation Areas) Act 1990. As a result the defendant did not send English Heritage a copy of the notices in accordance with regulation 5A(3). It followed the guidance in Circular 01/01 to the effect that because the listed building concerned was Grade II as opposed to Grade I or II* the application was not notifiable. The defendant, therefore, resisted the ground of challenge on the basis that notification in Circular 01/01 was validly issued under primary legislation and that notification applied until that was revoked. Alternatively, if the regulation did require a copy of the notices to be sent to English Heritage that had now been complied with. Regulation 5A(3) contains no deadline for sending the notices.

42. By the time of the hearing the defendant had changed its position. It accepted that there was a duty to notify under regulation 5A(3) which was not satisfied because its notification was post-decision. As a result the defendant resisted ground 1, in relation to English Heritage, only on the basis that the Court should exercise its discretion not to quash the decision.

43. The defendant relied upon a letter from English Heritage dated 16 February 2015 which contained the following paragraph:

> "With regard to the Gullivers Bowls Club, I note that the application affects the setting of a Grade II and falls outside the conservation area. This does not fall within our criteria for consultation as outlined above. However, any local authority may make a special request if they particularly need our advice and the application does not strictly meet the reasons for consultation. It should be noted however, that such request must be clearly made, with a valid reason given and at an early stage."

44. The policy of Historic England on consultation reads:

> "Broadly speaking we must be consulted on:
>
> - listed building consent applications relating to works to Grade I or II* building, or demolition of a Grade II building."

Although those words are within the Charter for Historic England Advisory Services published in April 2015 Diane Russell, confirmed in her witness statement, that it was usual practice for Local Authorities when notifying English Heritage of applications which affect the setting of listed buildings to follow the clear requirements of Circular 01/01. There have been updates to that circular but none affect paragraph 8 which makes it clear that consultation with English Heritage for planning applications outside London is required for development which in the opinion of the Local Authority affected the setting of a Grade I or II* listed building. There is no reference to Grade II. At the time of this application it was the policy and practice not to notify English Heritage.

45. The defendant accepted that regulation 5A(3) superseded the direction in 01/01 but submitted that what English Heritage had weight. The first time English Heritage was notified was on 12 February 2015. Their response can properly be taken to be that given by Alma Howell in her email set out above. The fact the decision had been made does not make English Heritage's position irrelevant. The Court did not have to be cautious about a post-decision comment in the normal way here because this was a response by an independent body with a statutory duty to give a view. The fact is that even if notification had been given there would have been no difference to the outcome.

46. The defendant relied, in particular, on the case of **Kendall v Rochford District Council** [2014] EWHC 3866 (Admin) where Lindblom J dealt with the topic of discretion. He said:

> "114. An obvious feature of the case law on discretion, both domestic and European, is that the court must exercise its discretion paying particular attention to the facts and circumstances of the case in hand. This is well illustrated, for example, in Joicey. As one can see from paragraphs 42 to 44 of Cranston J.'s judgment, the authority's failure in that case to follow the relevant statutory requirements seems to have been egregious – my word, not Cranston J.'s. But in any event that case serves to show very clearly that whenever the court has to exercise its discretion on the granting of relief, it must do so with realism and common sense, and having regard to the particular decision-making process it is considering, viewed as a whole."

47. The defendant's submission is that had consultation occurred it would have made no difference. The claimant's answer is that the only consultation which occurred was after the decision. Until then the defendant had proceeded on an erroneous basis that Circular 01/01 did not require consultation. The response of English Heritage after the decision cannot be relied upon as they had been told that legal proceedings were ongoing. If English Heritage had been aware of the full legal position which required them to be notified it was conceivable that they would have substantive comments. As a result the claimant invites quashing of the decision on the basis of the admitted legal error.

The Victorian Society

48. The claimant submits that the Victorian Society is recognised as a heritage consultee in certain circumstances. She points to the 'Arrangements for Handing Heritage Applications – Notification to Historic England and National Amenities Societies' and the 'Secretary of State (England) Direction 2015'. Paragraph 4 deals with notification to Historic England and National Amenities Societies. Where relevant it reads:

> "4. Notice of applications for listed building consent and of the decisions taken by local planning authorities on those applications must be given:
>
> …
>
> (b) to-
>
> …
>
> (v) the Victorian Society;
>
> …
>
> in the following cases:
>
> (aa) for works for the demolition of a listed building; or

> (bb) for works for the alteration of a listed building which comprise or include the demolition of any part of that building."

