Neutral Citation Number: [2023] EWCA Civ 172

Case No: C1/2022/001490

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**PLANNING COURT**
**HHJ WALDEN-SMITH sitting as a Judge of the High Court**
**CO/836/2021**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2023

**Before:**

**LORD JUSTICE BEAN**
**LORD JUSTICE MOYLAN**
and
**LORD JUSTICE LEWIS**

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**Between:**

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| **THE KING (on the application of GLENN KINNERSLEY)** | **Appellant** |
| **- and -** | |
| **MAIDSTONE BOROUGH COUNCIL** | **Respondent** |
| **PAUL DIXON** | **Interested Party** |

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**Harriet Townsend** (instructed by **Richard Buxton Solicitors**) for the **Appellant**
**Giles Atkinson** (instructed by **Mid Kent Legal Services**) for the **Respondent**
**The Interested Party** did not appear and was not represented.

Hearing date: 8 February 2023

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 22 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## LEWIS LJ:

## INTRODUCTION

1. This appeal concerns the proper interpretation of a particular policy, Policy DM5, in the Maidstone Borough Local Plan ("the Local Plan") which deals with developments on previously developed land, referred to as brownfield land. In essence, the policy provides that the residential development of brownfield sites in the countryside which are not residential gardens will be permitted if it meets certain criteria. Those include a criterion that the "site is not of high environmental value". The principal issue on this appeal is the meaning of "site". Does it mean the whole of the site which is the subject of the application for planning permission (including the land on which the residential development is to take place and any residential gardens forming part of that application site)? Or is it limited to the land where the residential development is to take place (leaving out of account that part of the application site which is residential garden)? The appellant, Mr Glenn Kinnersley, says it is the former. The respondent local planning authority, Maidstone Borough Council, says it is the latter. HHJ Walden-Smith sitting as a judge in the High Court ("the Judge") decided it was the latter. A secondary issue concerns the question of whether the respondent failed to have regard to earlier views of the conservation officer which were said to be a material consideration.

## THE LEGAL FRAMEWORK

2. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides, in essence, that applications for planning permission must be determined in accordance with the development plan for the area unless material considerations indicate otherwise. In the present case, the development plan includes the Local Plan. Relevant policies include Policy SP17 on the countryside which is defined to include all those areas outside the Maidstone urban area, rural service centres and larger villages. The proposed redevelopment in the present case is within the countryside. Paragraph 1 of Policy SP17 provides that:

> "Development proposals in the countryside will not be permitted unless they accord with other policies in this plan and they will not result in harm to the character and appearance of the area."

3. For present purposes, the material policy is DM5 which provides as follows:

> "Policy DM5
>
> **Development on brownfield land**
>
> 1. Proposals for development on previously developed land (brownfield land) in Maidstone urban area, rural service centres and larger villages that make effective and efficient use of land and which meet the following criteria will be permitted:
>
>  i. The site is not of high environmental value; and

> ii. If the proposal is for residential development, the density of new housing proposals reflects the character and appearance of individual localities, and is consistent with policy DM12 unless there are justifiable planning reasons for a change in density.
>
> 2. Exceptionally, the residential redevelopment of brownfield sites in the countryside which are not residential gardens and which meet the above criteria will be permitted provided the redevelopment will also result in a significant environmental improvement and the site is, or can reasonably be made, accessible by sustainable modes to Maidstone urban area, a rural service centre or larger village.

4. There is explanatory text in the Local Plan dealing with Policy DM5. Paragraph 6.38 of that text provides that "[r]esidential gardens in urban and rural areas are excluded from the definition of a brownfield site".

## THE FACTUAL BACKGROUND

### *The Grant of Planning Permission*

5. The Interested Party, Mr Paul Dixon, applied for planning permission in respect of an area of land of approximately 0.2 hectares and comprising two barns which were joined and used together, an historic walled garden to the rear, and a proposed driveway connecting with a nearby road. That is the application site and is marked in red on the application for planning permission. The barns are currently being used as a photography studio and are referred to here as the studio building. The application for planning permission was, broadly, aimed at the conversion of the studio into two dwellings, and the demolition of an historic wall forming part of the walled garden and its reconstruction at a lower height and with two openings within the wall to facilitate access from each dwelling to the garden. The garden would be subdivided into two by a hedge. The application site is within the curtilage of Hollingbourne House, which is to the south west. That is a Grade II listed Georgian house. There are two cottages, Mulberry Cottage and Wells Cottage, attached to Hollingbourne House. Mr Dixon also applied for listed building consent for the demolition and reconstruction of the historic wall as the wall is also listed.

