Neutral Citation Number: [2014] EWHC 3807 (Admin)

Case No: CO/2273/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2014

Before:

THE HONOURABLE MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF DOUG CARNEGIE (ON BEHALF OF THE OAKS ACTION GROUP)	**Claimant**
- and -	
LONDON BOROUGH OF EALING	**Defendant**
-and-	
ACTION REGENERATION GROUP LIMITED	**Interested Party**

- -
- -

Richard Turney (instructed by **Leigh Day**) for the **Claimant**
Christopher Boyle QC and Richard Moules (instructed by **Legal & Democratic Services, Ealing Council**) for the **Defendant**
Jonathan Karas QC (instructed by **Berwin Leighton Paisner**) for the **Interested Party**

Hearing date: 7 November 2014

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Approved Judgment

Judgment Approved by the court for handing down.

Mrs Justice Patterson:

Introduction

1. On 8 April 2014 the London Borough of Ealing granted planning permission for the redevelopment of the Oaks Shopping Centre and adjoining car park in Churchfield Road, High Street, Acton as follows:

> "Partial refurbishment, demolition and redevelopment of shopping centre and adjacent car park to provide 2 storey residential accommodation fronting Hooper's Mews, 5 storey accommodation fronting Churchfield Road (retail on ground floor with residential above), 9 storey accommodation to the corner of Churchfield Road/burial ground and 8 storey residential accommodation with a basement level across the remainder of the site. New foodstore to basement level (4,879 sq m) together with 4 new retail units (14 sq m, 78 sq m, 16 sq m and 43 sq m), 6 refurbished retail units (2,444 sq m), 142 residential units (52 x 1 bed, 50 x 2 bed, 39 x 3 bed and 1 x 4 bed) and ancillary service yard, storage, plant, circulation space, amenity space and play space, provision of 27 car parking spaces, including 15 disabled spaces (197 retail and 30 residential), 284 cycle parking spaces (84 retain, 14 employee and 186 residential), with vehicular access from Churchfield Road and access to the residential units off Churchfield Road, Hooper's Mews and burial ground. Provision of two pedestrian links between High Street and burial ground."

2. The claimant is a resident of Acton. With others he formed the Oaks Action Group to respond to plans for redevelopment of the Oaks Shopping Centre.

3. The defendant is the local planning authority which determined the planning application. The interested party is the applicant for planning permission.

4. Permission to apply for judicial review was refused by Mr Justice Mitting on 27 June 2014.

5. An application for oral renewal of permission was made but upon application by the interested party, Master Gidden ordered that the renewal hearing be vacated and a rolled up hearing be substituted. That came before me on 7 November 2014.

Ground of challenge

6. The claimant challenges the planning permission on the following grounds:

   i) That the substitution of Councillor Gulaid on the planning committee was unlawful;

   ii) That the officer report was flawed in how it dealt with heritage assets affected by the proposed development.

7. The defendant and the interested party contend that the claim is out of time and that it should be dismissed on grounds of delay.

Factual background

8. The site is the existing Oaks Shopping Centre with the adjoining Churchfield Road car park in Acton town centre. The site adjoins Acton town centre conservation area in which a burial ground lies. There are some eleven listed buildings within 500 metres of the site. The planning application was accompanied by an application for conservation area consent to replace part of the boundary wall to the burial ground as part of the redevelopment. The application for planning permission and conservation area consent was made on 10 August 2012.

9. There had been two previous unsuccessful applications to redevelop the site.

10. The planning application was controversial. It was reported to committee on 16 October 2013.

11. Before then, on 8 October 2013, English Heritage had responded to a letter notifying them of the application for planning permission. They said they did not wish to comment in detail but offered the following general observations:

> "English Heritage has previously provided substantive comments on two earlier schemes at this site, initially objecting to the layout, massing, height and design of the buildings proposed, and then on the later scheme, the previous objection was maintained and concerns were raised in particular to the siting of the 'landmark' tower at the junction of Churchfield Road and Derwentwater Road and the visual impact of the proposals for the aluminium mesh 'wrap' designed to disguise the multi-storey car park. We considered that both schemes would fail to respect the historic townscape and would appear as an incongruous features harmful to the setting of the Acton Town Centre Conservation Area.
>
> The current proposals have been substantially altered since the previous scheme, reducing the height of the tower and adopting a more contextual design approach and these changes have improved the proposals in the key views, and have addressed the issue of the tower and the mesh raised in our previous letter. However, although these alterations constitute significant improvements to the scheme, and are broadly welcomed, the new buildings do remain significantly higher than the predominant building height in the area and the quality of the new design still does fall short of what we would hope to see in this key location."

