Neutral Citation Number: [2019] EWHC 3437 (Admin)

Claim Nos: 813, 989, 1488 and 1648/2019

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

B e f o r e :
MR JUSTICE WAKSMAN

CITY & COUNTRY BRAMSHILL LIMITED

Claimant/Appellant

and

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

First Defendant/Respondent

HART DISTRICT COUNCIL

Second Defendant/Respondent

and

HISTORIC ENGLAND

Third Defendant/First Interested Party

THE NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY

Second Interested Party

James Strachan QC and **Ned Helme** (instructed by Pinsent Masons LLP, Solicitors) for the Claimant/Appellant
Guy Williams and **Alistair Mills** (instructed by the Government Legal Department) for the First Defendant/Respondent
The Second Defendant/Respondent not appearing or being represented
Richard Ground QC and **Ben Du Feu** (instructed by Historic England Legal Department) for the Third Defendant/First Interested Party
Melissa Murphy (instructed by National Trust Legal Department) for the Second Interested Party

JUDGMENT

Hearing dates: 12-14 November 2019

INTRODUCTION

1. These proceedings are brought pursuant to ss288 and 289 of the Town and Country Planning Act 1990 ("the Act") against numerous aspects of a decision letter of a Planning Inspector dated 31 January 2019 ("the DL"). The underlying Inquiry opened on 31 October 2017 and closed on 9 February 2018 after 26 days of hearing and two site visits. The Claimant/ Appellant, City & Country Bramshill Ltd ("C&C") is the present owner of the appeal site at Bramshill, Hook, Hampshire ("the Site").

2. The Site is spread over 106 hectares containing the following:

   (1) a Grade I-listed 17th-century Jacobean mansion ("the Mansion") together with some other smaller Grade I and II listed buildings, and adjoining gardens;

   (2) a Grade I-listed registered park and garden ("RPG") which includes a lake; and

   (3) a number of modern buildings including residential units, a building called Foxley Hall, a sports hall and other associated structures, all of which were part of a national police college built at the site after the Home Office purchased it in 1952 ("the Modern Buildings"). On any view, the Modern Buildings are inappropriate in their present setting having regard to the Mansion and the RPG. However they were created without any planning constraints because of the exemption from such laws applicable to government departments at the time of their construction.

3. C&C is a developer specialising in the development of historic and heritage sites. It bought the Site from the Home Office in 2015.

4. The appeals heard by the Inspector (on behalf of the First Defendant/Respondent ("the Secretary of State")) all arose from the refusals on the part of the local planning authority, Hart District Council ("HDC"- the Second Defendant/Respondent in these proceedings but which has played no part in them) to grant various planning permissions and its decisions to issue various enforcement notices.

5. Useful photographs of the Mansion and its grounds are at 5/6/2129-2134 of the Bundle, the last of which shows an aerial view of the Site with the Mansion in the foreground, the distinctive shape of Foxley Hall to the south-east of the lake and the sports hall to the south-east of Foxley Hall. The remainder of the Modern Buildings can be seen to the south and west of the lake. An existing site plan for it can be seen at A/43. Here the Mansion appears as the shaded building B001. The historic main access to the Mansion is known as Main Drive and on the plans was in a north-easterly direction up to the left of the Mansion shown in grey. A second access to the Mansion called Reading Drive ran from northwest to southeast on the plan through an area now covered by the Modern Buildings, crossing the northern end of Mansion Drive, and running north of the Mansion itself and the nearer walled gardens. Running from the Mansion north-eastwards to and then beyond Reading Drive, between the two rows of trees, is a formal walk.

6. I now set out the essential details of the various proposals made by C&C by reference to their appeal numbers as they appeared before the Inspector and retained before me:

(1) Appeal 1: conversion of the Mansion into 16 apartments and the adjoining stable block into 5 apartments;

(2) Appeal 2: conversion of the Mansion into a single dwelling;

(3) Appeal 3: conversion of the Mansion into B1 office space;

(4) Appeal 4: creation of 235 houses to the west of Reading Drive (looking at A/43 and A/47) across the area shown on the plan as Application 4. Most of the Modern Buildings in that area would be demolished to enable the new development although a few of them would be retained. This area can also be seen in plan A/45 and A/47;

(5) Appeal 5: this was an addition to Appeal 4 i.e. it would not take place without the Appeal 4 development and consisted of a further 14 houses southwest of the Appeal 4 site (looking at plan A/43) in the area shown thereon as "Application 5";

(6) Appeal 6: this is similarly dependent on Appeal 4, entailing the creation of 9 houses to the north of the lake as shown in the area marked "Application 6".

7. As for Appeals 7-33: Appeal 7 seeks planning permission for the use of 51 existing residential units on the Site as separate C3 dwelling houses, as opposed to housing ancillary to the C2 function of the Site when it was a college, strictly a "residential institution". On 2 August 2013 a certificate of lawful use in that respect was issued ("the CLEUD"). Of the 51 units, 26 were the subject of enforcement notices issued by HDC on the basis that their present occupation was a material change of use. The appeals against those enforcement notices constituted Appeals 8-33. In respect of those appeals, Appeal 7 was only necessary in relation to any house where its appeal against the material change of use limb of the enforcement notice failed. If the latter appeal succeeded (because the Inspector found no material change of use anyway) Appeal 7 would be unnecessary in respect of that house.

8. Appeals 15 and 17-33 concerned enforcement notices issued in respect of the use of 18 houses on Lakeside Drive and Reading Drive North i.e. near the lake. The Inspector held that there was no material change of use here and so (a) the enforcement notices were set aside and (b) Appeal 7 in relation to them became academic although it was considered separately by the Inspector.

9. As for Appeals 8-14, concerning enforcement notices issued in respect of houses further southwest in Green Ride Close, the Inspector upheld the enforcement notices and accordingly unless Appeal 7 succeeded (by giving them a new planning permission for C3 use) the relevant enforcement notices would stand. The same is true of Appeal 16 (2, Lakeside) which was a house in multiple occupation and it could not have been argued that there had not been a material change of use.

10. As for the other 25 of the 51 houses, the enforcement notices originally issued were later withdrawn since those houses were not in occupation anyway. But they still formed part of the Appeal 7 appeal.

11. In addition,

(1) Appeals 1-3 would all provide for the demolition of some of the Modern Buildings in the vicinity of the Mansion;

(2) Appeals 4-6 would bring in the demolition of all of the Modern Buildings on the Site marked in red at A/43. The small number of retained buildings are shown there in grey. It is now accepted that Appeal 4 itself would bring all of that demolition. There is an issue between the parties as to when that position became clear for the purpose of the Inquiry, as opposed to Appeals 5 and 6 each contributing some of the demolition as distinct from Appeal 4;

(3) Appeals 5 and 6 would also provide a cross-subsidy for necessary heritage repairs. But the nature of that subsidy depended on whether Appeals 1 or 3 were granted, as opposed to Appeal 2. In the former case, the cross-subsidy would to Mansion repairs only. In the latter case, Appeals 5 and 6 would both have funded repairs to the Mansion, but the cross-subsidy to the Mansion repairs from Appeals 5 would be reduced on the basis that all or most of the necessary repairs would by then have been undertaken by the new single purchaser, and spent instead on repairs to other listed structures;

(4) Finally, every planning permission appeal, save for Appeal 3, included the provision of a SANG ("Suitable Alternative Natural Green space"). This is in the context of the fact that a number of the buildings (either existing or to be created) fall within the 5km zone of influence, and some within the exclusion zone, being 400 m of the boundary of a Special Protection Area ("SPA") adjacent to the Site. I refer to this in more detail below.

12. The application/appeals before me arise out of the Inspectors decisions to refuse all the planning appeals save under Appeals 1, 2 and 3 and to dismiss enforcement appeals 8-14 and 16. They are resisted in their entirety by the First Defendant, the Secretary of State, representing the Inspector. At the Inquiry, there were additional interested parties represented. They included Historic England (formerly English Heritage) ("HE") and the National Trust ("NT"). Both of those parties have appeared in these proceedings before me essentially in relation to grounds concerned with heritage matters. They also seek the dismissal of the applications challenging the decisions on Appeals 4-6.

13. The Secretary of State accepts that if I find that the Inspector made an error that led to a material error in the balancing exercise, this would require the quashing of the decision. Further, that whether or not the decision would have been the same would depend on the ground of challenge which was successful. It is accepted by all sides that I cannot meaningfully make any decision on the question of discretion until I have determined the various grounds of challenge and then heard focused submissions on the question of discretion. The same applies to the separate applications/appeals against the particular costs orders made by the Inspector in two later decision letters dated 14 March 2019. I therefore say no more about either of these matters at this stage.

THE DECISION LETTER

14. The body of the DL consists of 433 paragraphs over some 78 pages together with schedules. The Inspector considered all of the planning permission appeals (i.e. 1-7) by reference to 5 main issues set out at paragraph 23, namely:

(1) Whether the proposals would provide appropriate sites for development having regard to planning policies that seek to control the location of new development and their sustainability credentials;

(2) The effect of the proposed developments on the character and appearance of the area;

(3) Whether the works and developments would preserve the listed buildings and registered park and garden or their settings, or any features of historic interest which they possess;

(4) The effect of the developments on ecological interests in particular with regard to the Thames Basin Heaths Special Protection Area ("the SPA"); and

(5) The effect of the developments on highway safety.

15. She reached conclusions on the relevant appeals by reference to each main issue, as follows:

(1) "I conclude that appeals 1, 4, 5, 6 and 7 - 33 would not provide appropriate sites for housing development in respect of their location and sustainability credentials. As such these appeals would not be in accord with Local Plan policy T 14 or the objectives of national planning policy.

I conclude that appeal 2 would be an appropriate site for a single dwelling. Appeal 3 would be an appropriate site for offices given the fallback position. Appeals 2 and 3 would be in accord with local and national planning policies in this regard. (Paragraphs 91-92)

(2) I conclude that appeals 4, 5 and 6 would be harmful to the character and appearance of the area. As such they would not be in accord with Local Plan policies GEN 1, GEN 3 and GEN 4, or be in conformity with the objective of national planning policy to protect and enhance the natural environment.

I conclude that appeals 1, 2, 3 and 7 - 3 3 would not be harmful to the character and appearance of the area and would be in conformity with Local Plan policies GEN1, GEN2, GEN3 and GEN 4 and national planning policy in respect of protecting and enhancing the natural and environment. (Paragraphs 119-120)

(3) I conclude that appeals 2 and 3 would preserve the listed buildings and RPG and their settings and their features of historic interest. They would be in accord with Local Plan polices CON 12, CON 17 and CON 18 and the objectives of national planning policy.

I conclude that appeals 1, 4, 5, 6 and 7 - 3 3 would not preserve the listed buildings and RPG and their settings and their features of historic interest. They would not be in accord with Local Plan polices CON 12, CON 17 and CON 18 (appeal 1 only) and the objectives of national planning policy. (Paragraph 262-263)

(4) I conclude that appeals 2 and 3 would not have an impact on the integrity of the SPA subject to the implementation of mitigation and avoidance measures secured under conditions. The proposals would be in accord with Local Plan policy NRM6.

Appeals 1, 4, 5, 6 and 7 - 3 3 all relate to residential development. The appeals were presented with mitigation and avoidance measures based on the exceptional circumstances of the case (appeal 1) or through the provision of a SANG and SAMM contributions in line with Local Plan policy NRM6. The assumption in all cases appeared to be that mitigation and avoidance measures would be required as there would be likely significant effects from the proposed residential development.