It is accepted that there is no statutory duty to consult the Victorian Society here.

49. Nevertheless, the Victorian Society objected in 2006 and it is clear from their letter on that occasion that they wished to be re-consulted on any resubmission. There was a failed attempt to consult on the instant application. The officer report gives a misleading impression that the Society was, in fact consulted, and did not respond whereas no proper consultation had taken place.

50. The claimant submits that the design and effect on the setting of the listed building was central to the key concerns on the part of the members. If the Local Authority had been properly informed of the position with the Victorian Society it is highly likely that the committee would have adjourned their determination until a response had been received from them.

51. The error of fact which gave the impression that the Victorian Society had been consulted significantly misled the committee and was never corrected as part of the oral presentation. Although only three members voted against the approval of the application it may well have been different if members had been told that there had been an omission in relation to the Victorian Society. Members may well have been influenced by officer advice that they did not have the expertise to defend the refusal and the cost of defending any such refusal.

52. The defendant accepted that there had been a failed attempt at consultation with the Victorian Society but contended that was not a legal error when there was not a legal duty to consult with them. It came down, in the defendant's submission, to whether the committee were significantly misled by what was said in the officer report. That said that no comment had been received which was factually correct. It could not be said therefore that the committee were significantly misled.

Discussion and Conclusion

53. Despite a confused and confusing period between the parties and English Heritage when there seemed to be uncertainty on consultation requirements all are now agreed that:

    i) at the material time the defendant was under a statutory duty to notify English Heritage of the application and send to it a copy of each of the notices that it was required to publish or display contained within the regulations;

    ii) that notification and sending of the relevant notices did not occur.

    The purpose of setting a statutory period before which determination cannot occur is to enable a Local Planning Authority to take into account representations relating to the application which are received by them before those periods have elapsed. No party contended that there had been a breach of the determination requirement.

54. The real issue then is whether, in the circumstances of an agreed breach of the relevant regulation in relation to English Heritage with which I agree, the Court should exercise its discretion not to quash the decision on that ground. The exercise of discretion may well be influenced by the outcome in relation to the other grounds of challenge. I deal, therefore, with the issue of discretion at the end of this judgment.

55. In relation to the Victorian Society their position is very different. There was no statutory duty to consult with them in relation to the instant application. They may have preferred to have been re-consulted on any resubmission and it would have been good practice on the part of the defendant to do so but it cannot be said that the defendant fell into legal error by failing to consult them effectively on the instant application.

56. Miss Wigley, counsel on behalf of the claimant, makes too much, in my judgment, of the officer report which says simply that no response was received from the Victorian Society. In my judgment, it is quite impossible to say that the officer report significantly misled the members in so saying. There had been an error in using an out of date email address for the relevant officer on the part of the Victorian Society but, without a statutory requirement to consult with them, it is quite impossible to conclude that:

    i) there has been any legal error in relation to the Victorian Society; and

    ii) the omission, in the circumstances of the case, is one which was material.

57. It follows that the claimant succeeds in relation to Ground 1(i) in relation to English Heritage and fails in relation to Ground 1(ii) in relation to the Victorian Society.

Ground 2: Did the Defendant Misunderstand the NPPF and, in particular, paragraph 74?

58. The claimant submits that there should have been an assessment of open space separate to the assessment which had been undertaken in relation to open space in use for sports and recreational usage. It is submitted that the defendant has not specifically engaged with the criteria of the NPPF on open space.

59. The claimant contends that paragraph 74 appears within chapter 8 of the NPPF which is entitled 'Promoting Healthy Communities'. There is nothing within paragraphs 69 to 78 which limits the role of open space to that which is used actively. Indeed, paragraph 77, where it deals with local green space designation is clearly dealing with other green space which gives the community a wider appreciation. Within the definitions section of the NPPF 'open space' is defined as:

> "All open space of public value, including not just land, but also areas of water (such as rivers, canals, lakes and reservoirs) which offer important opportunities for sport and recreation and can act as a visual amenity."