12. The officer report was lengthy and recommended that planning permission be granted. Because of the importance of the officer report to ground 2, I set out relevant extracts below.

13. As part of the site description the report records:

> "The application site is not located in a conservation area, but is surrounded by the Acton Town Centre Conservation Area on the north, east and south sides. The site is also within the setting of a number of Grade II listed buildings, including St Mary's Church, Acton Public Library, Acton Town Hall, Chimney at Acton Swimming Baths. It is also within the setting of a number of locally listed buildings along High Street and elsewhere."

14. In dealing with objections to the height, density and mass of the proposed building, a nine-storey tower, the report says:

> "Officer response: The 9 storey element of the building would be higher than its surroundings, but would not unduly dominate the townscape as confirmed in the visual analysis of the viewpoints. In long views the tower of St Mary's Church would remain the dominant feature. In closer views the development would be conspicuous but not impair views into or within the conservation area of the profile of St Mary's Church or any other heritage assets."

Later, in dealing with an objection from Councillor Crawford about the height of the development, the report reads:

> "Officer Response: The overall reduction in height (2 storeys) together with the recessing of the upper floors results in an acceptable scale and height appropriate for the site and context. The higher part of the development is located into the site to mitigate its impact and the edges lower to provide a suitable transition to surrounding development."

In dealing with a contention that design was out of keeping with surroundings and adjacent conservation area the report continued:

> "The revised design as described elsewhere in the report is considered to be in keeping and not harm the setting of the adjacent conservation area. English Heritage has also confirmed the revised scheme would not harm the setting of the CA.
>
> …
>
> The proposal is not considered to harm the significance of the adjoining heritage assets as also confirmed by English Heritage."

15. The English Heritage response was summarised as follows:

> "Planning Application (A)

> No objection. Comments, the revised proposal address the two main objections raised to the previous scheme. Whilst the proposed development is still quite bulky and bulkier than surrounding development, the architecture and materials are better than before.
>
> CAC Application (B)
>
> Do not wish to offer any comments says the Application should be determined in accordance with national and local policy guidance, and on the basis of the Council's specialist conservation advice.
>
> *Officer's response: The impact of the development on surrounding heritage assets is considered in detail in the Reasoned Justification.*
>
> No objection subject standard archaeological condition."

16. The report went on to consider the principle of the development. It said:

> "The development should improve the vitality and viability of Acton. It should also act as a catalyst for future investment and improvement in the retail offer locally."

It continued:

> "As discussed elsewhere in this report the proposed development would have a noticeable impact locally, but it would not harm the amenity of existing residents or the setting of the adjacent conservation area, including the burial ground."

17. The report then went on to consider the impact of the proposals on the setting of adjoining heritage assets:

> "The Application Site is currently used for car parking and servicing. It is a 'hole/gap' in the street scene along Churchfield Road exposing the rear elevations of buildings in High Street and Market Place. The condition of the current site is considered to have a negative impact on the setting of the conservation area, as confirmed in the adopted Conservation Area Character Appraisal (2009).
>
> …
>
> The character appraisal also identifies negative factors which undermine the character of the conservation area, including, the poor architectural quality of some recent building works, that have created fractures and visual gaps in the continuity of the streetscape. These include Morrisons, described as a large, unbroken footprint and especially its over-ground car park which creates a large gap site within the town centre that breaks

> continuity and adds to the unwelcoming environs of the Steyne Road Junction.
>
> The Application Site, described as 'Huge car park facing onto Churchfield Road', is also identified as a fracture within the continuity of the street scene."