6. There was a detailed officer's report dealing with the application for planning permission. That described the site. It set out the planning history. It noted that a previous proposal was rejected in 2018 and set out the reasons why it had been refused. It also noted that planning permission for a different scheme had been granted in 2019 but that that permission had been quashed on judicial review as it was accepted that the planning authority had failed to identify the setting of the listed building (Hollingbourne House) and to assess the impact of the proposal on the listed building.

7. The officer's report then described the proposal, the relevant policies and summarised the consultation responses received. At section 6, it began its appraisal. It identified

eight key issues one of which was "Brownfield Land DM5 and sustainability of the location". It dealt with that topic at paragraphs 6.43 to 6.68. At paragraphs 6.43-6.44, it states:

> "6.43 The Local Plan (paragraph 6.38) excludes residential garden land in both urban and rural locations from the definition of brownfield land.
>
> "6.44. In this context, the land to the rear of the studio building (that is associated with the two cottages and will be retained as residential garden land) is not brownfield land. The studio building with the existing commercial use is located on brownfield land."

8. The report then summarises Policy DM5 noting that the relevant part is paragraph 2 and identifying the four relevant criteria which included the following "a) the site is not of high environmental value" and "b) the redevelopment will result in a significant environmental improvement". It then assessed those matters under a heading of "Consideration of DM5 a) and b) above". At paragraph 6.47, it said the following:

> "6.47. The two key questions here are whether the large commercial building on the site is currently of high environmental value, and whether the 'redevelopment' will result in a significant environmental improvement to this building".

9. The reference to the commercial building is a reference to the existing studio building. The report then assesses the existing building against the criteria in Policy DM5 and concludes at paragraph 6.68 that:

> "6.68. This brownfield site in the countryside site is not on a site of high environmental value, the proposal will result in significant environmental improvement, the density reflects the character and appearance of the area and the site can reasonably be made accessible by sustainable modes to a larger village and has the benefit of removing a use that would have higher trip generation. After these considerations the proposal is in accordance with policy DM5 of the adopted Local Plan. The proposal is also in line with advice at paragraph 118 of the [National Planning Policy Framework] that states that planning decisions should encourage multiple benefits from rural land."

10. The officer's report also assessed heritage and noted the officer's conclusion that the current application building had a negative impact on the setting of Hollingbourne House and the proposal would cause less than substantial harm to it. The officer's report recommended that planning permission be granted.

11. The respondent's planning committee met on 17 December 2020 and resolved to grant planning permission, subject to conditions, and listed building consent. Planning permission was formally granted on 21 January 2021 for:

> "Demolition of the rear section of the building and erection of replacement structure, and conversion of front section of building including external alterations, to facilitate the creation of 2 dwellings with associated parking and garden areas. Demolition of existing derelict and unstable (north-east facing) garden wall, reconstruction on existing line at reduced height with 2 additional openings, repairs, restoration of other garden walls and restoration of 1 sunken glasshouse."

12. Listed building consent for the demolition of the existing wall and its reconstruction was also granted on 21 January 2021.

***The Claim for Judicial Review***

13. The appellant, who is the owner of Hollingbourne House, sought judicial review of the grant of planning permission and listed building consent. It is common ground that the two stand or fall together. There were four grounds of claim but, for present purposes, it is only the first two that are material. First, the appellant contended that the respondent had misinterpreted Policy DM5 as it had had regard only to the existing studio building when deciding whether the "site" was of high environmental value and failed to have regard to whether the site as a whole, that is, the studio building, the walled garden and driveway, was of high environmental value. The second ground was that the respondent had taken an inconsistent approach to the assessment of the contribution made by the existing building. The officer had considered that the existing building had a negative effect on the setting of Hollingbourne House whereas previous officers had assessed the existing studio building as having a neutral impact. That change altered the baseline for assessment of the heritage impact.