60. Further, the NPPG promotes a wide interpretation of open space saying that it can take many forms from formal sports pitches to open areas within development. It says that open space, "includes all open space of public value, can take many forms, from formal sports pitches to open areas within a development, linear corridors and

country parks….it can provide health and recreation benefits to people living and working nearby, have an ecological value and contribute to green infrastructure…. as well as being an important part of landscape and setting of built development and an important component in the achievement of sustainable development."

61. Green infrastructure is defined in the NPPF as:

> "A network of multi-functional green space, urban and rural, which is capable of delivering a wide range of environmental and quality of life benefits for local communities."

62. It follows that the criteria in paragraph 74 of the NPPF need to be interpreted to include the quality of the open space. No assessment had been undertaken which showed the open space was surplus to requirements, nor had there been an assessment of the amenity value of the open space; that was a material error.

63. That error was compounded by the fact that in the discussion on the application, as can be seen from the officer notes, the officer had said that the site could be regarded as brownfield land which was wrong given the definition of previously developed land in the NPPF which specifically excludes, "land in built up areas such as private residential gardens, parks, recreation grounds and allotments."

64. The defendant contends that there is a social role in supporting healthy communities. Open space may contribute to both a social role and an environmental role. Chapter 8 is dealing with the social limb of sustainable development. Paragraphs 73 and 74 need to be read together. The requirement in the first of the bullet points under paragraph 74 where it refers to an audit of open space is to that available for active use. It cannot be taken to be an assessment of amenity land or green infrastructure. That is not to say that is irrelevant but it is dealt with elsewhere, in chapter 11, at paragraphs 109 and 114. Open space clearly matters in the planning balance but this part of the NPPF is not referring to a requirement to carry out an assessment of whether there is sufficient open space for visual amenity.

65. The officer report expressly refers to paragraph 74 both in the summary of the relevant paragraphs in the NPPF and in the update to the report. Paragraph 6.9.1 of the officer report shows that the requirements of paragraph 74 of the NPPF as well as the Local Planning Policy were considered. The question is whether the assessment that was carried out should have been wider and included the role of the site as visual amenity.

66. It is clear from other paragraphs within the report that the role of green space was considered (see paragraphs 6.4.2 and 6.8.4) and the extent to which the visual amenity of the site was balanced with the other factors was clearly a primary consideration.

67. The reference to the status of the land whether as brownfield or previously developed needs to be read in context. It was not significantly misleading.

Discussion and Conclusions

68. Paragraphs 73 and 74 of the NPPF read:

> "73. Access to high quality open spaces and opportunities for sport and recreation can make an important contribution to the health and well-being of communities. Planning policies should be based on robust and up-to-date assessments of the needs for open space, sports and recreation facilities and opportunities for new provision. The assessments should identify specific needs and quantitative or qualitative deficits or surpluses of open space, sports and recreational facilities in the local area. Information gained from the assessments should be used to determine what open space, sports and recreational provision is required.
>
> 74. Existing open space, sports and recreational buildings and land, including playing fields, should not be built on unless:
>
> - an assessment has been undertaken which has clearly shown the open space, buildings or land to be surplus to requirements; or
>
> - the loss resulting from the proposed development would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location; or
>
> - the development is for alternative sports and recreational provision, the needs for which clearly outweigh the loss."

69. In my judgment the paragraphs are dealing with public access to high quality open spaces and, separately, opportunities for sports and recreation. Open space is clearly intended to mean something different from sports and recreational facilities in the local area as it is itemised separately. Assessments to be carried out are both quantitative and qualitative and in relation to open space and sports and recreational provision.

70. That the exercise required is wider than just land being used for active use is made even clearer by paragraphs 76 and 77 in particular. They read:

> "76. Local communities through local and neighbourhood plans should be able to identify for special protection green areas of particular importance to them. By designating land as Local Green Space local communities will be able to rule out new development other than in very special circumstances. Identifying land as Local Green Space should therefore be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be designated when a plan is prepared or reviewed, and be capable of enduring beyond the end of the plan period.

> 77. The Local Green Space designation will not be appropriate for most green areas or open space. The designation should only be used:
>
> - where the green space is in reasonably close proximity to the community it serves;
>
> - where the green area is demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
>
> - where the green area concerned is local in character and is not an extensive tract of land."