The analysis of the impact of the development proceeded by considering significant parts of the townscape, namely, the impact on the setting of the burial ground, the boundary wall, Churchfield Road and High Street. The visual impact on the listed buildings was considered separately by reference to a visual impact assessment compiled by the interested party. Having set out in grid form a summary analysis of the visual impact from all the viewpoints the report set out its summary conclusions on visual impact as follows:

> "The potential impact of the proposed development on the significance of the affected heritage assets, including the visual impact, has been assessed, and broadly accepted. That assessment confirms the proposals would have some adverse impacts in some views into and across the conservation area, in particular from the south but that overall the proposed development should not result in any substantial harm or loss of significance to designated heritage assets.
>
> The development would have an impact on the burial ground, which would be more overlooked, but this is to some extent mitigated by the separation of the building from the boundary, the reductions in height and revisions to improved appearance of the east elevation.
>
> Any residual harm to the setting of adjoining heritage assets would also need to be weighed alongside all the material considerations including the benefits in terms of regeneration of the site and town centre.
>
> English Heritage considers the revised proposal address their two main objections raised to the previous scheme. They acknowledge that the proposed development is still quite bulky in relation to surrounding development, but consider the architectural form and materials now proposed are better than before, and that overall the proposed development would not harm the setting of any nearby Heritage Assets."

18. The final conclusions read as follows:

> "Weighing up all the material considerations, the proposed development as revised is considered to be acceptable and to adequately comply with development plan policies and the National Planning Policy Framework.

- It will result in a viable development of an under-utilized brownfield site which is designated in the Development Plan for high density mixed-use development

- It should help to regenerate the town centre and act as a catalyst for future investment

- It will enhance the retail offer and add to the vitality and viability of the town centre

- It will provide 142 new homes (22% of which would be affordable dwellings)

- It will provide a good living environment and comply with adopted residential standards in most respects

- It will achieve an acceptable density in this accessible location

- It will not harm the significance of adjoining heritage assets

> The development will clearly change the surrounding environment and reduce the level of amenity currently enjoyed by surrounding residents particularly in terms of a reduced daylight and loss of openness. However this is an inevitable consequence of building on what has been a long-standing open car park. The living conditions of surrounding residents would be adequately maintained."

19. The committee resolved to grant planning permission. Planning permission was duly issued after the execution of a section 106 agreement on 8 April 2014.

Legal framework

20. The principles to be applied are not in dispute. I set them out under the relevant headings below.

Approach to officer reports

21. Baroness Hale in *R (on the application of Morge) v Hampshire County Council* [2011] UK SC 2 said at [36]:

> "Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23,

> [2003] 2 AC 295, para 69, "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

22. In *R (on the application of Zurich Assurance Ltd) v North Lincolnshire Council* [2012] EWHC 3708 Hickinbottom J brought together relevant legal principles in the construction of such reports and said:

> "15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:
>
> i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.
>
> ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:
>
> > "[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).
>
> iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may

> be expected to have a substantial local and background knowledge" (*R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (*Oxton Farms*, per Pill LJ).”

23. A challenge can only succeed if it significantly misleads a committee on a material matter which is left uncorrected. It is assumed that members of a planning committee have a substantial local and background knowledge.

24. In *R (on the application of Park Pharmacy Trust) v Plymouth City Council* [2008] EWHC 445 Sullivan J (as he then was) considered the position where there were differences of professional opinion among planning officers responsible for assessing the merits of a planning application. He said at [43]:

> “A report prepared for the assistance of members will reflect the professional judgment of the officer responsible for the report (who may or may not have been its author). Members will be well aware that he or she will have formed that professional judgment having considered the, possibly conflicting, views of colleagues within the department. There is no reason to impose a legal duty on the responsible officer to identify differences of view within the planning department.”

That approach was followed in *R (on the application of Save Britain’s Heritage) v Gateshead Metropolitan Borough Council* [2014] EWHC 896.

Approach to heritage assets

25. The statutory tests that a decision maker has to follow are set out in section 66 (1) and section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. They read:

> “**66. General duty as respects listed buildings in exercise of planning functions.**
>
> (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.
>
> …
>
> **72. General duty as respects conservation areas in exercise of planning functions.**

> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

26. The sections have been considered recently in the case of *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 where Sullivan LJ set out the question to be answered at paragraph 17:

> "17. Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?"