Given the *People over Wind* decision and my conclusions in relation to appeals 2 and 3, such measures could not be taken into account at screening stage. As competent authority it would be necessary for me to undertake an appropriate assessment. This is only required in instances where a competent authority is minded to undertake, or give any consent, permission or other authorisation for, a plan or project. As I have found all other appeals to be unacceptable on other grounds, it is not necessary for me to carry out an appropriate assessment on these appeals and I have not done so. (Paragraphs 337-339)

(5) I conclude that none of the appeals would result in an unacceptable risk to highway safety subject to the highway improvements and travel plan provided through obligations in the section 106 agreement or under conditions. As such the proposals would be in accord with Local Plan policies T14, T15 and T16 and the objectives of national planning policy." (Paragraph 353)

16. The Inspector then stated her overall conclusions as follows:

"415. I conclude that appeal 1 would be located in an unsustainable location and would not preserve the special qualities of the listed building. These matters are not outweighed by public benefits. As such it would not comply with Local Plan policies T14, CON 17 and CON 18 and national planning policy. For the reasons above I conclude that appeal 1 should be dismissed.

416. I conclude that subject to the imposition of conditions and obligations within the section 106 agreement, appeals 2 and 3 are acceptable proposals. They would provide appropriate sites for development, would preserve the listed buildings and RPG, would not have an adverse effect on ecological interests and would not give rise to an unacceptable risk to highway safety. They would be in accord with Local Plan policies GEN 1, GEN 2, GEN 3, GEN 4, NRM6, CON 12, CON 17, CON 18, T 14, T 15, T16 and national planning policy. I conclude that appeals 2 and 3 should be allowed.

417. Appeals 4, 5 and 6 would not provide appropriate sites for development being in an unsustainable location and resulting in isolated housing in the countryside. They would be harmful to the character and appearance of the area and would not preserve the special qualities of the listed buildings, their settings or the RPG. These matters are not outweighed by public benefits. They would not be in accord with policies GEN 1, GEN 3, GEN 4, T14, CON 12, CON 17 and national planning policy.

418. Appeals 7 - 1 4 and 16 would be located in an unsustainable location and it would not be in the interests of the heritage assets to find them a new use. They would not be in accord with Local Plan policy T 14. Appeals 8 - 1 4 and 16 fail on grounds (a) and (g) and the period for compliance will not be extended.

419. I conclude that appeals 15 and 17 - 33 succeed on ground (c) and no breach of planning control has occurred.

420. I have taken into account all other matters raised but none outweigh my conclusions."

INDIVIDUAL GROUNDS – INTRODUCTION

17. I will refer to the relevant paragraphs of the DL in the context of my consideration of each ground. I will do the same for the relevant policies and parts of the 2018 version of the National Planning Policy Framework (NPPF) in force at the date of the Inspector's decisions. Finally I should say that the fallback position advanced by C&C was the C2 use of the Modern Buildings for a residential institution as confirmed by the CLEUD.

GROUND 1 – ISOLATED HOMES

Introduction

18. This ground concerns the application (or not) of paragraph 79 of the NPPF. Paragraphs 78 and the first part of 79 provide as follows:

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

19. The Inspector determined whether appeals 1, 4, 5, 6 and 7-33 fell within paragraph 79 as follows in the DL:

> "54. The Council's reasons for refusal in respect of appeals 1, 4, 5 and 6 relate to the alleged unsustainable location of the site by virtue of its remote position away from nearby settlements with services and facilities and in the case of appeal 7 through the provision of new isolated dwellings in the open countryside. Its reasons for taking enforcement action in appeals 8 - 33 include the creation of new dwellings in the open countryside which do not represent a sustainable form of development. The Council does not object to appeals 2 and 3 on these grounds.
>
> 58. In rural areas, to promote sustainable development housing should be located where it will enhance or maintain the vitality of rural communities. Isolated homes in the countryside should be avoided unless they are to serve one of identified special circumstances including where such development would represent the optimum viable use of a heritage asset or would be appropriate enabling development to secure the future of the heritage assets; or where the development would re-use redundant or disused buildings and enhance its immediate setting.
>
> 59. Although the development plan policies relating to settlement boundaries are out of date, there is no dispute between the parties that the site is located outside any settlement area and is not in the vicinity of the boundary of any settlement. It is in the countryside.
>
> 60. Nonetheless the appellant considers that the proposals would not result in isolated homes in the countryside under the meaning given in paragraph 79 of the Framework. I have taken into account the findings of *Braintree* which remain relevant to the revised Framework as the text in the revision remains essentially the same. It was held in the judgement that the word isolated should be given its ordinary objective meaning of "far away from other places, buildings or people; remote". A distinction was also made in the judgement between "rural communities", "settlements" and "villages" on the one hand and "countryside" on the other. At the Court of Appeal it was agreed that the Framework does not define a community, settlement or village or that a settlement or development boundary must have been fixed in an adopted or emerging local plan. It was held that it should not necessarily have any services or public transport within easy reach. Whether in any particular case a group of dwellings constitutes a settlement or a village for the purposes of the policy will be a matter of fact and planning judgement for the decision maker.
>
> 61. In the cases before me, whilst I acknowledge that the site contains existing buildings, it is evidently not a rural community, settlement or village but rather a discrete group of buildings used in the past for a specific purpose as a residential institution centred on a historic house. It is remote from other settlements and villages and surrounded by open countryside. In my assessment residential development in this location would result in new isolated housing in the countryside…
>
> 88. The Framework should be read as a whole and seeks to direct development to locations which are or can be made sustainable, where services are accessible and where the natural environment is protected. I do not consider that the various measures proposed are of such weight to outweigh the conclusion the site is in an inappropriate location in the countryside for new residential development, divorced from services and facilities. Appeals 4, 5, 6 and 7 would result in isolated homes in the countryside. Whilst the travel plan and proposals for electric charging points would potentially provide some choice of travel, given the lack of facilities within walking distance of the site, the distance to the bus stops and the unattractive nature of the road network to walk and cycle, the site's location is not one that is or can be made sustainable. The developments would not enhance or maintain the vitality of the local communities or result in strong and vibrant rural communities. I conclude that the site would not be an appropriate and sustainable location for housing) development in Appeals 1, 4, 5, 6, and 7 - 33…

> 377. I have considered the merit of all appeals 8-33 in my overall decisions above. Whilst my findings in respect of appeals 15 and 17 - 33 are not applicable as these appeals succeed under ground (c), my findings on the merits of appeals 8-14 and 16 can equally be applied under ground (a). As set out above, I have found that these appeals would result in isolated homes in the countryside in an unsustainable location. I do not find that the re-use these buildings as dwellings would be in the interests of the heritage assets given the harm that all the parties agree results from their presence."

20. C&C's essential challenges are that the Inspector has either misapplied the law or acted irrationally in concluding that paragraph 79 applies (subject to any of its exceptions, dealt with in Ground 2 below). I deal with each in turn.

Misapplication of the law

21. C&C on the one hand, and the Secretary of State on the other, disagree as to the meaning and effect of two decisions of the Court of Appeal, namely *Braintree v Sec of State for Communities and Local Government* [2018] 2 P&CR 9 and *Dartford v Sec of State for Communities and Local Government* [2017] PTSR 737. Though later in time, I deal first with *Braintree* because (a) it is the case which dealt with (and had to deal with) directly the scope and interpretation of the predecessor to paragraph 79 and (b) because *Dartford* was not in fact cited to the Inspector.

22. *Braintree* dealt with the predecessor to paragraphs 78 and 79 as contained in the then paragraph 55 of the NPPF. There are no material differences between the two sets of provisions. In giving the lead judgment, Lindblom LJ stated as follows:

> "29. Secondly, the policy explicitly concerns the location of new housing development. The first sentence of para.55 tells authorities where housing should be "located". The location is "where it will enhance or maintain the vitality of rural communities". The concept of the "vitality" of such a community is wide, and undefined. The example given in the second sentence of para.55—"development in one village" that "may support services in a village nearby"—does not limit the notion of "vitality" to a consideration of "services" alone. But it does show that the policy sees a possible benefit of developing housing in a rural settlement with no, or relatively few, services of its own. The third sentence of the paragraph enjoins authorities to avoid "new isolated homes in the countryside". This is a distinction between places. The contrast is explicitly and simply a geographical one. Taken in the context of the preceding two sentences, it simply differentiates between the development of housing within a settlement—or "village" - and new dwellings that would be "isolated" in the sense of being separate or remote from a settlement. Under the policy, as a general principle, the aim of promoting "sustainable development in rural areas" will be achieved by locating new dwellings within settlements and by avoiding "new isolated homes in the countryside". The examples of "special circumstances" given in the policy illustrate particular circumstances in which granting planning permission for an isolated dwelling in the countryside may be desirable or acceptable. But what is perfectly plain is that, under this policy, the concept of concentrating additional housing within settlements is seen as generally more likely to be consistent with the promotion of "sustainable development in rural areas" than building isolated dwellings elsewhere in the countryside. In short, settlements are the preferred location for new housing development in rural areas. That, in effect, is what the policy says.
>
> 30. Thirdly, the adjective "isolated", which was the focus of argument before us, is itself generally used to describe a location. It is not an unfamiliar word. It is commonly used in everyday English. Derived originally from the Latin word "insula", meaning an "island", it carries the ordinary sense of something that is"... [placed] or standing apart or alone: detached or separate from other things or persons; unconnected with anything else; solitary" (The Oxford English Dictionary, second edition)…
>
> 31. In my view, in its particular context in para.55 of the NPPF, the word "isolated" in the phrase "isolated homes in the countryside" simply connotes a dwelling that is physically separate

> or remote from a settlement. Whether a proposed new dwelling is or is not "isolated" in this sense is a matter of fact and planning judgment for the decision-maker in the particular circumstances of the case in hand.
>
> 32. What constitutes a settlement for these purposes is also left undefined in the NPPF. The NPPF contains no definitions of a "community", a "settlement", or a "village". There is no specified minimum number of dwellings, or population. It is not said that a settlement or development boundary must have been fixed in an adopted or emerging local plan, or that only the land and buildings within that settlement or development boundary will constitute the settlement. In my view a settlement would not necessarily exclude a hamlet or a cluster of dwellings, without, for example, a shop or post office of its own, or a school or community hall or a public house nearby, or public transport within easy reach. Whether, in a particular case, a group of dwellings constitutes a settlement or a "village", for the purposes of the policy will again be a matter of fact and planning judgment for the decision-maker. In the second sentence of para.55 the policy acknowledges that development in one village may support "services" in another. It does not stipulate that, to be a "village" a settlement must have any "services" of its own, let alone "services" of any specific kind."

23. In my judgment, these paragraphs are entirely clear and unqualified. They purport to be, and are, a general statement of the approach to be taken when considering whether paragraph 79 applies. In other words, the decision-maker must (i) identify the relevant settlement for the purpose of its operation and then (ii) decide whether the proposed development of houses is remote from it i.e. isolated - or not. Both are questions of planning judgment.

24. C&C contend that there are two qualifications to this: first, the "remote from settlement" test does not apply if the proposed houses lie within the curtilage of "previously developed land" ("PDL"). Second, that the size of the proposed development can determine whether the houses are to be treated as isolated or not. In my judgment, neither suggested qualification is correct.

25. In order to understand the first qualification it is necessary to refer to the *Dartford* case. Here, the owners of a farmhouse had applied for planning permission for a change of use of land within its curtilage to use it as a private gypsy and traveller caravan site comprising one mobile home and one caravan. If the site was PDL, then there would be no relevant objection to planning permission. PDL was defined in the glossary of the NPPF as "land which is or was occupied by a permanent structure including the curtilage of the developed land". However, there were various exceptions which included any case of "land in built-up areas such as private residential gardens…". The Inspector held that this latter exception did not apply. The argument of the local planning authority was that the exception, despite its clear wording, covered <u>all</u> private residential gardens whether they were in a built-up area or not. If that was right, then planning permission should have been refused. Lewison LJ, giving the lead judgment in the Court of Appeal, did not accept that interpretation, instead confining the operation of the exception to cases of private gardens which <u>were</u> in built-up areas, the present garden not being in such an area.

