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Case Nos: CO/735/2013
CO/16932/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2014

Before :

Mr Justice Lindblom

Between :

The Queen (on the application of
(1) The Forge Field Society
(2) Martin Barraud
(3) Robert Rees) — **Claimants**

- and -

Sevenoaks District Council — **Defendant**

- and -

(1) West Kent Housing Association
(2) The Right Honourable Philip John Algernon Viscount De L'Isle — **Interested Parties**

Mr James Strachan Q.C. (instructed by **Winckworth Sherwood**) for the **Claimants**
Mr Alexander Booth (instructed by **the Council Solicitor of Sevenoaks District Council**) for the **Defendant**

Hearing dates: 24 and 25 March 2014

Judgment Approved by the court for handing down

Mr Justice Lindblom:

Introduction

1. In the village of Penshurst in Kent there is a field called Forge Field, on which planning permission has twice been granted for a development of affordable housing. Those two planning permissions are the subject of these proceedings.

2. There are two claims for judicial review. The claimants in both are the Forge Field Society ("the Society"), an unincorporated association which opposes the development of Forge Field, its chairman, Mr Robert Rees, and its secretary, Mr Martin Barraud. In both claims the claimants seek an order to quash a decision of the defendant, Sevenoaks District Council ("the Council"), to grant planning permission for the proposal. In the first claim the claimants attacked the planning permission granted by the Council in October 2012. The second claim challenged the permission for the same development granted a year later in October 2013. The applicant for planning permission was the first interested party, the West Kent Housing Association ("West Kent"). The second interested party, Viscount De L'Isle, owns Forge Field through the Penshurst Place Estate.

3. On the second day of the hearing the Council abandoned its defence of the first planning permission. But it still maintained that the second had been lawfully granted.

Background

4. Penshurst is in the High Weald Area of Outstanding Natural Beauty ("the AONB") and the Metropolitan Green Belt. Forge Field is about a third of a hectare of rough grassland, sloping down from the High Street. It is in the Penshurst Conservation Area, within the settings of Star House, a grade II* listed building erected in 1610, and Forge Garage, a building in the Arts and Crafts style, now divided into the Old Smithy and Forge Garage Cottage, and listed at grade II.

5. In 2009 the Council accepted that the need for affordable housing in Penshurst should be met by building about five two-bedroom houses and making them available as affordable dwellings for local people.

6. West Kent submitted its first application to the Council in August 2011. It sought planning permission for six affordable dwellings, each with two bedrooms. In April 2012 the Becket Trust Housing Association ("the Becket Trust") submitted an application for planning permission for affordable housing on another site in Penshurst, known as Becket's Field. As originally submitted, the application was for the construction of 10 affordable dwellings on a site including land owned by West Kent. But this proposal was later amended. West Kent's land was excluded from the site and the proposed development was reduced to a scheme for the construction of six new dwellings on land owned by the Becket Trust.

7. West Kent's proposal was put before the Council's Development Control Committee at its meeting on 4 July 2012. The committee received a report from the Council's Chief Planning Officer, recommending approval. The committee accepted that recommendation and resolved to grant planning permission, subject to conditions and a section 106 agreement to secure the provision of housing to meet local need and the necessary highway improvements. The Becket Trust's amended proposal was not considered by the committee at that meeting.

8. Both proposals were considered by the committee on 18 October 2012. The members were advised that the two schemes were alternatives to each other. Either of them would satisfy the identified need for affordable housing in the parish. The committee resolved to grant planning permission for West Kent's proposal and to refuse permission for the Becket Trust's. The decision notices were issued on 25 October 2012.

9. The first claim for judicial review was lodged with the court on 22 January 2013. Permission for that claim to proceed was granted by Lewis J. on 29 July 2013.

10. In the meantime, on 23 May 2013, West Kent made its second application for planning permission, for a proposal identical to the first, but with a revised design and access statement. On 17 July 2013 the Society's solicitors, Winckworth Sherwood, objected to that application on its behalf. On 14 August 2013 the Council's Legal Services Manager sent Winckworth Sherwood a draft of the Chief Planning Officer's report on the second application, and invited their comments on it. Winckworth Sherwood responded on 5 September 2013. They said the Council could not determine the new application for planning permission at Forge Field without there being a real risk of bias. But they also made several comments on the draft report, one of which was that the Council had not investigated the possibility of an acceptable development of affordable housing at Becket's Field, jointly pursued by West Kent and the Becket Trust.

11. The committee considered the second proposal on 3 October 2013, and accepted the officer's recommendation to approve it. Planning permission was granted on 4 October 2013.