He answered that question in 22:

> "22. Mr. Nardell submitted, correctly, that the Inspector's error in the Bath case was that he had failed to carry out the necessary balancing exercise. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. Mr. Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the Court could go behind the Inspector's conclusion. I accept that (subject to grounds 2 and 3, see paragraph 29 et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell LJ's judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."
>
> 23. That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will

> be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"."

27. That decision was considered by Lindblom J in *R (on the application of Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895. He said:

> "48. As the Court of Appeal has made absolutely clear in its recent decision in *Barnwell*, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in *Barnwell* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.
>
> 49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell*, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering."

Apparent bias/predetermination

28. The case of *R (on the application of Lewis) v Redcar & Cleveland Borough Council* [2008] EWCA Civ 746 preceded the Localism Act. Pill LJ said at [68] and [69]:

> "68. …While reference was made to the fair-minded observer, the court was putting itself in the shoes of that observer and making its own assessment of the real possibility of predetermination. That, I respectfully agree, is the appropriate approach in these circumstances. The court, with its expertise, must take on the responsibility of deciding whether there is a real risk that minds were closed.
>
> 69. Central to such a consideration, however, must be a recognition that Councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a Planning Committee would be entitled, and indeed expected, to have and to have expressed views on planning issues. The approach of Woolf J in *Amber Valley* to the position of Councillors in my judgment remains appropriate."

Rix LJ agreed and said:

> "94. Thus, there is no escaping the fact that a decision-maker in the planning context is not acting in a judicial or quasi-judicial role but in a situation of democratic accountability. He or she will be subject to the full range of judicial review, but in terms of the concepts of independence and impartiality, which are at the root of the constitutional doctrine of bias, whether under the European Convention of Human Rights or at common law, there can be no pretence that such democratically accountable decision-makers are intended to be independent and impartial just as if they were judges or quasi-judges. They will have political allegiances, and their politics will involve policies, and these will be known. I refer to the dicta cited at paras 43/52 above. To the extent, therefore, that in *Georgiou v. Enfield London Borough Council* Richards J seems to have suggested (at paras 30/31) that such decision-makers must be subject to a doctrine of apparent bias just as if they were like the auditor in *Porter v. Magill* with an obligation therefore of both impartiality and the appearance of impartiality, I would, with respect, consider that he was stating the position in a way that went beyond previous authority and was not justified by *Porter v. Magill*. I do not intend, however, to suggest that the decision in *Georgiou* was wrong, and it is to be noted that the common ground adoption of the *Porter v. Magill* test in *Condron* did not prevent this court there reversing the judge on the facts and finding no appearance of predetermination.
>
> 95. The requirement made of such decision-makers is not, it seems to me, to be impartial, but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case, no complaint is raised by reference to the merits of the

> planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy."

Ground 1: Was the process of substituting Councillor Gulaid unlawful?

29. The claimant submits that Councillor Gulaid was substituted to obtain a vote in favour of the development proposed. He was able to attend the meeting of the planning committee but was told not to by the whip of his political party, Councillor Reeves. The composition of the committee is not a political decision but one of the council. When a substitution is made in conflict with the defendant's own rules, as here, the result is an improperly constituted committee. Accordingly, the planning permission must be quashed.

30. The only factual explanation for the change was that Councillor Reeves did not want Councillor Gulaid to vote.

31. There is no evidence from the defendant or interested party. The only evidence is from the claimant as to his conversation with Councillor Gulaid. Councillor Gulaid said that he had been told that because he had been making statements which indicated he was committed to supporting the objectors he should not sit on the committee as that would give rise to a risk of a challenge to a decision on the basis of predetermination. In fact, Councillor Gulaid had made no such statements and was, therefore, improperly removed.

32. Alternatively, there was a real appearance of bias and/or predetermination as a result of the substitution: see *R (Lewis) v Redcar & Cleveland Borough Council* (supra).

33. The defendant and interested party submit that the revised composition of the planning committee was a political decision and is not therefore justiciable. They rely, by analogy, on *R v Secretary of State for Education and Employment ex p Begbie* [2000] 1 WLR 1115.