26. It was suggested to Lewison LJ in argument that if his interpretation was correct, it would lead to conflict with other parts of the NPPF. As to this, he stated in paragraph 9 that "Even if that were true it is not the business of an interpreter to go searching for possible ambiguities or conflicts in order to detract from the obvious meaning of the words to be interpreted." In other words, he was saying that even if there was such a conflict, it could not affect the interpretation which he regarded as the clearly correct one on the face of the

words used. However, he went on to say that in truth there were no conflicts with other provisions. In that regard, he stated as follows:

> "14. Nor do I see any conflict between the definition and paragraph 55 or 111 of the NPPF. Paragraph 55 states: "Local planning authority should avoid new isolated homes in the countryside unless there are special circumstances…"
>
> 15. However, the definition of previously developed land, in the context of the present case, takes as its starting point that the proposed development is within the curtilage of an existing permanent structure. It follows that a new dwelling within that curtilage will not be an "isolated" home. There will already be a permanent structure on the site. Paragraph 111 states: "Planning policies and decisions should encourage the effective use of land by re-using land that has been previously developed (brownfield land) provided that it is not of high environmental value."
>
> 16. This paragraph expressly adopts the expression "previously developed" land and I cannot see that there is any conflict in so doing."

27. In *Braintree* Lindblom LJ observed in paragraph 37 of his judgment that the interpretation of the policy which he had adopted seemed consistent with the guidance on plan-making in the Planning Practice Guidance ("PPG") including the proposition that "settlements can play a role in delivering sustainable development in rural areas and so blanket policies restricting housing development in some settlements and preventing other settlements from expanding should be avoided unless their use can be supported by robust evidence". He then stated in paragraph 38 that "this all seems at one with Lewison LJ's observation about the policy - brief as it was - in [15] of his judgment in *Dartford*."

28. It is submitted on behalf of C&C that if *Dartford* is right in this respect it must follow that there is a "PDL Exception", as it were, to paragraph 79. As to this, first it is to be noted that Lewison LJ's observation about paragraph 55 was strictly *obiter* because he had already said that whether there was a conflict or not would make no difference to his decision on the issue before him. Second, and as recognised by Lindblom LJ in *Braintree*, this was a brief observation about policy albeit he found it to be consistent with his own remarks. Thirdly insofar as he saw the actual decision in *Dartford* as consistent with his own approach, it could only be because of his view that it was an example of applying the "isolated from settlement" test. Given Lindblom LJ's reference to a "cluster of buildings" being able to qualify as a settlement, it is possible to see the observations of Lewison LJ as being to the effect that in this case the farm should be regarded as an existing settlement. So the intended caravan site could not be regarded as remote from it. In my judgment, the endorsement of that approach by Lindblom LJ goes no further than that.

29. While I accept that in *Braintree*, the specific issue was whether the relevant "settlement" needed to have any or any specific services to warrant that appellation, and Lindblom LJ found not, it does not mean that his analysis of the approach to isolated homes was only applicable to a case where the issue of services arose.

30. I should add that at the time of the parties' Closings, the Court of Appeal had not yet given its judgment in *Braintree*. It had by the time of the DL. The parties had made reference to *Braintree* at first instance where Lang J (whose decision was upheld by the Court of Appeal) had also in paragraphs 30 and 31 of her judgment quoted *Dartford*, expressing the view that it was consistent with her approach. However, *Dartford* itself was not relied upon

by C&C in its Closing nor, in my judgment was it making a discrete submission to the effect of the PDL Exception.

31. Accordingly for all those reasons I do not consider that the PDL Exception contended for by C&C exists.

32. As for the second qualification, I fail to see how the number of intended houses could itself remove the development from the ambit of paragraph 79. If so, one would have to ask what particular number was the threshold for such a departure: 5, 10, 20 or 100? Mr Strachan QC argued that if the number of houses was not relevant, then the establishment of a new town would violate paragraph 79. In my judgment, that is misconceived. If a new town was being planned (which by definition would involve not only the local planning authority but no doubt national bodies as well) entirely different considerations would apply which would be wholly outwith and outweigh the effect of any violation of paragraph 79. It is no basis on which to carve out a house-numerical exception to that paragraph in a case such as that before me.

33. On that basis, it seems to me that in paragraph 60 the Inspector cited the principle in *Braintree* entirely correctly and she therefore directed herself properly as to the law.

Irrationality

Background

34. HDC had originally refused planning permission for Appeal 7 (on 11 February 2016) on grounds which include the following:

> "The proposed development would result in the provision of new isolated dwellings in the open countryside and does not represent a sustainable form of development. The proposal is contrary to the objectives of Policy RUR2 of the Hart District Local Plan (as saved) and the NPPF."

35. It refused permission for Appeals 4-6 (on 10 March 2017) on grounds which included the following:

> "The proposed development is a significant major residential development in the countryside in an unsustainable location which is remote from nearby settlements with services and facilities. The quantum and scale of development proposed is unjustified as enabling or cross subsidy development in this rural landscape, it is therefore contrary to the provisions of policies GEN3 and RUR 1 - 3 of the HDLPR and the Core Principles of the NPPF."

36. These points were summarised by the Inspector in paragraph 54 of the DL.

37. In evidence at the Inquiry, Mr Archibald, HDC's locational sustainability witness, accepted in cross-examination that if some of the Modern Buildings were retained by the Appeals, then the proposed new houses would not be isolated for the purposes of paragraph 79. On the other hand, Mr Stevenson, its principal planning witness, said in the context of Appeal 8 that the houses were isolated. C&C referred to that evidence in paragraph 352 of its Closing . It went on to say at paragraph 353 that under its interpretation of *Braintree* the houses were not isolated and apart from the Modern Buildings there were other existing houses adjoining the boundary of the Site. It concluded that "It is artificial in the extreme to think of the site in active use as "isolated" given the existing buildings that exist."

38. At paragraph 354, C&C went on to invoke some exceptions to paragraph 79, in the alternative (dealt with below).

39. For its part HDC put its case thus at paragraph 164 of its Closing:

> "It would result in the provision of isolated dwellings in the countryside, contrary to para 55 NPPF. The appeal site is far away from other places - it is remote. Simply placing a large number of houses together in a remote location does not make it any less remote. Nor is it the case that proximity to any building means that proposed dwellings are not "isolated". If that were the case, then (outside perhaps AONBs and National Parks, which are subject to their own separate policy restrictions) one would struggle to find any location in England that was distant from any building. The effect of the decision in Braintree is not that a development close to any building falls outside para 55 NPPF. It must be read as a whole. It concerned a proposal for two dwellings on the edge of a settlement. The judge drew a distinction between "rural communities", "settlements" and "villages" on the one and "the countryside" on the other. The agreed position is that the appeal site is in "the countryside" and that it is not part of, nor near, any existing community, settlement or village. It is also of a scale quite incomparable with that under consideration in that case. As the judge correctly recognised, "the scale of the proposed development may also be a relevant factor when considering transport and accessibility....the policy in NPPF 17 in favour of focusing development in locations which are or can be made sustainable applies in particular to 'significant development'".

40. C&C contends that the Inspector was irrational to conclude that paragraph 79 applied because her reasoning in paragraph 61 of the DL was defective. This is because, while she referred to "existing buildings" (ie the Modern Buildings) she said that they had been used in the past for the residential institution which centred on the Mansion. That group of buildings was found by her not to constitute a "settlement" for the purposes of isolation and paragraph 79, as described in *Braintree*. C&C argues that the Inspector failed to refer to the fact that at least 18 houses from the existing development would remain to be used as independent dwellings because of her upholding enforcement appeals 15 and 17-33. Moreover, there might end up being up to 35 houses if those not presently occupied became so in the future, in a way which would not constitute a material change of use.

41. It is correct that this was not referred to in paragraph 61 of the DL. I think it highly unlikely that the Inspector would have forgotten about these houses since she knew she had allowed the relevant enforcement appeals, described later in the DL. See in particular paragraph 374, just before she deals with isolated homes again in paragraph 377. If she thus had them in mind she must have taken them into account in relation to NPPF paragraph 79 even if she did not do so expressly. In addition, of course, she was well familiar with the Site having visited it twice. In fact, it is hard to see how the 18 houses could have been given much if any weight since Appeals 4-6 contemplated their demolition. It makes no sense to say that a proposed new housing development would not be isolated by virtue of its proximity to buildings which were there but which would not be there once it had been completed. Insofar as there would still be some existing buildings (not very many - see A/45) there had been no particular submissions by C&C as to how they specifically constituted a settlement for these purposes.

42. In the light of all that, the Inspector was in my view well entitled to exercise her planning judgment as she did in her paragraph 61. I do not consider her reasoning here to be incomplete or defective.

43. Equally, while it is true that the Inspector did not expressly refer to the evidence of Mr Archibald or Mr Stevenson as noted above, whether any development would be "isolated" for the purposes of paragraph 79 is a matter of planning judgment for the Inspector. She was neither bound by that evidence nor bound to refer to it in my view.

44. A final point made by C&C to me (though not, it would seem, to the Inspector) was that Appeals 4-6 would constitute their <u>own</u> settlement, as it were which could not then be affected by any question of isolation from some <u>other</u> settlement. I do not agree. This seems to be a variant of the "new town" point which I rejected above. In any event, if this argument was correct, since, according to *Braintree* a settlement for these purposes could be, say 10 or 20 houses, it would follow that *Braintree* would rarely be engaged at all in such cases. That cannot be right. Paragraph 79 envisages two things - the proposed development in question and an existing settlement from which it may or may not be remote.

45. Accordingly, the Inspector was entitled to reach the view that there was no relevant settlement in relation to the housing development proposed which consisted of at least 235 houses. Indeed, if the number of houses was to be taken into account at all in consideration of the question of isolation or not, it would militate against rather than in favour of the outcome sought by C&C.

46. On the basis that Appeals 4-6 were found to be remote (see above) the Inspector was clearly entitled to reach the same conclusion on Appeals 7-33 (in the end Appeals 8-14 and 16) and effectively look beyond the Site for any relevant settlement. This is so even where (in this context) the Appeals 15 and 17-33 houses would remain.

47. These were all matters of planning judgment for the Inspector and it is impossible to conclude that her assessment thereof was irrational or in some other way unlawful.

48. Accordingly, Ground 1 fails.

<u>GROUND 3</u>

Introduction

49. There are 5 different aspects of this challenge whose overall description is “Unlawful approach to heritage”. I deal with each below. I also deal with this ground as a whole before considering Ground 2. This is because that ground considers the exceptions to paragraph 79 which in part deal with, and are dependent upon my determination of matters arising under Ground 3 (b) and (c). It is more convenient to deal with those matters first.

Ground 3 (a): Failure to deal with evidence presented

50. This ground concerns Appeal 4. By the end of the Inquiry, it was clear enough that with Appeal 4 came the demolition of all the unwanted Modern Buildings and that was so, whichever development proposal in relation to the Mansion (i.e. Appeals 1, 2 or 3 or none of them) succeeded. In addition, Appeal 4 would take in the restoration of parkland and gardens outside the Mansion curtilage, a new permissive path and a site-wide landscape management plan.

51. All of that appears from a Benefits Table which was produced on 4 December 2017 some considerable time after the Inquiry had started and after all the material witnesses had given their evidence. The origin of the table was discussed by the Inspector at paragraph 128:

> "During the Inquiry it was evident that there was some uncertainty and inconsistency as to the benefits being offered for each proposal. At my request a list of the benefits being put forward for each proposal was tabled and it is on this basis that I have determined the appeals. However, much of the heritage evidence before the Inquiry was given prior to this document being provided. The National Trust provided a written response to the document and the parties agreed that rather than recalling witnesses it would be appropriate for me to consider all the evidence on harm and benefits and reach my own judgement on the balance to be reached. It is on that basis that I have reached my decisions."

52. Ms Deborah Evans was a consultant who gave evidence on behalf of HE who was cross-examined on 2 November. At that stage, it was certainly not clear that Appeal 4 would necessarily deliver all the demolition benefits as later set out in the Benefits Table, this lack of certainty having been pointed out in paragraph 128 of the DL cited above. Indeed it was put to Ms Evans by Mr Strachan QC for C&C that the s106 agreement as then offered did not deal with all the demolition, even though this was apparently contrary to the intention of C&C. It was put to her that if one assumed that Appeal 4 did offer all the relevant demolition then it would be an enhancement and positive if sensitively done. She said that if one compared the "current proposal" with the current situation it would be an enhancement but it was predicated on harms. Later she said that she was "not convinced" that the enhancement outweighed the harm.