14. The Judge dealt with ground 1 in the following terms:

> "35. The claimant's contention that the manner in which MBC has applied DM5 is artificial, and an impermissible restriction of the scope of the policy and offends against the clear wording of DM5, is not a contention with which I can agree. DM5 is clearly worded. It applies to this development but it expressly does not apply to residential gardens. The officer clearly applied the policy and considered the correct issues in coming to the conclusion he did. The policy is only applicable to that part of the site which is brownfield.
>
> 36. The claimant is relying upon an incorrect interpretation of DM5 in an effort to show that the development is contrary to DM5. The officer's report correctly refers to the relevant parts of DM5 and to the relevant guidance on the application of DM5. There was no proposal for the development of any part of the residential garden. The planning officer properly focussed on whether the proposed works would fulfil the policy considerations."

15. In relation to ground 2, the Judge held that any inconsistency between the views of earlier conservation officers and the current planning officer as to the impact of the existing studio building on the setting of Hollingbourne House was not material. The respondent's planning committee was not considering whether the proposals were removing something that was negative or damaging to the significance of the listed building but rather they were considering whether what was put in its place was damaging to the setting of the listed building. Concentration on an inconsistency between whether the existing building had a neutral or negative impact was not where the focus should be. The Judge dismissed this ground of claim, and the other grounds, and dismissed the claim for judicial review.

16. Coulson LJ granted permission to appeal on two grounds, which correspond to grounds 1 and 2 of the claim. He refused permission to appeal on the other grounds.

## THE FIRST ISSUE – THE PROPER INTERPRETATION OF DM5

### *Submissions*

17. Ms Townsend submitted that the word "site" in paragraph 1.i of Policy DM5 means the whole of the application site. That is the natural meaning of that word. That is how the word "site" is used in other parts of the Local Plan. Further, the proposed redevelopment here involved parts of the walled garden, namely the wall itself and two patio areas. In addition, the aim of the Local Plan policies was to prevent redevelopment of residential gardens in the countryside. There would be no purpose in excluding the area of the walled garden from consideration of whether the site as a whole was of high environmental value in determining whether it met the criteria for redevelopment. She submitted that the respondent therefore erred in considering only part of the application site, that is the studio building.

18. Mr Atkinson for the respondent submitted that Policy DM5 was not intended to apply to residential gardens. They were excluded from the scope of that policy. That was consistent with the explanatory text to the policy which said, at paragraph 6.38 that "residential gardens in urban and rural areas are excluded from the definition of a brownfield site". Consequently, the reference to "site" in paragraph 1.i of DM5 should be interpreted to mean the site excluding the residential garden.

### *Discussion*

19. This issue concerns the proper interpretation of a policy in a development plan. Planning policies should be interpreted objectively, in accordance with the language used, read in its proper context. They should not be interpreted as if they were statutes or contracts. See, generally, *Tesco Stores Ltd. v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13, [2012] PTSR 983, and see the summary of relevant principles set out by Holgate J. in *Rectory Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 2098 (Admin), [2021] PTSR 143 at paragraphs 43 to 45.

20. The context is that Policy DM5 is dealing with development on previously developed land (which it refers to as "brownfield land"). Paragraph 1 provides that the residential development of previously developed land in urban areas must meet certain specified criteria including that the site is not of high environmental value and

that the density of the housing is acceptable and consistent with policy. Paragraph 2 provides that exceptionally, the residential redevelopment of previously developed land in the countryside (but not land which is a residential garden) may be permitted provided that certain criteria are met. Those are that (1) the "site is not of high environmental value" (2) the density is acceptable (3) "the redevelopment will also result in a significant environmental improvement" and (4) the site is, or can reasonably be made, accessible.

21. First, on the natural interpretation of the words of Policy DM5, read in context, the reference to "site" in paragraph 1.i means the application site, that is, the site which is the subject of the application for planning permission. That is how the word "site" is used in other parts of the Local Plan. By way of example, Policy DM1 indicates that proposals should incorporate "natural features such as trees, hedges and ponds worthy of retention within the site". The reference to "site" there must mean the application site and cannot be read as excluding parts of the area in respect of which planning permission is sought.