Discussion and conclusions

34. Rule 24 of the Council and Committee Procedure Rules reads:

> "Where any member of a committee, sub-committee, or panel is unable to attend a scheduled meeting of that body, for a reasonable reason, then a representative of that political group (if any), to which that member belongs, may, by written notice to the proper officer at any time before the day of the meeting in question, authorise the proper officer to make a change to the standing appointments of the committee, sub-committee, panel in question, to substitute an alternative member for the duration of that meeting."

35. Committee membership is determined by the council to reflect the political balance of the elected members. Inevitably, there will be times when elected members cannot attend committee meetings. It is part of the political process that the political party

will then substitute another of its party to ensure that the political balance of the committee is preserved.

36. Here, what happened was that Councillor Gulaid was substituted by Councillor Varma who, in turn, was substituted by Councillor Kang. Councillor Kang voted in favour of the proposal. However, all three councillors were duly appointed Labour Party members of the planning committee. It was a political decision as to who attended the meeting to vote on the planning application on 16 October 2013. Whether there was a reasonable reason for any member being unable to attend a committee meeting was a matter to be determined by the political party. There is nothing to indicate that an inability to attend is confined to physical inability to attend. It could extend to where there were concerns that the member due to attend may not possess an open mind on the decision to be taken. Whether the councillor had or had not, in fact, an open mind would not affect the reasonableness of the concern on the part of the relevant political party. But in any event that decision making process is part of the democratically elected political process and is outwith the reach of the courts.

37. The next step in the process is for the party to give written notice to the proper officer of the council "at any time before the day of the meeting in question and authorise the proper officer to make a change." That is what happened here. Although, unusually, the written notice is not before the court the evidence is that that was duly given: see the response to the pre-action protocol letter and the detailed grounds of resistance (which is accompanied by a declaration as to the statement of truth). Upon receipt of that notice the officer was duly authorised to make a change to the members who were to attend the meeting. I do not accept, therefore, that the procedure for member substitution was not properly followed. Accordingly, the committee was properly constituted to be able to make a decision on the planning application before it.

38. The claimant further submits that due to the nature of planning decisions members have to go in with an open mind to be able to determine the planning application fairly. Here, the change in composition was done deliberately to alter the outcome of the planning process. With Councillor Gulaid excluded there was one more vote in favour of the proposal.

39. As the defendant submits that submission can only be made out if Councillor Kang can be shown to have a closed mind. If he had an open mind then the substitution made no difference.

40. The minutes of the committee meeting record Councillor Kang's contribution to the debate as follows:

> "Councillor Kang said that it was a difficult site that needed developing. On the scale, he said that he could understand why it had to be reasonable rather than small because of the expensive price of land. Attempts have also been made to address the links between Churchfield Road and the High Street, set the development back from Churchfield Road and there is a reasonable size car park. On the traffic issues, although he thought Churchfield Road was narrow, this situation could be resolved by placing conditions on lorries

> entering and existing the site. Looking at the whole picture he said that he was, on balance, minded to approve the application and the development of the site."

He also made a comment on affordable housing and conditions:

> "Councillor Kang commented that less affordable housing in town centre locations such as this may in fact be better and questioned whether the Council had sufficient grounds to refuse the application if it goes to appeal. … Councillor Kang said that there should be a condition stipulating that lorries engines be turned off when they are unloading"

41. Those contributions do not support any contention that Councillor Kang was a councillor with a closed mind on how the application should be determined. Rather, they reveal a concerned politician who had evaluated the proposal as a whole and reached an "on balance" conclusion. That is the only evidence that there is before the court as to his state of mind.

42. It follows that there is no evidence that Councillor Kang had a closed mind in the determination of the planning application on its merits. Accordingly there is no evidence of pre-determination. Nor is there any evidence upon which a fair minded observer informed of all the relevant facts could reasonably conclude that there was an appearance of bias.

43. This ground is unarguable.

Ground 2 – Whether the proper approach was taken to considering the heritage assets?