53. On 3 November, another witness for HE, Mr David Brock, gave evidence. It became clear that there was confusion (not least in the mind of the Inspector) as to what benefits were being offered respectively by Appeals 4, 5 and 6. In particular, if Appeal 4 now in fact offered all the demolition, the question was what Appeals 5 and 6 would add, if looked at in their own right. The hearing was adjourned that afternoon so the position could be clarified.

54. By 17 November there was still some confusion with the Inspector saying that she needed a clear schedule of what benefits would fund what, in what scenario because "the sands have shifted".

55. The summary of evidence referred to above was provided by a number of people on the NT team. NT's own witnesses were clear that they did not accept that there was any net benefit.

56. In its Closing, C&C argued that both Ms Evans and Mr Brock had made important concessions. In paragraphs 34 and 35 it said that they had both agreed in terms that the heritage benefits were greater than all of the heritage harms, and planning permission should be granted on Appeal 4. For its part, HE in its Closing at paragraphs 8.5 and 8.7 stated that Ms Evans had accepted that in terms of the significance of the RPG, Appeal 4 would represent an enhancement on the assumption that it would secure demolition of the police buildings and provide other valuable benefits. HE contended that this "sea-change" in C&C's case was sprung on Ms Evans in the middle of her oral evidence. As for Mr Brock, HE submitted that his evidence, taken as a whole could not be viewed as supportive of Appeal 4 in the absence of conditions or a planning obligation that secured the repair of the Mansion and its conversion ready for use. NT emphasised the evidence of Mr Lewis and Mr Wheeler who considered that the harms outweighed the benefits. Its Closing also said that on the basis of the demolition of all the Modern Buildings and other unspecified

benefits to the Mansion, Ms Evans had agreed that Appeal 4 would be beneficial. But as noted above, this was not the view of Mr Wheeler or Mr Lewis.

57. The key point made by C&C here is that the Inspector did not refer to the evidence of Ms Evans and Mr Brock at all or take account of it or deal with it in any way. It was accepted that the Inspector did not have to agree with it, but when it contained concessions favourable to C&C it had at least to be addressed and there was no evidence that it had been.

58. This was a particularly serious omission, argued C&C, because both of these witnesses appeared for an expert body i.e. HE and reference was made to the case of *Smyth v SSCLG* [2015] PTSR 1417, which concerned not HE but Natural England which was said to be a body of similar standing in relation to habitat questions. The Inspector there held that no appropriate habitat assessment was necessary because no significant effect of the development on the protected area was likely. The Inspector had relied for this conclusion on the view of an expert ecologist. Mrs Smyth, the claimant and an objector to the permission granted, brought a challenge on the basis that among other things, the Inspector had relied upon "mere assertion" by the expert, a contention rejected at first instance by Patterson J. The Court of Appeal agreed, noting that in fact, the view of the expert was based on a significant amount of work and that it was good quality evidence. At paragraph 85 of his judgment, Sales LJ stated as follows:

> "… The authorities confirm that in a context such as this, a relevant competent authority is entitled to place considerable weight on the opinion of Natural England, as the expert national agency with responsibility for oversight of nature conservation, and ought to do so (absent good reason why not)…"

59. In *Smyth*, the question was the adverse effect (or not) on the habitat. The expert's evidence was in that sense concerned with primary fact (or opinion) and if of good quality one can understand why it was said that the decision-maker was not only entitled to but should, give weight to it. But context is everything. It hardly follows from the observations of Sales LJ that where (as here) evidence was given as to where the ultimate harm/benefit balance lies which was the overarching planning judgment question for the Inspector, the latter was obliged to give particular weight to that evidence or even refer to it. This is particularly so, given the way in which the evidence as to benefits unfolded and how this whole issue was dealt with as recounted in paragraph 128 of the DL. As to that paragraph, of course, it goes without saying in any case that in the end, the judgment of the Inspector is what matters. But surely what was being emphasised there was that while various witnesses had given evidence on various assumptions as to where the balance lay, the Inspector would and could assess herself the evidence as to (a) harm and (b) benefit and conduct her own balancing exercise. This she did, and formed the view on this point that the benefits did not outweigh the harms, as set out ultimately in her paragraph 417. And just as the Inspector made no specific reference to the evidence of Ms Evans, neither did she to the opposing evidence of Mr Lewis and Mr Wheeler.

60. I do not accept that having made the point in her paragraph 128, the Inspector had simply forgotten about all such evidence. She had not only been reminded of it, in various ways in the parties' Closings, but stated the following in paragraph 8 of her Costs Decision dismissing C&C's application for costs against HE on the basis of unreasonable conduct:

> "The applicant contends that Historic England's opposition to all of the appeals was unreasonable given the concessions given by its witnesses under cross examination. I have acknowledged in my decisions that there was some uncertainty and inconsistency as to the benefits being offered for each proposal with the final list of benefits being provided after much of the heritage evidence was

> given. This led me to agree that it would be appropriate for me to consider all the evidence of harm and benefits and reach my own judgment.…"

61. I do not accept that because this reference came some 6 weeks after the main DL the Inspector could not have been aware of such matters at the time when she wrote the latter. In my view, she had been.

62. Equally, I do not accept that the Inspector should have referred specifically to the evidence of C&C's heritage expert, Dr Henderson, as to the significance of particular benefits, for example the restoration of the route of Reading Drive and the extent to which it would be restored to its original function. As it so happens, she did make reference to her evidence (though not referring to her by name):

> 219. Although the original purpose of Reading Avenue is not fully understood it is agreed that it would have provided part of a walk from the house into the park and garden. From the evidence before me, whilst I concur that it is a significant part of the layout and function of the Jacobean design, it would have been a secondary route to the main entrance to Bramshill which was clearly along Mansion Drive. The presence of the lodges, the High Bridge, the walls, and turrets and gateways when entering from the south-west and which are listed in their own right demonstrate the status of this grand entrance. The farmstead was located to the north adjacent to Reading Avenue suggesting that this had a lesser status. In my view Reading Drive, whilst of considerable significance, is of less significance than Mansion Drive. Its significance has also already been reduced by the modern development that straddles it and follows its length.
>
> 220. It was agreed by the appellants heritage landscape witness in cross-examination that despite the proposals being a major step to re-instating the Jacobean garden, it could never be restored to its 17th century experience. I concur with this view. Whilst the restoration of the link would provide a sense of its original form and layout it would not replicate the original undeveloped walk from the mansion taking in the open, scenic views. Whilst the removal of Foxley Hall and the sports building would re-open views to the lake, the user of Reading Avenue would experience an intensive form of development of considerable bulk and scale, dominated for considerable lengths by walling and parking."

63. Although C&C contends that the last sentence of paragraph 219 is "perverse in principle" I disagree. The Inspector was entitled to make the further point that the present significance of Reading Drive had been reduced because of the recent emergence of the Modern Buildings.

64. The specific reference to witnesses, even if experts, in setting out the reasons for conclusions in this context is not in my judgment required of the decision-maker. The Principal Important Controversial Issue (the "PICI") here is the heritage harm/benefit assessment contained within Main Issue one, as opposed to the individual significance of a particular witness on the subject.

65. For all those reasons, I do not accept that there is anything in Ground 3 (a).

Ground 3 (b): Optimum Viable Use and Enabling Development

Introductory Matters

66. Optimum Viable Use ("OVU") was relevant to the issues before the Inspector in two direct ways. First, it formed part of the public benefits to be weighed against the "less than substantial harm" for the purposes of the NPPF; see paragraph 196 cited below. Second it forms one strand of exception (b) to paragraph 79 (dealt with below). OVU is thus to be seen as a form of benefit.

67. In the section of the PPG on Historic Environment, OVU is described thus:

> "If there is only one viable use, that use is the optimum viable use. If there is a range of alternative economically viable uses, the optimum viable use is the one likely to cause the least harm to the significance of the asset, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes. The optimum viable use may not necessarily be the most economically viable one. Nor need it be the original use. However, if from a conservation point of view there is no real difference between alternative economically viable uses, then the choice of use is a decision for the owner, subject of course to obtaining any necessary consents."

68. Likewise, "enabling development" features in NPPF paragraph 202 as follows:

> "Local planning authorities should assess whether the benefits of a proposal for enabling development, which would otherwise conflict with planning policies but which would secure the future conservation of a heritage asset, outweigh the dis-benefits of the parting from those policies."

69. In addition, it forms the other strand of exception (b) to paragraph 79, again dealt with below.

70. For the purpose of understanding the nature of and rules about enabling development I have been referred to the HE document entitled "Enabling Development and the conservation of significant places" ("the HE Guidance"). According to this document, and in broad terms, enabling development is a development for which planning permission would not ordinarily be granted but where it would serve the future conservation of heritage assets. This development is not therefore of or to the assets themselves. Often, it will consist of the creation of separate housing which will produce sufficient revenue to assist with the preservation of the assets for example by contributing to necessary repairs and maintenance.

71. An important subsidiary concept here is that of "conservation deficit". This occurs where the cost required to put the heritage asset into a good state of repair, for example, so as to preserve it, is more than its value once repaired. Therefore, from the point of view of the owner, such a project would be loss-making or unaffordable without some sort of subsidy from elsewhere. That might be provided by way of a financial contribution from some interested party or body, or it could come from the profits made by the owner from the separate enabling development.

72. It follows that the need for enabling development and the funds which it generates, cannot be established until it is determined that there is indeed a conservation deficit and the HE Guidance contains detailed provisions on how to calculate this.

73. If some buildings associated with the assets (here, for example, the Modern Buildings) are to be demolished then the cost of doing that will increase the "cost of repair" to the heritage asset, as it were, usually calculated by what the value of those buildings would have been. In simple terms, the owner, in removing them, has lost their value. That exercise therefore has the potential to increase the ultimate conservation deficit depending on the value to be ascribed to the heritage asset at the end of the day.

74. Equally, if for example, prior to any demolition, the owner receives short-term income from the relevant building in the form of rent, this can be treated as mitigating the ultimate "cost of repair" and in that sense can have the effect of reducing the ultimate conservation deficit.

75. It follows that the greater the ultimate conservation deficit, the more will be required from any enabling development.

76. The above summary has been drawn from paragraphs 5.4.1, 5.5.1, 5.6.7 and 5.11.1 of the HE Guidance.

77. Accordingly, it was important for the Inspector to determine which if any of the Appeals would amount to OVU or enabling development in relation to the heritage assets here.

The Inspector's findings

78. Having found that Appeal 4 (with or without Appeals 5 and 6) would be harmful in heritage terms (dealt with above) she then made the following findings on the question of OVU:

> "224. Turning to whether appeal 4 would provide the optimum viable use, it is the only scheme before me that seeks to provide the restoration of the RPG and the wider setting of the mansion.
>
> 225. I have been provided with a considerable amount of information about the financial viability of the scheme and heard evidence on the same at the Inquiry. I note that the appellant claims that this is the minimum amount of development that can be provided for viability reasons. However, as I have set out above, the approach to providing this amount of development and that is the subject of this appeal, would be harmful. There is nothing before me to persuade me that an alternative design and approach to the development could not be provided that would not have the resulting harm to the RPG and setting of the listed buildings and still provide the public benefits. As such, irrespective of the respective views of the viability of appeal 4, I have no compelling evidence before me that appeal 4 represents the optimum viable use of the site.
>
> 234. As appeal 5 would only go ahead with appeal 4, my conclusions in relation to the optimum viable use of the site in respect of appeal 4 are as relevant to appeal 5 and I do not repeat them here."

79. The Inspector did not deal in terms with OVU in respect of Appeal 6 but it is obvious that her reasoning would have been the same as for Appeal 5.