It is clear that when a local green space designation is applied it is for areas which are demonstrably special to a local community and which hold a particular local significance including beauty, history or tranquillity. None of those attributes are necessarily required for land in active use.

71. The defendant is clearly correct when it submits that the NPPF is to be read as a whole. Within the glossary, 'open space' is defined as including "All open space of public value…which offer important opportunities for sport and recreation and can act as a visual amenity." The assessment required under paragraph 74 has to be consistent with that definition. It follows that the assessment is not to be limited just to areas of land which are for active recreational use. That is not what a true reading of the paragraph says nor, indeed, is it consistent with healthy communities as contained within section 8 of the NPPF. The qualities required for local green space designation make it abundantly clear that green areas can be demonstrably special for a variety of reasons which include, but are not limited to, recreational value.

72. In advising the members the officers made it clear that the Local Action Plan highlighted the need to preserve green open spaces, specifically identifying this site as being of exceptional quality.

73. The claimant contends that the policy and guidance give a broad interpretation of open space. I agree. A proper reading of the policy documents makes that clear. However, that is not to say that the Council was in error in the way that it applied paragraph 74 in the NPPF.

74. The assessment that was submitted with the application by GVA was entitled a 'Leisure Use Assessment'. It makes it clear that it was considering the planning policy framework for bowls facilities, the current demand and need for replacement bowls facilities in the locality and whether the proposals provided adequate replacement in quantitative and qualitative terms to address current need and demand for such facilities. It was not intended to be a comprehensive assessment open space assessment. Notwithstanding that it concluded that:

i) The active bowling green and inactive bowling green were both surplus to the local requirement for bowls greens as there was an overprovision of greens in active use compared to the national average;

ii) That the proposed replacement clubhouse, indoor rinks and outdoor bowling green will provide a better quality and quantity of provision than the existing facilities which were in a poor state of repair.

75. The officer report made it clear that the issue of the loss of one of the few open spaces on the east side of the town centre which the Local Action Plan had highlighted as being of exceptional quality was a matter which had to be considered.

76. Further, the officer report considered the loss of facilities with the redevelopment of the bowls club but went on to consider the value of the site for its openness with public views of the greens. The redesigned proposal which facilitated views through the building with areas of glazing and across the car park, unobstructed by solid fences or ancillary buildings, was regarded as an acceptable balanced approach to maintaining awareness of the open space to the rear. It follows that, in my judgment, whilst an assessment had not been undertaken which clearly showed the open space buildings or lands to be surplus to requirement the loss resulting from the proposed development was one that would be replaced by equivalent or better provision in terms of quantity and quality in a suitable location and thus comply with the second bullet point of paragraph 74. The requirements under the paragraph are not cumulative but alternative so that on any view paragraph 74 was complied with.

77. Notwithstanding that it is clear from a true reading of the officer report that the issue of visual amenity was very much in the minds of the officers both in the content of the report itself and in the way that it is recorded that they addressed the members.

78. Whilst I agree with the claimant, therefore, that in terms of an assessment, on the evidence that I have seen, a comprehensive assessment does not appear to have been undertaken it is of no matter given that the development proposed complied with the second bullet point of paragraph 74 in any event.

79. As to the reference to the land being brownfield, in my judgment, that is a misreading by the claimant of what it recorded that the officer said. It has to be borne in mind that the notes provided are not committee minutes, which have been agreed, but a note of one officer. Having said that Mr Rowland is recorded in those notes to have said as follows:

> "It is a green space but there is a blurring here of whether it is a greenfield or brownfield site, but previously developed land is the nearest. It does include recreational grounds (not previously developed land) but buildings on that site that would require planning permission today if built. So there is an argument to say that it is a brownfield site."

80. He does not say at any time that the land was previously developed or that it was a brownfield site. He said it was nearest to previously developed land and that there was an argument to say that it was a brownfield site but did not say that that was his view or advise committee members to that effect. It cannot be said that he

significantly misled the committee on the words that are recorded and, as I have set out, appropriate latitude needs to be given to the fact that these are not committee minutes.

81. It follows that this ground fails.

Ground 3: Did the Defendant Fail to have Regard to the Correct Designation of the Land as an ACV?

82. On 29 April 2013 the Council listed the 0.7 hectares site of Gullivers Bowls Club as an ACV.

83. Under the Localism Act 2011 a Local Authority must maintain a list of land in its area that is land of community value. Once listed the land remains there for a period of five years beginning with the date of entry.