12. On 14 November 2013 the claimants issued their second claim for judicial review. On 9 December 2013 Patterson J. ordered a rolled-up hearing of that claim, to be fixed for the same day as the hearing of the first.

The issues

13. As I have said, the Council no longer opposes the first claim. On its behalf Mr Alexander Booth acknowledged, while making his submissions, that on one of the Society's grounds, which alleged that the Council had failed to comply with its statutory duties in making a decision with implications for the settings of listed buildings and for the conservation area, the claim could not properly be resisted. No other party in those proceedings had opposed the claim. In the circumstances Mr James Strachan Q.C., for the Society, invited me to order that the planning permission of 25 October 2012 be quashed. He recognized, of course, that the claimants' success in the first case would be of no use to them unless they also won in the second.

14. The second claim raises five issues:

    (1) whether the second planning permission was tainted by the appearance or risk of bias because when it was granted the Council was still fighting the claim for judicial review against its previous decision on the same proposal (ground 1);

    (2) whether the Council failed to discharge its duties under sections 66(1) and 72 of the Listed Buildings and Conservation Act 1990 ("the Listed Buildings Act") when considering the likely effects of the development on the setting of the listed buildings and on the conservation area (ground 1A);

(3) whether the Council misdirected itself on the principles of policy for the AONB in the National Planning Policy Framework ("the NPPF") (ground 2);

(4) whether the Council failed properly to consider alternative sites for the development of affordable housing to meet the identified need (ground 4); and

(5) whether the Council's decision was irrational (ground 5).

15. Ground 3 of the claim, which alleged that the Council had failed to screen the second proposal under the regime for environmental impact assessment, was not pursued after the Council had provided the claimants with a copy of its screening opinion.

Issue (1) – the appearance or risk of bias

16. On 2 July 2013 West Kent's planning consultants, Smiths Gore, wrote to the Council to explain why the second application for planning permission had been submitted. The claim for judicial review would delay the project and might jeopardize its funding. West Kent had therefore decided to submit the proposal to the Council again, with further explanatory information in the revised design and access statement.

17. When he wrote to Winckworth Sherwood on 14 August 2013 the Council's Legal Services Manager said the draft officer's report had taken into account "the criticisms raised by the legal challenge". But he said this was not an admission by the Council that the previous officer's report was deficient in any way, or that there was any error in the decision to approve the first proposal. The Council recognized that this was "an important but controversial development for Penshurst". It wanted the Society to be satisfied that its views had been considered and that "procedurally" the decision was correctly taken. The Society was therefore invited to consider the draft committee report and to tell the Council if it thought there was any omission or error in the draft report.

18. In their letter of 5 September 2013 Winckworth Sherwood said that if the Council believed the 2012 planning permission was not vulnerable to challenge it was "inevitable that neither the officers nor the Council will be approaching the reconsideration with the required degree of objectivity and lack of bias". Pointing to the decision of the Court of Appeal in *R. (on the application of Carlton-Conway) v Harrow London Borough Council* [2002] EWCA Civ 927, they said it was "obvious that there is a real risk that the Council, in taking its decision on this fresh application, will wish to support the decision that they have already taken on the 2012 permission in order to try and avoid the consequences of the forthcoming judicial review and any costs implications". But without prejudice to that point they made "some limited preliminary observations" on the draft report.

19. In his report for the meeting of the committee on 3 October 2013 the Chief Planning Officer gave the committee this advice on the approach it should take:

> "The detail of the Court proceedings is not relevant to the consideration of this planning application. The officer's report on the application that follows is based on additional information and includes additional analysis to address concerns raised through the Court process." (paragraph 9)

and:

> "As planning permission SE/11/02258/FUL is subject to a legal challenge members should approach the determination of the application as if this were the first time they have seen it. Members are specifically warned not to approach the task of determination with consistency with previous decisions at the forefront of their minds." (paragraph 10).

20. The report dealt with the suggestion that the Council would not approach the application with an open mind. It said that the officers who had prepared and contributed to it were "professionally qualified and duty bound to provide an impartial objective assessment of the planning merits of this planning application". They did not accept that the Council's previous decision was "legally flawed". But it was "simply common sense to consider points raised by the judicial review and ensure that the application is correctly assessed in respect of the grounds of challenge". The Chief Planning Officer explained how the new proposal had been assessed:

> "Officers have adopted the approach of starting with the assumption that each of the grounds of judicial challenge has merit. Officers have then tested the application as required for each particular ground. Had the [judicial] review been decided and planning permission SE/11/02258 quashed it would still be necessary for the Council to determine SE/11/02258. That would require the officers to prepare a report that took into account the procedural irregularity that resulted in the quashing of the decision. This planning application has allowed the Council to in effect do this in advance of any decision on the merits of the challenge." (paragraph 91).