80. In respect of enabling development, her findings were as follows:

> "248. Nonetheless, the appellant has stated that in the event that I find that the individual proposals do not meet planning policy that consideration should be given to the proposals as enabling development for both the mansion and RPG. In this respect, the Framework states that an assessment should be carried out as to whether the benefits of a proposal for enabling development, which would otherwise conflict with planning policies, would secure the future conservation of the heritage asset, and thus outweigh the disbenefits of departing from those policies.
>
> 249. Historic England has published advice on enabling development. Whilst this precedes the revised Framework, given that the content of the revised Framework is similar to its predecessors the advice remains relevant and I have taken [it] into account.
>
> 250. Historic England's advice includes a policy on enabling development. This requires, amongst other things, that enabling development that would secure the future of a significant place, but contravene other planning policy objectives, should be unacceptable unless, amongst other things, it will not materially harm the heritage values of the place or its setting, it avoids detrimental fragmentation of the place and it is demonstrated that the amount of enabling development is the minimum necessary to secure the future of the place and its form minimises harm to other public interests.
>
> 251. I have found that appeals 2 and 3 would not be harmful to the heritage assets and are acceptable developments in heritage terms. Appeal 2, on the evidence before me, would result in a viable new use for the mansion if sold to an individual to repair and convert. Appeals 5 and 6 which provide additional funding for the mansion, conflict with planning policies as set out elsewhere in my decisions. In light of my findings in respect of appeal 2, funding from these developments would not be required to secure the future of the mansion. This, taken with the harm that they would cause to the heritage value of the RPG and setting of the mansion, leads me to

> conclude that there is no case for enabling development resulting from appeals 5 and 6, or indeed any development intended to bring the mansion back into use.
>
> 252. The only proposal before me for the restoration of the RPG is appeal 4 and I have found that this would contravene planning policies as set out elsewhere. It would result in greater harm to the heritage assets than the retention of the existing buildings. It is not therefore an acceptable form of enabling development as it would further harm the heritage value of the RPG and the setting of the mansion. As I have set out above, whilst I acknowledge the appellant's view that the proposals represent the minimum amount of development required to achieve the benefits, I am not persuaded that there is not another less harmful residential scheme that could be provided with the same benefits to the RPG. In this respect Historic England's advice is that the onus in on the applicant to justify an assertion that a particular form of development is the least damaging way of achieving what may be a common objective. I am not persuaded that appeal 4 would be the least damaging; indeed I find it would cause greater damage to the status quo. As such I do not find that appeal 4 would result in acceptable enabling development.
> 253. Appeals 7 – 33 offer no benefits to the heritage assets and as such cannot reasonably be considered enabling development.
>
> 254. I conclude that the proposals are not an acceptable form of enabling development and would not secure the future conservation of the heritage assets. Therefore the disbenefits of departing from planning policies are not outweighed by the benefits of enabling development."

Analysis: (1) OVU

81. I deal first with the question of OVU. I think it is a reasonable inference from the paragraphs dealing with that subject that the Inspector, by stating that she "notes" and "acknowledges", accepted for the purpose of the argument that the scale of the Appeal 4 development, consisting as it did of 235 houses, was the "minimum amount" needed to make it viable. However she was not persuaded that a different scheme could not be designed which would have less harmful effects than Appeal 4 (as found by her). The essential point advanced by C&C against this reasoning is that it was an illegitimate approach where no alternatively designed scheme had been put before her by any party or by C&C itself. It contends that this was unfair.

82. As to the question of possible alternative schemes there is a distinction between cases where heritage assets are involved and where they are not. As to the latter case, in the decision of the Court of Appeal in *First Secretary of State v Sainsbury's Supermarkets Ltd* [2008] JPL 974, Keene LJ stated at paragraph 37 that:

> "… There may well be cases where the degree of harm which would result from a proposal is such that it is decided that the benefits which the proposal would bring must await a new scheme with an improved design. The decision-maker may properly and lawfully reach that conclusion in appropriate cases. Conversely, there may also be cases where the degree of harm is not judged to be so great that it warrants rejecting the proposal and sending the developer away, on the basis that he will come up with an improved scheme. There may well be disadvantages from the public standpoint in terms of delay and uncertainty in rejection of the current proposal. Certainly there is nothing inherently illogical or unlawful in the decision-maker concluding that the scheme is acceptable, even though a yet better scheme could be devised. Into which of these two categories a proposed development falls is a matter of planning judgment for the decision maker only to be impugned on the usual *Wednesbury* grounds."

83. To put in another way, in general, land may be developed in any way acceptable for planning purposes. The fact that another scheme exists which may be more acceptable does not of itself provide a legitimate basis for refusing permission. See *Trust House Forte v Secretary of State* (1986) 53 P & CR 293 at 299.

84. However, where heritage assets are concerned, the position is different. As Cranston J observed at paragraph 35 and 36 of *Gibson v Waverley and Fossway* [2012] EWHC 1472 (Admin) ("Gibson 1"):

> "35. … This was not a situation where so long as the Committee took all the relevant considerations into account it was for it to weigh them in the balance. Nor was it a matter of the Committee simply adapting what [was] characterised as a realistic and achievable plan to preserve Undershaw. In broad terms the statutory mandate is to pay special regard to the preservation of heritage assets.…HE9.4 then requires weighing the public benefit of a proposal in securing the optimum viable use of a heritage asset against any significantly harmful impact…
>
> 36. The guidance suggests in paragraph 88 that viability is measured not just in terms of viability for the owner but for the conservation of the asset. Crucially it explains that if there are alternatives which would secure a viable use, the optimum viable use is that which has the least harmful impact on the significance of the asset, a use which may not be the most profitable. In my view, the result is that if one of the alternatives would secure the optimum viable use and another only a viable use not only does that have to be taken into account in determining an application but it provides a compelling basis for refusing permission for the non-optimum viable proposal. The principle in *Trusthouse Forte*... Cannot be applied full blown in the context of heritage assets: although there may be alternative viable uses, for heritage assets the law elevates the optimum viable use when a proposal is being considered."

85. And in *Gibson v Waverley and Fossway* [2015] EWHC 3784 (Admin) ("Gibson 2") Foskett J stated as follows:

> "69.. I do not doubt the correctness of what was said by Lindblom J, as he then was, in the context of heritage harm in .. *Forge Field Society v Sevenoaks* [2015] JPL 22 when he said this:
>
> > "if there is a need for development of the kind proposed, which in this case there was, but the development would cause harm to heritage assets, which in this case it would, the possibility of the development being undertaken on an alternative site on which that harm can be avoided altogether will add force to the statutory presumption in favour of preservation. Indeed, the presumption itself implies the need for suitably rigorous assessment of potential alternatives."
>
> 70. Whilst that observation was made in the context of harm to heritage assets and the need to consider alternative sites, I accept that there is a need to consider alternative, less harmful uses of the same site when evaluating a proposal that would cause harm to a heritage asset… However the way in which that evaluation may be carried out will vary from case to case…"

86. Accordingly, the possibility of alternative modes of development at the site of the heritage asset is of particular importance. I do not consider that a decision maker is only entitled to have regard to such a possibility in cases where a specific alternative development has been put forward in some detail or even in outline.

87. In this case, NT made a number of points relating to design deficiencies in the Appeal 4 proposal; see paragraphs 149-153 of its Closing. So did HDC in paragraphs 112, 116 and 126-129 of its Closing. For its part, HE suggested in its paragraphs 11.6-11.9 that there was an alternative use which included use pursuant to the existing CLEUD and acquisition of the Mansion by a single owner who would most likely ultimately demolish some or all of the Modern Buildings. In addition, there are numerous references as to how Appeal 4 would harm the setting of the heritage assets here by reference, for example to its particular siting and the layout of the houses in paragraphs 203-210 of the DL, leading the Inspector to her conclusion at paragraph 211 that this development would be harmful to the visual appearance, planned design and function of the RPG, and more harmful than the existing development. The fact that the proposed OVU contained design deficiencies which created or added to its harmful effect itself suggests that there might be other ways of creating the development which do not have such deficiencies.

88. A decision that there are other less harmful ways of creating the development, in the context of a refusal of planning permission for the proposed development may lead to further cost and delay for the developer while it devises and proposes a less harmful scheme; however, I do not accept that a very experienced specialist developer such as C&C would be completely at a loss as to how to put it forward if it wished to pursue the planning permission and assuming there were no other serious obstacles to obtaining permission. And no doubt in relation to any such revised scheme, there would be consultation with the interested parties prior to the application being formally made.

89. Moreover, the only alternative in this case would have been for the Inspector, when thinking along these lines, to so inform C&C before making the final decision but all of that would simply be liable to result in yet further submissions and delays without any guaranteed outcomes. It would not be a case of some minor modification to or tinkering with the existing proposal which could be done in short order. That there would be no obligation on the Inspector to take such a course is supported by the judgment of Lewison LJ in *SSCLG v Engbers* [2016] JPL 489 where he observed at paragraph 53:

> ".. As Jackson LJ said in *Hopkins*, the Inspector is not required to give the parties regular updates about his thinking. Indeed he may not have reached any conclusion at all on a particular issue before the end of the Inquiry. Nor is the Inspector required to give advance notice that he proposes to reject one party's evidence in favour of another party. The decision letter is the appropriate place for the inspector to explain why he has reached the factual conclusions that he has."

90. Accordingly, I do not consider that the Inspector's approach to OVU in relation to Appeal 4 was legally defective. It was, in truth, simply the exercise of her planning judgment.

91. As for Appeals 5 and 6 in this context, I can see nothing wrong in the Inspector's view that once OVU cannot be shown in respect of Appeal 4, the same result must follow for those other appeals which are dependent upon its success.

Analysis (2): Enabling Development

92. I now turn to the question of enabling development.

93. At paragraph 252, the Inspector referred to the possibility of an alternative scheme in the context of enabling development as she had in paragraph 225 when considering OVU. C&C's essential challenge to her reasoning here is also the same and therefore the response which I have set out above rejecting that challenge applies here also. The same applies to Appeals 5 and 6.

94. In addition, in this context, the Inspector also referred to paragraph 4.9.14 of the HE Guidance, dealing with "Practical Points" which states that "the onus is on the applicant to justify an assertion that a particular form of development is the least damaging way of achieving what may be a common objective." As to this, it is said that such guidance originally pre-dated the 2012 as well as the 2018 version of NPPF and so should not have been followed. Taken by itself, I do not see anything in this point because the relevant paragraph has been maintained in the current version of the HE Guidance which is said to be subject to periodic revision. Nor do I agree that it is in any way inconsistent with paragraph 202 of the NPPF, set out above. It does not contradict the balancing exercise required by that paragraph, it simply sets out how the enabling development should be

demonstrated. These two matters are not inconsistent with each other. Further, in my view, the guidance is consistent with the general approach to possible alternative schemes in the heritage context referred to in *Gibson No. 1* and *Forge Field* referred to above.

Conclusion

95. Accordingly, I reject the Ground 3 (b) challenge.

Ground 3 (c): Appeals 7-14 and 16

96. This relates to the Inspector's finding at paragraph 253 (cited above) that Appeals 7-33 offer no benefit to the heritage assets so that they cannot be considered enabling development. In fact, the only relevant appeals here would be Appeals 7-14 and 16 because the other enforcement appeals succeeded. It is argued by C&C that the finding here was wrong because there was a benefit.