84. A building or land in a Local Authority's area is land of community value under S88(1) of the Localism Act if, in the opinion of the Authority, it is:

> "(a) an actual current use of the building or other land that is not an ancillary use furthers the social wellbeing or social interests of the local community, and
>
> (b) it is realistic to think that there can continue to be non-ancillary use of the building or other land which will further (whether or not in the same way) the social wellbeing or social interests of the local community."

85. The effect of the listing is to impose a moratorium on the disposal of listed land. Section 95 reads:

> "95. Moratorium
>
> (1) A person who is an owner of land included in a local authority's list of assets of community value must not enter into a relevant disposal of the land unless each of conditions A to C is met.
>
> (2) Condition A is that that particular person has notified the local authority in writing of that person's wish to enter into a relevant disposal of the land.
>
> (3) Condition B is that either—
>
> (a) the interim moratorium period has ended without the local authority having received during that period, from any community interest group, a written request (however expressed) for the group to be treated as a potential bidder in relation to the land, or
>
> (b) the full moratorium period has ended.

> (4) Condition C is that the protected period has not ended.
>
> …
>
> (6) In subsections (3) and (4)—
>
> > "community interest group" means a person specified, or of a description specified, in regulations made by the appropriate authority,
> >
> > "the full moratorium period", in relation to a relevant disposal, means the six months beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal,
> >
> > "the interim moratorium period", in relation to a relevant disposal, means the six weeks beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal, and
> >
> > "the protected period", in relation to a relevant disposal, means the eighteen months beginning with the date on which the local authority receives notification under subsection (2) in relation to the disposal.

86. At present I was told that two community groups were interested in bidding for the land.

87. The claimant submits that the committee were misled about the effect of the listing in discussion. Reliance is placed on the officer notes of the meeting:

> "**Kate Barnes – Planning Lawyer:** Some members have asked about the effect of Gullivers Club as an Asset of Community Value (ACV). This is defined for the purposes of the Localism Act and associated regulations associated with the Community Right to Bid as 'a building or other land whose main use furthers the social wellbeing, or social interests of the local community or has recently done so and is likely to do so in the future'. Where an ACV is to be sold a local community group can buy or bid on the land. The community group has six weeks to confirm if they wish to be considered as a potential bidder. If they so confirm they have six months to put a bid together to buy the ACV. DCLG guidance states that it is open to a local authority to decide whether the listing is a material consideration, where, for example, a change of use is applied and this would be in the context of considering all the circumstances of the case. ACV status does not place any restrictions on what an owner can do with his property as it is planning policy which determines uses for particular sites.

With regard to this, planning applications have to be determined in the normal way in accordance with the development plan unless material considerations indicate otherwise. At present there is no direct case law on what weight is attached to ACV listing. The weight to be given to any material consideration is a matter for the decision-maker, subject to his decision being reasonable and rational in all the circumstances. Each case depends on its merits. Reference has been made to the NE Derbyshire case, but in that case the proposal was also contrary to a planning policy. In making your decision here you will be doing the usual balancing act to see what weight you attach to material considerations in question.

Councillor Mrs Prochak: There are two elements to challenge:

1. The design is not acceptable.

2. It is an Asset of Community Value. (Although not so much a material asset to the public as it is a private site.)

Councillor Ganly: They have understood from Kate Barnes that this is a material consideration from which you can refuse an application.

Andy Rowland: But what asset would be lost? The Bowls Club would remain with new facilities.

Councillor Mrs Williams: Green space, which is a visual asset to the town.

Kate Barnes: The asset has been registered because it is a Bowls Club.

Councillor Mrs Williams: Gullivers put a note on the land to stop disposal – it is still an asset.

Andy Rowland: Listing as an ACV is done under separate legislation.

Councillor Mrs Gadd: Surely we consider this to be a material consideration and insist we would like to refuse it.

Tim Hickling: It can be a material consideration. The point is the site is a Bowls Club. This planning application enables the Bowls Club to remain on the site. The Bowls Club will be retained by the planning permission.

Councillor Mrs Williams: The flats will destroy the street scene, using a coloured development and by putting in a modern block of retirement flats.