The members were told again that they should "consider the application afresh on the basis of this officer report which has been prepared with additional information over the reports on SE/11/02258" (paragraph 92).

21. The officer then set out his appraisal of the proposed development, issue by issue (paragraphs 93 to 181). At the end of that part of the report he came to the Society's suggestion that "... this application is an admission that the previous application [was] not properly considered". His advice on that point was that "[the] existing planning permission is subject to Judicial Review and the High Court will determine whether the decision was procedurally flawed or not" (paragraph 178).

22. In his first witness statement, dated 27 November 2103, the Council's Principal Planning Officer, Mr Andrew Byrne says that at the committee meeting the Chairman asked the Legal Services Manager to explain why the members had been advised to deal with the proposal as if it was the first time they had seen it. The Legal Services Manager said the members should decide the application on its merits and should not let the decision taken in October 2012 influence their decision. When some of them asked questions about the claim for judicial review, the Legal Services Manager told them this was not relevant to the decision they were making on the application before them. Mr Byrne says he is "entirely confident that Councillors fully understood that their decision on this fresh application should be based on the planning merits of the application and nothing more" (paragraph 5). At the meeting Mr Rees was given the chance to speak on behalf of the Society and did so, opposing the application (paragraph 6).

23. Mr Strachan submitted that the Council's consideration of West Kent's second application for planning permission was inevitably tainted by the risk or appearance of bias, in the same

way as the local planning authority's redetermination of its officer's decision in *Carlton-Conway*. When the Council considered the second application the first claim for judicial review was live, and the Council was resisting it. Mr Strachan said that a fair-minded person would be bound to think that the members would want to support their previous decision, thus avoiding for the Council the inconvenience and cost of defending that decision before the court. An authority can lawfully make a decision whose effect is to render a claim currently before the court redundant. But, Mr Strachan submitted, this can only be done if the authority has first admitted that there was, or might be, some error of law in its previous decision. What the authority cannot do is make a second decision while denying any legal error in its first, for if it did that its second decision would be influenced, or at least would seem to be influenced, by the aim of justifying the previous one. This mischief was not to be avoided by officers producing a report advising members to ignore the earlier decision. The members could not be expected to do that. They would be conscious of their earlier decision and would naturally want to follow it. But anyway, Mr Strachan submitted, the advice given to the Council's committee in this case – that they should not have the principle of consistency in decision-making "at the forefront of their minds", and that the officers did not regard the previous decision as legally flawed – was equivocal and apt to mislead.

24. I think that argument is misconceived. I do not accept that a planning permission granted on a second application seeking approval of the same development will automatically be infected by apparent bias unless the local planning authority admits to some error of law in making its previous decision. A finding of apparent bias will always depend on the facts of the case in hand. In this case, on the facts, I see no basis for holding that the Council's second decision was vitiated by bias, real or apparent, or by predetermination.

25. The relevant law is clear. The court will not readily find the appearance of bias in an administrative decision. The test is whether a fair-minded and informed observer, having considered the relevant facts, would think there was a real possibility of bias (see, for example, the speech of Lord Hope of Craighead in *Porter v Magill* [2002] 2 A.C. 357, at paragraph 103, and, in the context of a planning decision, the judgment of Richards L.J. in *R. (on the application of Condron) v National Assembly for Wales* [2006] EWCA Civ 1573, at paragraphs 11 and 38 to 40). The fair-minded observer is neither complacent nor unduly sensitive or suspicious. He views the relevant facts in an objective and dispassionate way.

26. The lodging of a claim for judicial review does not suspend the normal business of development control. Such a claim is not a means of defeating the proposal itself. It is a means of overturning an unlawful decision. The court's jurisdiction is confined to a review, on public law principles, of the process by which the decision was made. Success for the claimant does not come in the form of a different result on the planning merits, but in the undoing of a legally bad decision and a legally sound one being taken instead.

27. There is no reason in principle why a second application for planning permission should not be submitted and determined while a previous permission for an identical or closely similar development is under attack in the courts. This is often done. The same statutory requirements govern the process. The local planning authority has the same period in which to make its decision before the applicant can appeal for non-determination to the Secretary of State. The second application, like the first, must be determined on the merits of the proposal as they are at the time when the decision is made. If permission is granted it too may be challenged in a claim for judicial review.