97. It is correct that paragraph 5.21 of C&C's Planning Statement in relation to Appeals 7-33 stated as follows:

> "In this case it is considered that the public benefits that accrue from this scheme are manifest and manifold:
>
> 1. The continued active use of Bramshill substantially mitigates risk of harm or loss of the heritage assets by bringing activity, security and surveillance onto the site to mitigate risks associated with theft, vandalism and neglect.
>
> 2. The active use of the dwellings supports the substantial investment that City & Country are making to better understand the significance of the heritage assets and the natural environment.
>
> 3. The active use of parts of Bramshill assists, to a small extent, in reducing the conservation deficit thereby minimising the eventual amount of development that will be required to find a long term sustainable future for the asset. The current application simply proposes the continuation of a use which has been in operation for over 50 years associated with the Police Training College. Hart District Council will be aware of ongoing discussions in respect of the wider development and enhancement of the Bramshill Estate which would secure significant heritage benefits linked with a combination of refurbishment and new build proposals. This application for the independent use of the dwellings would not prejudice the longer term proposals; to the contrary it will generate a limited amount of revenue to assist with the conservation deficit assessment which is currently taking place.
>
> 4. There is no material change to the use of the buildings - the proposed independent C3 use will replicate the current lawful C3 use which is ancillary to the principal C2 use.
>
> 5. The active use of what are currently empty houses will contribute to the housing stock in the local area and will therefore be a direct public benefit, in line with policy outlined at paragraph 51 of the NPPF and the Hart Housing Strategy."

98. However, this section did not suggest that Appeals 7-33 could themselves constitute enabling development. This is hardly surprising because the only possible connection between them and the heritage assets would be the possible revenue available in the short term which could in some way reduce the conservation deficit. In fact, it is not even suggested here that such funds would go directly to for example, repairing the fabric of the Mansion. Rather it is said that such funds could assist with the conservation deficit "assessment" already taking place. Moreover, as has been pointed out by the Secretary of State, there was no legal guarantee of the availability of such funds anyway. In any event, I do not consider that any such reduction in the conservation deficit can amount to enabling development. Nor do I see how the indirect benefit to the RPG as a whole from making it somewhat more secure due to the presence of those living in the relevant houses can really be said to amount to a benefit in the enabling development sense.

99. For those reasons, I reject Ground 3 (c).

Ground 3 (d) - *Palmer*

100. It is necessary here to refer to a number of provisions dealing with the preservation or otherwise of heritage assets.

101. The NPPF provides as follows:

> "193. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.
>
> 194. Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification. Substantial harm to or loss of:
>
> a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
> b) assets of the highest significance… should be wholly exceptional.
>
> 195. Where a proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply….
>
> 196. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.
>
> 197. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application…."

102. I should add that for the purpose of these provisions, "Conservation" (for heritage policy) is defined as "The process of maintaining and managing change to a heritage asset in a way that sustains and where appropriate enhances its significance."

103. Next, s66 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides that:

> "In considering whether to grant planning permission… for development which affects a listed building or its setting, the local planning authority or… Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

104. Finally, local policy CON 12, headed "Historic Parks and Gardens" states that "Development that would adversely affect historic parks and gardens or their settings will not be permitted." The rubric states that "changes may take place within these historic environments particularly as many now have alternative uses. It is important that such changes are managed to ensure that they can be carried out sensitively avoiding harm to the general elements of the historic landscape." Local policy CON 17 states that a "proposals for the extension or alteration of listed buildings or buildings of local interest will not be permitted unless (i) the scale of the building is not materially changed; and (ii) design is appropriate to the character and setting of the building". The rubric states that where proposals may affect the character or settings of listed buildings, the local planning authority will request the submission of a detailed application including photographs of relevant details.

105. As is well known, s70 (2) of the Act requires the local planning authority when considering an application for planning permission to have regard to the development plan insofar as material to the application, and s38 (6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") requires that "where in making any determination under the Planning Acts, regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise".

106. Policies CON 12 and 17 form part of the local development plan and while this is not so for the NPPF, it is a material consideration.

107. In relation to this issue, the Inspector stated as follows:

> "121. In considering the effects of the proposals on the listed buildings cited above, I have had regard to Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990…
>
> 122. Whilst the RPG does not have the same statutory protection as listed buildings it is nonetheless recognised as a heritage asset in the Framework. The Framework recognises such assets as an irreplaceable resource, and states that they should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations. Chapter 16 of the Framework sets out the approach in determining applications (or appeals) in respect of such assets. It states that if when considering the impact of a proposed development on the significance of a designated heritage asset great weight should be given to the asset's conservation with the more important the asset the greater the weight be. Any harm or loss should require clear and convincing justification. The Framework sets out the criteria to be considered where either substantial or less than substantial harm are identified.
>
> 123. Historic England and the National Trust provided their evidence on the basis that paragraphs 195 and 196 of the Framework would always be engaged where any element of harm was identified. The appellant held that this was not the correct approach based on the findings of Palmer. The appellant's case is that an "internal heritage balance" should be carried out where elements of heritage harm and heritage benefit are first weighed to establish whether there is any overall heritage harm to the proposal. Paragraphs 195 and 196 would only be engaged where there is residual heritage harm. This should then be weighed against the public benefits of the scheme.
>
> 124. The judgement in Palmer related to whether there had been a failure to consider harm to the setting of a listed building arising from noise and smell. Paragraph 29 of the judgement acknowledged that:
>
> > "the clear thrust of the reports to the planning committee and the views of specialist officers that underlay and were summarised in those reports, was that if mitigation measures were put in place there would be no adverse effects on the setting of the listed building. I would accept Mr Reed's submission for the Council that where proposed development would affect a listed building or its settings in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting".
>
> 125. In my assessment the judgement does not necessarily bring me to a conclusion that an internal heritage balance should be carried out in the manner that the appellant advocates. The case clearly involved a wholly different context and set of circumstances and the conclusions relating to harm were based on avoidance through mitigation measures rather than any assessment of whether the benefits of the development outweighed any harm. However, the judgement clearly does reinforce that a balancing exercise needs to be carried out but it does not direct the decision maker to only one method by which that should be done.
>
> 126. I note the cases that have been drawn to my attention, some of which do follow the approach advocated by the appellant and some do not. These are clearly cases where alternative approaches have been taken based on the particular circumstances of each case. Nonetheless, irrespective of these decisions, the statutory duty to preserve the

> building should be given considerable importance and weight when the decision maker carries out the balancing exercise, consistent with the Barnwell Manor judgement.
>
> 127. The cases before me are complex with multiple works involved. Some of the benefits to the assets are not proposed with the individual developments themselves but are put forward as a part of other developments subject to separate decisions. In this context, I have adopted a straightforward application of paragraphs 190 and 193-196 of the Framework. I have firstly identified the significance of the assets. I have then assessed whether each development proposal would, of its own doing, lead to substantial or less than/ substantial harm to that significance. Subsequent to making this assessment of harm, I have then considered whether this harm is outweighed by the public benefits of the individual proposal and provided in other proposals subject to other decisions. Paragraph 20 of the Planning Practice Guidance "Conserving and enhancing the historic environment" (the PPG) explains what is meant by public benefits (which may include heritage benefits), and that all types of public benefits can be taken together and weighed against harm."

108. In relation to Appeals 4-6 and for the purpose of the balancing exercise under the NPPF, the Inspector held that the relevant harm was "less than substantial", so paragraph 196 applied.

109. C&C argues that instead of working through the relevant parts of the NPPF as she did, the Inspector should have carried out an initial internal balancing exercise within paragraph 193 to see if there was a net resulting harm so as to engage the following paragraphs at all. This is the argument she refers to, and rejects, in her paragraphs 123-125. C&C's point is that if that internal balancing exercise had been carried out, then it might well be that there would be no net harm resulting at all or at least any net harm would be of a much lower order, and this would consequently affect any overall balancing exercise. C&C further contends that the "great weight" to be applied to "conservation" within paragraph 193 would include any proposed benefits on the basis that conservation is defined so as to include any enhancements to the relevant assets. C&C contends that the case of *Palmer* mandates the approach which the Inspector rejected.

110. I disagree with all of those contentions for the reasons set out below.

111. First, *Palmer* was dealing not with the NPPF but with local policies which in that case followed the same broad pattern as CON 12 and 17 here, along with s66. That is to say, while they made specific reference to the special attention to be paid to the preservation of heritage assets, they did not refer to countervailing benefits to be taken into account, as did the NPPF. In those circumstances, and in order to make the former provisions work, one had to undertake some kind of balancing exercise to see if in fact there were any adverse effects at all. This was in a context where the apprehended odours from the intended development would in fact be avoided because of the contemplated mitigation measures. That is quite different from balancing an admitted or found adverse impact on the heritage asset on the one hand, against separate beneficial effects on the other.

112. In my judgment, the distinction between separate benefits and mitigation measures to negate the adverse effects which would otherwise arise, is sufficient to distinguish *Palmer* from this case.

113. However, there is a clear principled difference as well. It is not in dispute that the Court of Appeal in *Mordue v SSCLG* [2016] 1 WLR 2682 held that generally, if a decision maker works through the "fasciculus" (or bundle) of the relevant provisions of the NPPF (as cited above) such an approach will amount to compliance with the s66 duty. See in particular

paragraph 28 of the judgment of Sales LJ (as he then was). The same must surely be true of compliance with (non-statutory) local policies which themselves effectively replicate the s66 duty. All of that makes sense when one considers the graduated sequence of balancing exercises set out in the NPPF paragraphs.

114. If one was to concentrate on s66 itself, or the CONs, and without regard to NPPF, however, it is inevitable that a balancing exercise has to be conducted within them because otherwise they would not work at all. Indeed, for this reason, the parties to varying degrees stated that lesser weight must be given to the CONs precisely because of their lack of reference to countervailing benefits. But on any view it is not possible to abandon the duty set out in s66 - so how that duty is to be performed needs to be analysed. And this is what the Court of Appeal did in *Mordue* so far as the NPPF was concerned.

115. *Palmer* itself was all about local plan policies, not the NPPF which is why a potential problem would have arisen even if the countervailing factor was not mitigation measures but separate benefits.

116. However, in this case, the Inspector proposed to work through the NPPF which was recognised in *Mordue* as a compliant approach and where the successive provisions set out carefully a balancing exercise for the harms and benefits. In the context of the NPPF, therefore, it makes no sense to second-guess that exercise, as it were, by trying to encompass it all within paragraph 193. To do so would render nugatory, or almost so, the following paragraphs.

117. As it so happens, in my judgment, I have serious doubts as to whether the definition of "conservation" in paragraph 193 was intended to allow in weight according to the countervailing benefits as C&C contends. This is because in my view, what "conservation" in paragraph 193 is getting at is the value to be placed on preservation in the sense of not harming the heritage asset. A development which would harm or interfere with the asset's continued existence or its preservation or its enhancement, is that which then engages this collection of paragraphs as a whole.

118. But whether that view be right or wrong, the way to conduct the exercise has in my view now been put beyond doubt by the recent decision of Sir Duncan Ouseley in *Safe Rottingdean v Brighton and Hove City Council* [2019] EWHC 2632 (Admin). In that case, the Planning Officer had considered local policies akin to CON 12 and 17 but also the NPPF. The Judge saw each as involving a different exercise. Thus he stated as follows:

> "68. Mr Parkinson's argument has to start from the false premise that the Framework was being applied because the OR concluded that *overall*, under each of the HE3 and 6 policies, there was some but less than substantial harm. Mr Parkinson, in my judgment, confuses two distinct issues: what view was formed about compliance with HE3 and HE6? What does the Framework require with its differently worded policy? I have dealt with the former. I now deal with the latter. Paragraph 196 contemplates the position where there is some but less than substantial harm to a heritage asset, whether listed building or conservation area. It does not look at the overall balance of advantage or disadvantage to the heritage asset at that stage. The weighing exercise then includes the advantage of "securing its optimum viable use" as a factor against which the less than substantial harm has to be weighed. That is a clear reference to the public policy advantage of bringing a listed building or part of a conservation area into a viable long-term use. Such public heritage benefits are clearly among those to be weighed against the less than substantial harm So the Framework adopts its own approach

but emphatically is not dependant on a view that the less than substantial harm is a net overall less than substantial harm. That necessarily means that it had to be approached differently from the way in which the HE policies were approached.