44. The claimant submits that the defendant erred in law because:

i) The officer report failed to advise members of the existence of the statutory duties. Considerable importance and weight had to be given to the preservation of the setting of the listed building and conservation area because of identified harm. Members were therefore misled.

ii) The officer report failed to itemise the listed buildings whose setting were affected by the proposals.

iii) The officer report significantly misled members as to the position of English Heritage. They did not say that the scheme would not harm the setting of the conservation area. They did not say either that the scheme would not harm significance of the adjoining heritage assets. They objected to the scheme in their response which was not reported to members.

iv) The officer report failed to report strong objections of the defendant's own conservation officer to the scheme.

v) The officer report misled members by treating the impact of the setting of the listed buildings and conservation area as matters to be simply balanced against the benefits of the scheme rather than a matter to be accorded considerable importance and weight.

45. The defendant submits that the setting of a heritage asset is defined in Annex 2 to the National Planning Policy Framework 2012 (NPPF):

> "**Heritage asset**: A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest. Heritage asset includes designated heritage assets and assets identified by the local planning authority (including local listing)."

46. There can be a deleterious change in view without it affecting the setting of the heritage asset.

47. The officer report concluded that there would be no harm to the significance of the adjoining heritage assets. The visual impact assessment (VIA) was a different exercise. There would be a change in view as a result of redevelopment of the scheme. But the overall conclusion was one that there was no harm caused.

48. English Heritage raised no objection, and did not say that there was any harm to the heritage asset.

49. The conservation officer expressed a different view but there was no obligation to set that out in the committee report: see *Park Pharmacy Trust* and *Save Britain's Heritage* (supra).

Discussion and conclusions

50. I have set out the relevant extracts of the officer report above. It is well established that a report does not have to enumerate all the relevant statutory tests. Members of a planning committee are assumed to be aware of them. The key is whether those tests were applied.

51. Likewise, there is no duty on an officer to list all of the listed buildings that potentially could be affected by the proposed development. The officer report is addressed to local councillors familiar with the area.

52. The response from English Heritage of 8 October 2013 was, as it said, one of general observation. It was not a letter of objection as its earlier comments had been on the two previous schemes on the site. English Heritage made it clear that there had been substantial alteration to the proposals which were broadly welcomed. However, the height of the new buildings and quality of design still fell short of what they hoped to see.

53. It follows that in reporting English Heritage's response the officer report was correct to say that it had raised no objections. The residual concerns of building height and quality of design were matters of planning judgment for the officer report and ultimately the members to evaluate. The officer report did so, as set out above, in dealing with specific objections raised to the development.

54. In the absence of evidence to the contrary it can be inferred that members adopted the reasoning of the officers. It cannot be said, therefore, that the members were significantly misled by the officer report as to the stance of English Heritage.

55. The conservation officer commented adversely on the scheme. However as the cases of *Park Pharmacy Trust* and *Save Britain's Heritage* make clear there is no reason to impose a legal duty on the responsible officer to identify differences of view within the planning department. It is the role of the planning officer to distil in a clear fashion the issues for members to determine. Of course, if they omit a material consideration, then the report is vulnerable to challenge. However, in the instant case it was an overall planning judgment that was material.

56. It is clear from the conclusion to the report that the professional evaluation was that the development proposals would not cause harm to the significance of the adjoining heritage assets. That conclusion was reached taking into account as part of the consideration of the principle of development that, although the proposed development would have a noticeable impact locally it would not harm the setting of the adjacent conservation area including the burial ground.

57. Under the impact of proposals on the setting of adjoining heritage assets reference was made to the revised heritage statement submitted by the interested party incorporating a visual impact statement. In the report the impact on the conservation area was analysed as was the impact on the listed buildings. Views 1, 2, 5 and 16 were the only views relevant to listed buildings and the change caused by the proposed development was described as not significant in relation to them. In any event the exercise of visual impact is not to be equated, in itself, with an assessment of the significance of the effect of the development on any heritage asset. It is part only of that exercise. What emerges from scrutiny of the report and background papers is that there had been a thorough assessment carried out by first the interested party and, second, the defendant which considered the statutory duties and reached a rational conclusion of no harm to the heritage asset to be reached.