> **Tim Hickling:** Going back to the Inspector's comments at the Public Inquiry – the design of the building itself was a reason why the appeal was dismissed. This new design is deemed to be acceptable. We do not think that design is a reason for refusal that can be fully supported. This new proposal addresses the concerns of the Inspector."

88. The claimant submits that to say that the asset was registered because it was a bowls club was a material error. The committee were not advised that the listing was to protect the land as a whole. The committee was, therefore, given incomplete advice which was misleading.

89. The defendant submits that the issue of listing was fully gone into in the appeal to the First Tier Tribunal General Regulatory Chamber. In a decision dated 24 April 2014 the Judge outlined the current use of the site and then continued:

> "8. It seems to me that I should approach the matter recognising that each case will turn on its own facts. Lines will have to be drawn somewhere and so far as possible, those lines should correspond with actualities. In my judgment, Rother were correct to take the nominated site as a whole and to conclude that, as a whole, its current use furthered the social wellbeing or social interests of the local community. It is a feature of some sports clubs to have, at any one time, some facilities that are redundant. In this case it seems to me, having looked at the aerial photographs, that it would be artificial to separate out the old green for the purpose of listing under the Act.
>
> …
>
> 10. Another issue which I need not explore is Dr Stookes' proposal that both greens were a visual amenity for the local community and thus furthered its social wellbeing. He pointed out that some residential care homes overlooked both greens. I would be doubtful about this. It may be wrong to say that something which is merely looked at can never satisfy the test for listing. It is conceivable, for example, that a mural or a statue might do so. In the circumstances of this case, however, I am doubtful whether as a matter of fact I would describe the care home residents overlooking the bowling greens as being a 'use' of them; and it is were, it would surely be ancillary."

90. The defendant submits that listing was upheld on the basis of the bowls club use and the Judge was expressing doubt as to whether amenity could be a use.

91. In the officer report there was the section headed 'Asset of Community Value' which made it clear that the whole site was listed. That was not a block to development but it was open to the local authority to decide whether it was a material consideration. The report made clear that the issue of visual permeability through to the bowling green was a point that not only the planning appeal inspector had considered desirable

but one which had been taken into account as part of the redesign. Even if the claimant was right, therefore, visual amenity was taken into account.

92. In terms of the meeting notes what was said was entirely accurate but even if it was not and visual amenity should have been added in that would have made no difference. The oral and written advice was accurate but in any event visual amenity was considered.

Discussion and Conclusions

93. The First Tier Tribunal dismissed the appeal by the interested party on the decision to list the whole of the area even though it was not all in active use. The Judge concluded that its current use furthered the social wellbeing or social interest of the local community and that it was artificial to separate out the old green for the purpose of listing under the Act.

94. The Tribunal Judge concluded that he did not need to consider and reach a final view as to whether the value to the listing was added by the visual amenity/green infrastructure of the bowling greens.

95. It is clear from the officer report and from the notes of the meeting that the fact that the site was listed as an ACV was dealt with as a material planning consideration. In the circumstances of this case that was clearly an appropriate thing to do. That much is accepted by the claimant.

96. Nevertheless, the claimant continues that the advice of the officers, both orally and in writing in the report, was to advise the committee that the benefit of the listing would not be lost so long as some form of the bowls club remained as part of the proposed development. That it is submitted was a material misdirection. I reject that submission. Read as a whole the officer report makes it clear that the entire site was listed and it was to the entire site that the statutory protection attached. The quality of the existing provision on the site was analysed in the officer report, as also was the effect of listing under the Localism Act, both in terms of the community right to bid and the issue of visual openness.

97. I can see no basis upon which it can be contended that the committee were significantly misled in relation to the asset of community value.

98. This ground fails.

99. That leaves the issue of discretion in relation the only ground upon which the claimant has been successful, Ground 1(i). To that I now turn.

Discretion

100. In **Kendall v Rochford District Council** (supra) the issue was whether to quash a District Allocations Plan which had been adopted when there had been flaws in the plan making process by way of failure to notify the public effectively. Lindblom J found that a partial failure to discharge the requirements for consultation had not resulted in anyone being denied in substance of any right arising under European Law. Nor had it constituted a substantial failure to allow anyone to participate in the

plan making process. Thus, there was not any real prejudice to or any basis upon which the Court could realistically conclude that the outcome of the plan making process would have been other than exactly the same if the breach of the SEA Directive had not occurred.