69. That reading of the Framework is the reading adopted in the OR to paragraph 196. It does not turn on any conclusion under the HE policies. The way it is dealt with turns on the application of that reading. The OR, as I have said, continues to recognise the less than substantial harm to the setting of the Conservation Area, and the harm to the setting of the listed building. It did not simply adopt the approach of saying that that harm ceased to be relevant because overall there were setting benefits. As I understand the implication of Mr Parkinson's approach, once the conclusion had been reached that there was no overall harm to the settings of the listed building or Conservation Area, that less than substantial harm should have fallen out of account as a matter of the interpretation of the Framework. That seems likely to yield a rather artificial approach to the balancing exercise."

119. Then, as to the s66 exercise:

"86. Mr Parkinson's argument focuses on but one part of one aspect of s66: the less than substantial harm to the setting of the listed building from the development on the playing field. The section is different in scope from HE3 and brings in HE1, as well. Lewison LJ in *Palmer* at [29] made the point that the section requires an overall view of the effect on the listed building itself its features and its setting. I do not think that giving considerable weight to the desirability of achieving the statutory duty requires separate views to be reached on each part, and then the beneficial parts to be put to one side where there is some harm, however relatively unimportant. It would be an irrational thought process, not sanctioned by statutory wording, to require significant weight to be given to the benefit, and significant weight to the harm, without the two being brought into a single balance under the statute, and then requiring only significant weight to be given to the harm. It is difficult, however, to avoid concluding that that is what Mr Parkinson's argument amounts to. There was in reality no overall harm to which the strong presumption could apply or to which considerable weight could be given as a matter of statutory duty.

87. That is not to say that the harm becomes irrelevant; it is simply that the statutory duty can be complied with, in line with the jurisprudence, even if there is some harm to a setting, if it is not as significant as the benefit to the building and its setting, as was obviously the case here. Quite the reverse; considerable weight has to be given to the overall benefits."

120. Accordingly, the Inspector was well-entitled to adopt the course she did and she did not in any way misdirect herself. *Palmer* did not impel her to undertake an internal initial balancing exercise under paragraph 193. Indeed, had she done so, I would have regarded that as an error of law.

121. Subject to the other points on Ground 3, it is not suggested that the balancing exercise she did undertake could be impeached. As the exercise was a classic application of planning judgment, that would have been a hopeless contention.

122. Ground 3 (d) must therefore be rejected.

Ground 3 (e): Mistaken Approach to CON Policies in Local Plan

123. C&C contended before the Inspector that local policies CON 11, 12, 17 and 18 which deal with heritage assets and related matters should be given "little weight" because they do not contain the balancing exercise of harm as against benefits set out in the relevant paragraphs of the NPPF. HDC agreed that there was that inconsistency. However, it, along with the NT and HE, argued that moderate weight should be attached because the emphasis on the preservation of designated assets was in accordance with the NPPF and s66.

124. The Inspector found as follows in paragraph 46:

> "Whilst the Framework sets out a clear balancing exercise to be undertaken and which is absent in the relevant development plan policies, the statutory requirement of the Listed Building and Conservation Areas Act [ie s66] relates to the special regard the decision maker should have to the desirability of preserving the building, its setting or its special features. Whilst I find policies CON 11 – CON 18 to lack the balancing requirement of the Framework, they contain the statutory requirement. Given this, I find that the policies should be given significant weight."

125. It is clear from other parts of the DL that all the parties used three different levels of weight- little, moderate, and significant.

126. C&C contends that since no opposing party argued for significant weight to be attached to the local policies it was unfair for the Inspector to adopt a greater weight than moderate. Secondly it is said that the adoption of significant weight was itself illogical since the fact that they reflected the statutory requirement was not a good reason to give them such weight when they did not contain the balancing exercise.

127. As to the first point, I do not consider that the Inspector was obliged to go back to the parties to canvas her view that greater weight should be attached than they had submitted. This was not a question of a decision maker rejecting an agreed factual position reached between the opposing parties. It was a question of weight to be attached to local policies which ultimately was a matter for her. She was entitled to take a different view.

128. As to whether the view she took was properly maintainable, in principle the weight to be attached to local policies (subject to the operation of the statutory requirements in s38 (6) of the 2004 Act and s70 (2) of the Act (referred to above)) is a matter of planning judgment. Moreover, there is some sense in saying that significant weight should be given to the local policies because, after all, they are essentially reflecting the statutory duty contained in s66. The latter is not a duty to which the decision-maker can choose to give only limited weight. It has to be followed.

129. In truth, the real answer to the suggestion that the local policies were inconsistent with the NPPF lies in *Mordue*. In other words, the task of working through the relevant paragraphs in the NPPF will itself lead to compliance with the statutory duty. That is in fact what the Inspector said she would do in her paragraph 127 and did do. Although her conclusions at the end of the balancing exercise stated that the relevant appeals would not accord with CON 12 and CON 17 as well as not being in accordance with the NPPF, in my view, what she was essentially doing was applying the NPPF paragraphs. That was sufficient because, if properly applied, that application would be consistent with the statutory duty, and also the local policies which gave effect to that duty.

130. Accordingly, I reject Ground 3 (e).

Conclusions on Ground 3

131. It follows that Ground 3 as a whole must fail.

GROUND 2: ERROR OF LAW AS TO THE EXCEPTIONS IN PARA. 79 OF THE NPPF

132. The two relevant exceptions in play here are as follows:

> "(b) the development would represent the optimal viable use of a heritage asset or would be appropriate enabling development to secure the future of heritage assets;
>
> (c) the development would re-use redundant or disused buildings and enhance its immediate setting;"

133. I deal with each in turn.

Exception (b)

134. As to Appeals 4-6 it will be recalled that the Inspector concluded that paragraph 79 applied to them (see Ground 1 above). At paragraph 63 she said this:

> "As I have concluded elsewhere in these decisions, I am not persuaded that appeals 4, 5 and 6 represent the optimal viable use of a heritage asset or provide appropriate enabling development to secure the future of the heritage asset. As such these proposals do not fall under the special circumstances allowed by paragraph 79."

135. As I agreed with the Inspector's approach on OVU and enabling development here (see Ground 3 (b) above) it follows that I agree with this part of the DL as well. It is then said that the Inspector should have considered Appeals 7-33 in relation to Exception (b) and that had she done so they would have qualified.

136. However, she did expressly deal with those appeals in the context of enabling development and as found under Ground 3 (c) above, her finding that they were not such development cannot be impeached. That then leaves OVU. However, I cannot see how the limited benefits said to be conferred by these appeals can really amount to the optimum viable use of the appeal properties themselves, which are not heritage assets. As against that C&C suggested that the existing houses were heritage assets because they were located within the RPG which is itself a heritage asset. Accordingly, their use is use of a heritage asset even if they themselves are not the beneficial part of such an asset. I do not accept that argument. The fact that they are located there does not in my view make them the asset, or part of it, for the purpose of OVU. Moreover, it was accepted that the presence of the Modern Buildings (including the houses) was itself harmful to the RPG. It is hard to see how that could be so if they had to be treated as part of the asset itself. It must be remembered that the fact that these appeals were said to confer certain limited benefits in the form of possible revenue contribution and improved security is not the issue. The issue is whether all this amounts to OVU. In my judgment, it clearly did not and could not, so the fact that this matter was not specifically covered by the Inspector is irrelevant.

137. I would add (but it is not necessary for my decision here) that it does not appear to have been submitted in terms at the time that they would qualify under Exception (b). If that is correct, I fail to see why the Inspector should have dealt with it anyway.

Exception (c)

138. Because of its terms, this exception could only apply to Appeals 7-33. The Inspector's paragraph 64 deals with this as follows:

> "Whilst I acknowledge that appeals 7 and 8-33 reuse disused buildings they do not include an enhancement to the immediate setting within the individual proposals. These are only secured through the wider proposals in other appeals and which would in any case either remove or alter the subject buildings. As such they failed to be considered as a special circumstance under paragraph 79."

139. It is necessary here to start with what these appeals concerned. Principally, it was of course a change of use from C2 to C3 in respect of the relevant houses. Paragraph 1.4 of the relevant appeal's statement of case says that it included provision of the SANG. Planning permission for the SANG itself was granted by HDC on 11 December 2017. The SANG land is shown at Plan 7 of the s106 agreement schedule (p1474). It is also shown superimposed on a photograph at p843. It is to the north and east of the lake within an area which covers a large part of the site, but not all of it, which is 400m from the SPA boundary. It is common ground that under Policy NRM6 of the South East Plan, such an area is considered an "exclusion zone" where residual development is to be permitted only in exceptional circumstances. The SANG included provision of a 2.3 km circular walk with connections to a wider network of footpaths on the site as well as the removal of rhododendron (considered an invasive species in this context) to the east of the lake. The provision of the SANG as a feature of all appeals was in order to "ensure potential adverse effects on the SPA are prevented." See paragraph 5.10 of the relevant planning statement. It is described in paragraph 5.5 as part of "the avoidance strategy and development that makes necessary contributions towards the defined avoidance measures, and would avoid the need for a full habitat regulations assessment". And paragraph 5.7 states that "taking a precautionary approach to avoidance and mitigation the proposed independent use of the dwellings is accompanied by a proposal to provide a SANG." In that planning statement the SANG is not put forward as an independent benefit in its own right. There is no reference to it in paragraph 5.21, referred to above in the context of Ground 3 (c). See also paragraph 2.1 of the SANG Creation and Management Plan. There was also offered a condition of any consent in respect of Appeals 7-33 that there should be no occupation of the houses until the SANG was fully operational.

140. As refined in argument at the hearing, C&C contended that the Inspector had been wrong to conclude that Exception (c) did not apply here. It submits that the re-use of the houses together with the SANG would amount to an enhancement of the "immediate setting" of the intended development. There are various problems with this argument. First, while of course it is true that the SANG was offered in the way described above, it was not put forward as an enhancement to the immediate settings of the houses. Second, I fail to see how the SANG could constitute such an enhancement when it is located essentially on the other side of the lake to where the houses are. I do not accept that it is in the immediate setting of either the houses or their curtilage. C&C submits that for the purposes of the enhancement the "development" involved is something different from the buildings. But I do not see how where the only development for which permission was sought was the change of use to the houses. The object of the exception is surely that where the development was to re-use redundant or disused buildings, it would be beneficial if their immediate setting was enhanced - as opposed to, for example, left standing as disused and derelict buildings. In other words there has to be a connection between the re-used buildings and the consequential enhancement. The fact that the application for the permission might include as a condition or mitigating feature something entirely different to deal with a different problem (i.e. the SANG) does not make it an enhancing feature of the reuse of the buildings.

141. Even if one included the SANG as part of the development, it hardly makes sense to say that it enhances its own immediate setting because without the SANG there was no pre-existing immediate setting as there always would have been for the disused buildings. Reference was made at one stage to benefits from the SANG such as the removal of the rhododendrons. But that was on the other side of the lake where the SANG would skirt it.

142. The Inspector was therefore entitled to reject the claim to Exception (c) as she did in paragraph 64. She was entitled to observe that, in effect, the only real enhancement to the immediate settings of the houses was their own alteration or demolition as proposed by the other appeals. Given the lack of focused submissions from C&C on the availability of the exception, it is hardly surprising that she said little more about it.

143. A final point made by C&C was that if (as I have found) there was no enhancement as required by the exception the Inspector should have imposed some conditions to any grant of permission under these appeals so as to enable the exception to apply. There is nothing in this point. The Inspector is there to decide the appeals and not to create further alternatives. Of course where conditions offered or discussed involve details like hours of the day or a range of particular dimensions which had been the subject of discussion the decision-maker in an appropriate case might make adjustments. But that is nowhere near this case.

144. Accordingly, Ground 2 must be dismissed.

GROUND 4 - UNLAWFUL APPROACH TO REUSE OF APPEAL 7 (INCLUDING 8-14 AND 16) BUILDINGS

145. On these appeals and the question of harm, the Inspector stated as follows:

> "244. No objection has been raised to appeals 7-33 heritage grounds. Given that these appeals relate to the use of existing buildings and no material change is proposed to the buildings or their surroundings I have no reason to disagree. However it is pertinent to note that all of the buildings in these appeals are proposed to be demolished or altered as part of appeal 4. In this respect, the appellant's case is that these buildings are harmful to the RPG and setting of the Mansion.
>
> 245. I agree that these buildings are harmful to the RPG and setting of the Mansion. As such it cannot be in the interests of the heritage assets to find them a new use. I find this way is against allowing appeals 7-33. The proposal would not be in accord with Local Plan policies CON 12 and CON 17 and national planning policy."