58. That being the case, the circumstances here are distinguishable from those in *East Northamptonshire* and *Forge Field* (supra) where harm to the setting of a range of heritage assets was found. In those circumstances there was a strong presumption against granting planning permission which would harm the character and appearance of the heritage assets because of the desirability of preserving the character and appearance of conservation area and listed buildings. They were considerations to which considerable weight must attach. Even if the harm was less than substantial the balancing exercise must take into account the overarching statutory duty to give considerable weight to the preservation of the setting of the heritage asset and/or listed building. That is not this case. No harm was found after a diligent consideration of the effects of the development. That was the clear advice given to members. There was no obligation to go further in the officer report in the light of that conclusion. The conclusion is not attacked on the grounds of irrationality. In my judgement, the issue was approached entirely correctly.

59. I do not regard this ground as arguable.

Judgment Approved by the court for handing down.

Ground 3: The issue of delay

60. The claimant filed a claim form on 16 May 2014. It was sealed by the Administrative Court that day. In section 5 the detailed statement of grounds box is ticked with an entry "See attached letter before claim." Section 9 headed 'Statement of facts relied upon' referred to the attached letter before claim. Section 10 leaves blank any reference to statement of grounds and statements of fact relied upon. For reasons why a document is not supplied the entry reads "Statements of facts and grounds to be issued within 14 days." The statement of facts and grounds was filed on 28 May.

61. The defendant and interested party refer to CPR 54.5 and maintain that the final day for filing the claim form was 20 May. The claimant had to comply with CPR 8.2(b)(ii) which states that when the claimant is using part 8 procedures the claim form must state, "the remedy which the claimant is seeking and the legal basis for that remedy."

62. CPR 54.6(2) states that the claim must be accompanied by the documents required in PD 54A. The claim form filed was in breach of the CPR in that it failed to state the legal basis for the case and was not accompanied by a statement of facts and grounds. It was, therefore, out of time. The claimant contends that the claim form was filed within time and met all relevant procedural requirements. The appropriate remedy was for the defendant and interested party to apply to strike out the claim form which has not occurred: see CPR 3.4.

63. A defective claim form does not render the document a nullity. Each relevant box of the claim form has been completed.

Discussion and conclusions

64. In my judgment the claim form was clearly defective. CPR 54.5(5) was introduced expressly to ensure expedition in bringing challenges to a grant of planning permission.

65. The claim form does not state the legal basis of the claim but, rather, refers to the letter before action. The claim form itself is incomplete in that the boxes within section 10 dealing with the statement of grounds and statement of facts relied upon are not completed. There is no reason why the document has not been supplied. The form simply reads "Statement of facts and ground – within 14 days." In effect the claimant was seeking an extension which was not permitted under the rules.

66. I accept that the claim form as filed was not a nullity. However, it was clearly defective. As such the claimant requires the permission of the court to grant an extension of time. The Judicial Review Pre-Action Protocol draws specific attention to the six week rule now applicable in planning cases and in a footnote says, "While the court does have the discretion under rule 3.1(2)(a) of the Civil Procedure Rules to allow a late claim, this is only used in exceptional circumstances. Compliance with the protocol alone is unlikely to be sufficient to persuade the court to allow a late claim."

67. The claimant submits that it was delayed in producing a statement of facts and grounds because of the delay on the part of the defendant in responding to their pre-

action protocol letter. In itself, I do not regard that as sufficient to amount to a reasonable excuse. Nor is it exceptional. However, here the claimant did attach a copy of the pre-action protocol letter instead of its grounds. When the grounds were served eight days after the six week period had expired they closely followed what was raised in a pre-action protocol letter. It cannot be said, therefore, that the defendant or interested party were prejudiced by the claimant's non-conformity. Further, neither had applied to strike out the defective claim form. Despite the approach of the claimant being one that I would normally deprecate because of the importance of challenging planning decisions within a short and certain time in the circumstances here I have eventually concluded that it is appropriate to extend time to the claimant in which to file his statement of facts and grounds.

Conclusions

68. It follows from the above that:

i) I grant the claimant an extension of time within which to file his statement of facts and grounds;

ii) I would not have granted permission to the claimant to proceed on the two remaining grounds of his challenge;

iii) I invite submissions as to the final order and costs.