101. There are no European issues raised in the instant case. The position is, therefore, simpler. The test is whether the Court is satisfied that the decision maker would have reached the same decision: see **Bolton Metropolitan Borough Council v Secretary of State for the Environment** [1990] 61 P&CR 343 and **Simplex GE (Holdings) v Secretary of State for the Environment** [1989] 57 P&CR 306. As Lindblom J made clear in **Kendall** (supra) having considered the case law on discretion both domestic and European:

> "the court must exercise its discretion paying particular attention to the facts and circumstances of the case in hand. … whenever the court has to exercise its discretion on the granting of relief, it must do so with realism and common sense, and having regard to the particular decision-making process it is considering, viewed as a whole." [paragraph 114]

102. The breach which had occurred here is failure to notify English Heritage under regulation 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 as they were in force at the material time. The claimant contends that if the decision is quashed English Heritage will still have to be notified because of transitional provisions which make it necessary to notify them. The comments made by English Heritage subsequent to the decision have been made on their erroneous understanding of the law.

103. It is right that, in terms of notification, English Heritage misunderstood their position at the relevant time and considered that they did not need to be notified for development affecting a heritage asset or its setting below Grade II* when no demolition was involved. It is right to say also that the defendant did not notify English Heritage because of its misunderstanding, at the material time, of the relevant statutory provisions.

104. However, what is clear from a reading of the officer report is that the issue of the effect of the development upon the listed De La Warr Terrace and the relationship of the proposed development with Knole Road were highly material issues and raised by (i) members of the public who objected, and (ii) as a result of the previous decision letter. In the officer report, at paragraph 6.2.1, the appeal decision letter was described as an important milestone and account had to be taken of the inspector's conclusions within it. One of those was that the frontage of the proposed building was within the setting of the De La Warr Parade, a heritage asset of significance in the locality, and so demanded a high quality of design. All of that was set out in the officer report to remind members of the key parts of the previous decision letter.

105. The various amendments which had been made to the design as part of the application being considered by the Council were set out within the officer report and the conclusion reached, in paragraph 6.4.4, that:

> "It now succeeds in delivering a robust design solution of far higher architectural integrity than previous schemes, responding well as it does to the rhythm and street scene characteristics of the surrounding late Victorian villas. Since the principle of building a structure of this scale has already been supported by the planning inspector, it is not considered that the design of this building now adversely affects the character of the area of the setting of the listed terrace to the south. Accordingly it is considered that the proposal is in compliance with Local Plan Policy GD1(iv)(viii), Core Strategy Policy EN2 and EN3 and the requirements of chapters 7 and 12 of the NPPF."

106. Earlier in the report, at paragraph 6.4.1, it was recorded that the applicant had sought to address design issues with revised plans that had been the subject of presentation to, and comment upon, by the Council's design panel and the Council's conservation and design officer. After receipt of the planning application further design comments were made which had resulted in further amended plans which were then considered as part of the application. A comprehensive evaluation of the revised design including comments from the defendant's own expert conservation and design officer had thus taken place.

107. In those circumstances it is difficult to see what a consultation response from English Heritage would have added to the overall appraisal considered within the officer report. There is nothing to suggest that English Heritage would have taken a negative stance to the revised development proposals. Their stance may have been positive. They may not have responded at all. Their stance at the time is unknown. The public were able to respond and did so. The post-decision correspondence between the defendant and English Heritage I have attached no weight to because:

    i) it is after the decision making process was complete; and

    ii) it contains views expressed in the knowledge of ongoing legal proceedings.

108. The key point is that, even taking the position at the most favourable to the claimant, which is that English Heritage would have responded and responded in an adverse way on the submitted design, the degree of scrutiny and care with which the defendant considered the revised application would not have been any different. The defendant was aware throughout of the importance of the revised design on the setting of the Grade II listed building opposite the development site. It regarded that factor as a highly material consideration and took it very much into account as part of its decision making process.

109. In those circumstances I have no doubt that the decision would have been the same had English Heritage responded on the application as a result of notification and I exercise my discretion not to quash the decision.

110. In the circumstances this claim fails. I invite submissions as to costs and the final Order.