146. It seems to be common ground that in the Inquiry no party was contending that the change of use in the houses was itself harmful to the heritage assets. That appears to be what the Inspector was acknowledging in paragraph 244. Her reasoning in paragraph 245 is in my judgment somewhat opaque. But I think that what she was saying was that because, all other things being equal, it was desirable, if possible, to alter or demolish the Modern Buildings (certainly a feature of Appeals 4-6 but which appeals she did not allow), the grant of a new use leading to their residential occupation was likely to ensure that they would remain longer than otherwise. However, that is not spelled out and one is not assisted here by any of the parties' submissions because this point was not taken. Furthermore, if she was taking the view of harm which I have postulated, the Inspector should surely have brought into the equation the (admittedly limited) benefits which these appeals were said to confer and to which I have referred above, even if they did not count specifically as OVU or enabling development. Finally, it seems to me that she ought to have given consideration to the fallback position here, namely the existing right to use the Modern Buildings for C2 purposes.

147. On this particular point, I consider that the Inspector has here not provided proper reasons or taken into account all the material considerations.

148. Accordingly, and subject to any later argument on discretion, I consider that Ground 4 is made out.

GROUND 5 - SUSTAINABILITY AND TRAFFIC IMPACTS

149. On the question of transport sustainability, the Inspector summarised the evidence at paragraphs 69-81 of the DL. She then went on to state as follows:

> "82. However, I have no evidence as to how likely these particular measures would be to reduce the use of the private car. In my assessment whilst they would provide some choice this would be limited and having regard to the factors above, I do not find that the proposals would offer a genuine choice of transport modes as required by national and local policies.
>
> 83. The Framework recognises that a choice of transport modes can help to reduce congestion and emissions. I have found above that this choice is not available for the proposed developments. Nonetheless, the appellant considers that the developments would represent an improvement in greenhouse gas emissions in comparison to the site's previous use.
>
> 84. The appellant contends that due to the nature of the trips that were undertaken in association with the previous use (and that could still be undertaken) it is relevant to sustainability to consider how the proposals would result in a reduction in greenhouse gas emissions due to the nature of the trips in the extant and proposed uses. I was not provided with evidence of the comparative greenhouse emissions of the previous and proposed uses. I was provided with information on trip rates by both main parties although the appellant acknowledges that it is not possible to define the ultimate origin and destination of trips from the former use. The appellant instead relies on the national and international nature of the former use that is alleged to have resulted in far greater emissions arising from trip lengths and international flights.
>
> 85. The Council claims that the proposals would result in more trips than the former use. This is largely due to the residential nature of the police college which did not generate regular trips off site. The Council did not provide information on trip lengths. I reach no conclusion on whether the existing or proposed uses would generate greater trip numbers as these do not assist in concluding on the relative greenhouse gas emissions arising from each as this would depend on distance and type. In addition it is likely that residents would travel abroad for holidays.
>
> 86. The offer of electric charging points to facilitate the use of electric cars would have the potential to assist in reducing greenhouse gas emissions. However, this would be reliant on individual occupants purchasing such cars and I have no evidence before me as to the likelihood or extent of this and the associated effect on greenhouse gas emissions.
>
> 87. As such I am unable to conclude that greenhouse gas emissions would be less with the appeal schemes before me as I do not have sufficient information before me. However, even if I did reach such a conclusion, this one factor would not lead me to a conclusion that the schemes would overall comprise sustainable development due to the isolated location of the site and the lack of genuine alternative transport modes.
>
> 88. The Framework should be read as a whole and seeks to direct development to locations which are or can be made sustainable, where services are accessible and where the natural environment is protected. I do not consider that the various measures proposed are of such weight to outweigh the conclusion that the site is in an inappropriate location in the countryside for new residential development, divorced from services and facilities. Appeals 4, 5, 6 and 7 - 33 would result in isolated homes in the countryside. Whilst the travel plan and proposals for electric charging points would potentially provide some choice of travel, given the lack of facilities within walking distance of the site, the distance to the bus stops and the unattractive nature of the road network to walk and cycle, the site's location is not one that is or can be made sustainable. The developments would not enhance or maintain the vitality of the local communities or result in strong and vibrant rural communities. I conclude that the site would not be an appropriate and sustainable location for housing development in Appeals 1, 4, 5, 6, and 7 - 33."

150. This was all in the context of paragraph 103 of the NPPF (noted by the Inspector at her paragraph 57) which provided that:

> ".. Significant development should be focused on locations which are or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. This can help to reduce congestion and emissions and improve air quality and public health. However, opportunities to maximise sustainable transport solutions will vary between urban and rural areas and this should be taken into account in both plan-making and decision-making."

151. C&C makes various challenges here. First, it contends that the Inspector was wrong to find that she could not conclude that greenhouse gas emissions would be less than before (i.e. under the previous use). This was particularly so, where C&C had submitted in paragraph 337 of its Closing that the evidence from Mr Archibald accepted the relevance of comparative trip lengths to the question of comparative greenhouse emissions. That paragraph was specifically footnoted in paragraph 84 of the DL. Equally, C&C submitted

in paragraph 339 of its Closing that the evidence showed that the proposed developments would in fact be more sustainable than the previous college use. On the other hand, in paragraphs 150-163 of its Closing, HDC argued that a comparison of greenhouse gas emissions was not possible and on analysis of comparative trip and traffic movements, the new use would be less sustainable than the old.

152. All of this was a matter for the assessment and planning judgment of the Inspector. I do not accept that she had to make a specific reference to the evidence of Mr Archibald. The paragraphs referred to, and quoted, above clearly show that she had all the arguments in mind. In my judgment, she was entitled to come to a view that on the evidence she could not conclude that there would be less greenhouse gas emissions than before. If that was her view, she was entitled to express it.

153. A further point made by C&C was that the Inspector had not engaged with C&C's submissions on the fallback position. But the paragraphs referred to above show that she had.

154. Third, it is argued that the Inspector misdirected herself by only looking at the appeals cumulatively, on the basis that if she looked at each one individually or a few of them, there would obviously be, intuitively, a different result so far as numbers of trips/greenhouse gas emissions were concerned. I can see the force of that in theory, but it does not seem to me that it was put to the Inspector that in relation to this particular matter that it would be open to her to allow some appeals but not others. In the absence of that, it is difficult to see that she should have started to make decisions on individual units. She was entitled to look at Appeals 8-33 cumulatively.

155. Finally, C&C makes reference to the second part of paragraph 87 where the Inspector said that even if she had concluded that the proposed developments would lead to less greenhouse gas emissions than before, that particular finding would not lead to her finding that overall this was sustainable development. C&C says that this secondary point depended in part on her view that the developments would be "isolated". That is correct but, contrary to C&C's submissions, I consider that the Inspector was entitled to take that view. C&C also says that the Inspector's reference to a lack of genuine alternative transport modes here could not assist in this context since the same could have been said of the fallback use. I see that but I do not agree that she was not entitled to refer to it in a context where the existence of such alternative transport modes was said to be a positive factor leading towards sustainability for the purposes of paragraph 103. In any event, what the Inspector said in this part of paragraph 87 is strictly irrelevant since, as I have found, she was entitled to come to her primary view (that she could not conclude an improvement in greenhouse gas emissions) in any event.

156. Accordingly, I reject Ground 5.

GROUND 6: THE BENEFITS OF THE SANG

157. I have dealt with the potential benefit of the SANG insofar as it related to Ground 2, dealt with above.

158. But here, C&C makes a general point that the SANG included benefits to both the landscape and ecology in an area near to the appeal sites and yet the Inspector did not take this into account when looking at the overall merits. It contends that it submitted clearly that the SANG addressed not only ecology but produced landscape benefits. Reference was made to paragraphs 260 (c) and 310 of its Closing. In fact, the former dealt only with the removal of rhododendron and the latter simply referred to the exemplary quality of the SANG which of course as put forward in the first place is a necessary mitigation measure having regard to the SPA. I have set out above how that measure was described by C&C in the planning statements.

159. It is not the case that the Inspector made no reference to the SANG at all. She makes reference to the circular walk at her paragraph 300 and describes it again at paragraph 323 where she refers to it as a reasonable and necessary part of the suite of measures put forward to demonstrate exceptional circumstances of this case. Moreover, at paragraph 112, she makes reference to C&C's reliance on the benefits to the landscape character arising from the demolition of numerous buildings and the reinstatement of heathland and landscaping proposals together with public access via a permissive path. She goes on to say when dealing with general landscape character that this would be beneficial to the landscape character area of the site. The creation of the path would also enable the public to enjoy the unique character of the Bramshill estate. And finally, albeit in relation to ecology, at paragraph 264 she says that the proposals would lead to site level benefits including enhancement of woodlands, creation and management of species-rich grassland, enhanced bat roost features and bird nesting opportunities, eradication and control of invasive species and overall benefits to habitats once operational. That can only be a reference to the SANG. It is in my judgment inconceivable that she did not have well in mind the features and benefits of the SANG given its relevance in different ways.

160. In my judgment, to the extent that C&C was actually putting forward the SANG as an additional benefit to be weighed against the harms, as opposed to its necessary function as a mitigation measure having regard to the SPA, the Inspector had it in mind and took it into account.

161. There is therefore nothing in Ground 6.

GROUND 7: THE TILTED BALANCE

162. Paragraph 11 of the NPPF states that plans and decisions should apply a presumption in favour of sustainable development. This is sometimes referred to as "the tilted balance". Paragraph 177 of the NPPF as it was at the time of the Inquiry provided that:

> "the presumption in favour of sustainable development does not apply where a development requiring appropriate assessment, because of its potential impact on a habitats site, is being planned or determined."

163. At paragraph 49, the Inspector agreed with HDC, Natural England and the RSPB that in respect of any developments with which she was dealing which would require an appropriate assessment in connection with habitats, the presumption should be dis-applied.

164. At paragraph 50 she then said this:

> "I note that since the Inquiry the Government has issued a technical consultation on an update to the revised Framework. This relates to a potential amendment to paragraph 177 that would state that the presumption in favour of sustainable development would apply where an appropriate assessment concludes that they would be no adverse effect from the plan or project on the integrity of the habitats site. This reflects the appellant's view that it was not the intent of the policy to dis-apply the tilted balance where an appropriate assessment concludes that there would be no adverse effect on the integrity of the protected site. Whilst I acknowledge the consultation, at the time of writing, the amendment had not been adopted and as such I give it little weight. Notwithstanding, it is not been determinative in these cases given my conclusions in relation to the effect of the development on the historic assets as set out below and which do dis- apply the tilted balance."

165. C&C's point here had been that she should have concurred with its view and not dis-applied the presumption in the light of the consultation. However, the recent decision of Dove J in *Gladman Developments v SSHCLG* [2019] EWHC 2001 supports the approach taken by the Inspector on this point. At paragraph 39 and 40 of his judgment, he said that the consultation did not change matters. C&C accepts that this decision is against it on Ground 7 but submits that it was wrong. However I would only depart from it if I thought that it was clearly wrong and I do not think that is so. Recognising that possibility, C&C indicated at the hearing that it would not make any further submissions on this ground but reserved the right to revisit it should the matter go further.

166. As matters stand, therefore, Ground 7 must be dismissed.

CONCLUSION

167. For all the reasons set out above, this appeal fails save in respect of Ground 4. I am most grateful to all Counsel for the excellence of their oral and written submissions. Apart from dealing with the consequential matters relating to this judgment, I shall also give the parties an appropriate opportunity to make submissions on discretion and the challenges to the two costs decision letters dated 14 March 2019.