22. That interpretation also reflects the difference between the words used in the main body of paragraph 1 and the criteria in paragraph 1.i. The paragraph itself provides that redevelopment on "previously developed land" (defined as "brownfield land") will be permitted if it meets certain criteria. The criterion in paragraph 1.i is that the "site" is of high environmental value. The use of a different word, "site", instead of the phrase "brownfield land" or "previously developed land" suggests that "site" may have a different meaning or scope. The obvious difference will be where the application site includes "previously developed" or "brownfield land" together with other land. In those circumstances, the environmental value of the whole of the site (not simply the brownfield, or previously developed, land) will need to be assessed. Similarly, when paragraph 2 refers to the redevelopment of "brownfield sites", it requires that specified criteria be met including those in paragraph 1.i. that the "site" is not of high environmental value. Paragraph 2, therefore, distinguishes between the area where redevelopment is to be permitted and the "site". The natural inference is that the reference to the "site" is to the application site as a whole.

23. Secondly, that meaning accords with the purpose underlying DM5. The aim is to ensure that redevelopment will take place on previously developed land only if the site is not of high environmental value. Where an application site consists both of previously developed land (which may be redeveloped) and other land such as a residential garden (where redevelopment is not permitted), it does not accord with the purpose of the policy if only the environmental value of part of the application site is assessed and if the "protected" part (the residential garden) is left out of account.

24. Thirdly, the premise upon which the respondent proceeded is mistaken. They considered that the "policy" did not apply to residential gardens as the explanatory text made it clear that residential gardens were excluded from the definition of a brownfield site for the purpose of Policy DM5. That is, however, to equate the policy as a whole with the definition of "previously developed land". It is clear that

residential gardens in the countryside will not benefit from the presumption that redevelopment will be permitted if certain specified criteria are met. That does not mean, however, that other aspects of the policy should not apply to residential gardens. In particular, where residential gardens together with other previously developed land form part of a single application for redevelopment, there is no reason why other parts of Policy DM5 cannot apply. In particular, there is no reason why the residential garden area forming part of the application for planning permission should be left out of account when deciding if the "site" as a whole is of high environmental value.

25. In the present case, it is clear that the officer's report only considered whether the existing studio building was of high environmental value. That follows in part from paragraphs 6.43 and 6.44 of the report which concluded that the residential garden was not part of the brownfield land. It appears most clearly from paragraph 6.47 and following where the officer considered whether "the large commercial building", that is the studio building, was of high environmental value. He did not consider whether the application site, that is the existing building, the walled gardens and the land connecting with the road, was taken as a whole of "high environmental value". For that reason, the respondent erred in its interpretation and application of Policy DM5. I would quash the planning permission, and the listed building consent and remit the matter to the respondent for it to consider the matter afresh. The respondent will need to determine whether or not the application site as a whole is of high environmental value.

26. The respondent will also have to assesses whether the other criteria are met including whether the proposed redevelopment will result in a significant environmental benefit. That latter consideration is not tied to any particular geographic area. The local authority will have to consider the proposed redevelopment as a whole (and here the proposed redevelopment includes the changes to the existing studio building and the changes to the wall forming part of the walled garden). The significant environmental improvement may be to the whole of the application site, part of the application site (e.g. the repair of the historic wall) or to areas outside the application site, or a combination.

27. This consideration also explains why interpreting "site" in paragraph 1.i of Policy DM5 as meaning the application site will not lead to other difficulties. In particular, it was suggested in argument that the application could be drafted in a way which excluded the residential gardens so, for example, the application would only be for permission to redevelop the studio building and the application site would not include the walled garden. As a matter of fact, that would not be a practical proposal here as the redevelopment presupposes that the walled garden will be divided into two

separate gardens, one for each of the two dwellings, and that would require work to the wall to provide two openings. More significantly the redevelopment, in this scenario, would comprise only the demolition and rebuilding of the studio building. That more limited redevelopment would still need to result in a significant environmental improvement in the way described above. If all that was to be done was to replace the existing studio building with a different building, it may well be that that criterion would not be met.

## THE SECOND GROUND – MATERIAL CONSIDERATION

### *Submissions*

28. Ms Townsend submits that the grant of planning permission was unlawful as there was an inconsistency between the decision in the present case and earlier expressions of view by the respondent's then conservation officer which was not explained by the officer's report. Ms Townsend submitted that at various stages in the officer's report he referred to the impact of the existing studio building as negative and the proposal as having a less than substantial effect on the listed building. This she submitted set the baseline for assessment of the impact of the proposed redevelopment on the listed building. Previously it had been implicit that the conservation officer had considered that the effect of the existing studio building was benign or neutral as if that were not the conservation officer's view, the officer would have said so explicitly.

29. Mr Atkinson submitted that the Judge below was correct to conclude that any inconsistency was not critical as the issue was the effect of the current proposals on the listed building.

### *Discussion*

30. The existing case law establishes that a decision of a planning inspector or a local planning authority on a critical issue such as the interpretation of planning policy, aesthetic judgments, or assessments of need may depending on the circumstances, be a material consideration for subsequent planning decisions. If a subsequent decision-maker is to depart from the conclusion on such an issue, he will need to give reasons for doing so or there will be a risk that a court would conclude that the subsequent decision-maker failed to have regard to a material planning consideration: see *North Wiltshire District Council and the Secretary of State for the Environment and Clover* (1992) 65 P. & C.R. 137 especially at 145 to 146. If a decision is quashed, that decision is not capable of giving rise to legal effect. But if the decision is quashed for reasons which do not affect the conclusions of the decision-maker on a specific issue, the conclusions on that issue may be a material consideration for subsequent decision-makers: see per Coulson J. in *Vallis v Secretary of State for Local Government* [2012] EWHC 578 (Admin) cited in *R (Davison) v Elmbridge Borough Council* [2019] EWHC 1409 (Admin), [2020] 1 P. & C.R. 1 and see *Fox v Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198, [2013] 1 P. & C. R. 152.

31. The first document relied upon by the appellant is a record of the conservation officer's response to consultation on an application for planning permission for conversion of the studio building into two dwellings in 2018. The officer commented on the studio building, referring amongst other things to "the long, linear qualities of

the cowshed, its pitched slate roof and its simple agrarian form." Ms Townsend submitted that it is implicit in this and other comments that the then conservation officer considered that the existing studio building was neutral or benign in its impact or the officer would have said so. The refusal of planning permission was made for other reasons. The second document is a brief note of advice given by the then conservation officer when a different proposed redevelopment was granted planning permission. The officer commented that she was satisfied that the conversion of the barns would not have a negative effect. Ms Townsend again submitted that this amounted to a conclusion that the effect of the existing studio was neutral or benign which was unaffected by the subsequent quashing of the planning permission. The planning officer therefore had to explain why he was taking a different and inconsistent view.

32. I do not consider that either of the documents relied upon amounts to a material consideration that required the planning officer in the present case specifically to give reasons as to why he was departing from their earlier reasoning. The first contains general expressions of view about aspects of the existing building contained in a consultation response. It is not possible on the facts of this case to discern any clear or implicit conclusion on a critical issue to do with the assessment of the impact of the existing studio buildings such that any later expression of a different view had to refer to and explain the departure from that earlier view. Further, the application for planning permission was refused and it is difficult to see that that refusal would amount here to an endorsement of any views on the existing building expressed by the conservation officer in the course of considering the application. Similarly, on the information before this court, I do not consider that the comments of the conservation officer in the second document that she was satisfied that a different proposed development did not have a negative impact on the adjacent heritage assets amounts to a clear conclusion on the assessment of the impact of the existing buildings. The grant of planning permission was subsequently quashed. It could not, however, be said that that left in place any discrete decision on a critical issue concerning the impact of the existing building.

33. In any event, I am satisfied that, reading the planning officer's report as a whole, the focus was on the effect of the proposed redevelopment on the listed building. In that regard, he considered that the "impact of the proposal on the significance of this heritage asset will be less than substantial" (see paragraph 6.133 and repeated at paragraph 6.155 of the report). Any difference between the current planning officer's assessment of the existing building and any earlier view was not critical or material to the advice that the officer was giving to the planning committee. The officer's advice was not based on any difference in the assessment of the impact of the existing buildings. For those reasons, I do not regard the second ground of appeal as established.

## CONCLUSIONS

34. The respondent failed properly to interpret Policy DM5 in that it failed to consider whether the application site as a whole had environmental value. Rather it only considered whether part of the application site, that is, the existing studio building, had a high environmental value. For that reason, I would quash the planning permission and the listed building consent and remit the matter to the respondent. It will have to decide whether or not the application site, comprising the studio building,

the walled garden and the land connecting with the road, has high environmental value and whether the other criteria in DM5 are satisfied.

**MOYLAN LJ**

35. I agree.

**BEAN LJ**

36. I also agree.