28. In this case, as Mr Booth submitted, there was nothing to prevent West Kent from submitting its second application. That it did so was hardly surprising. It feared a lengthy and possibly fatal delay for its development until the Society's claim for judicial review had been decided by the court. The application itself was valid. Further information on the proposed development was provided. The Council could have put off its decision on the second application until after the claim for judicial review had been heard. But it did not do that, and there was nothing to compel it to do so. West Kent was entitled to a timely decision on that application.

29. The Council did not have to concede any of the grounds in the claim for judicial review of the first planning permission if it was to avoid creating the appearance of bias in its decision on the second. What it had to do was to consider the proposal on its planning merits, acting throughout in accordance with the statutory regime for the making of development control decisions. In my view, subject to what I shall say on the other issues in the claim, that is what the Council did. I do not see how it can be suggested that a fair-minded observer, made aware of all the relevant facts, would have been in any doubt about that. The committee was advised that it must consider the proposal entirely afresh, and was cautioned against simply replicating the decision it had made before. The officers' advice to that effect was not ambiguous. It was perfectly clear. The fair-minded observer would not think that the members ignored it, or that they believed they could approach their task as if it were simply an exercise in validating their previous decision. There is no evidence to support such a conclusion.

30. I do not see the decision of the Court of Appeal in *Carlton-Conway* as authority for the broad proposition which Mr Strachan seeks to extract from it. That case turned on its own facts, which were very different from the facts here. A decision to grant planning permission which had been made by an officer under delegated powers was challenged on the basis that it ought to have been taken by a committee of members. After the decision had been challenged, and permission to apply for judicial review granted, a committee of the local planning authority purported to "ratify" the officer's decision. It was not suggested that this resolution represented a fresh grant of planning permission. But given the committee's decision it was argued on behalf of the authority that the court should exercise its discretion not to grant relief. That argument was rejected by the Court of Appeal. In a judgment with which Robert Walker L.J. and Sir Martin Nourse agreed, Pill L.J. said (at paragraph 27) that there was a "real risk" that when the members took their decision "there was a potential motivation, as would be perceived by a fair-minded member of the public, that a wish to support their Chief Planning Officer and to avoid the possibility of judicial review were factors which led to the relevant decisions". The appellant was therefore entitled to "a fresh consideration by the committee which was not burdened by the possibility of the extraneous factors" to which Pill L.J. had referred (paragraph 28).

31. As Mr Booth submitted, on the facts of this case, there was no attempt by the Council to confirm the decision it had already taken on the first proposal, nor any evidence that the committee was motivated to do that. On the contrary, in this case there was a wholly separate statutory process, begun by the making of a further application for planning permission and continued, in the normal way, with full consultation on that new application, representations for and against its approval, the opportunity for parties to comment on the draft committee report, the planning officer presenting the application to the committee as a fresh proposal, and the committee deciding whether or not planning permission for the proposed development ought to be granted. The legal integrity of that statutory process can be tested in a claim for judicial review, and it has been. But the process itself was a discrete and complete

exercise in statutory decision-making. The members who took the decision were left in no doubt by the officers that this was so, and that it was their duty to approach their decision with an open mind. They considered the proposal in the light of the assessment presented in the committee report, which was an entirely free-standing analysis of the planning merits. In my view it is unreal to suggest that a fair-minded observer would regard this process as liable to a risk of bias or predetermination. On the facts before the court, there was no bias, no appearance or risk of bias, and no predetermination.

32. This ground of the claim therefore fails.

Issue (2) – sections 66 and 72 of the Listed Buildings Act

33. Although this ground of the claim was introduced only after the Court of Appeal had given its decision in *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] EWCA Civ 137, Mr Booth did not press the Council's resistance to its being argued, and I heard full submissions on it from either side.

34. Section 66(1) of the Listed Buildings Act provides:

> "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."

35. Section 72(1) provides:

> "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."

Among the provisions referred to in subsection (2) are "the planning Acts".

36. Policy SP4 of the Sevenoaks Core Strategy, "Affordable housing in Rural Areas", is the relevant policy of the development plan. The relevant parts of it state:

> "Small scale developments for affordable housing only will be developed to meet local needs identified through rural housing needs surveys. The following criteria will be applied in identifying sites:
>
> a. the local needs identified through the rural housing needs survey cannot be met by any other means through the development of sites within the defined confines of a settlement within the parish or, where appropriate, in an adjacent parish;
>
> b. the proposal is of a size and type suitable to meet the identified local need … ;
>
> c. the proposed site is considered suitable for such purposes by virtue of its scale and is sited within or adjoining an existing village, is close to available services and public

transport, and there are no overriding countryside, conservation, environmental, or highway impacts[.] ...".

37. Paragraph 132 of the NPPF, in the section dealing with the conservation and enhancement of the historic environment, states:

> "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. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. ..."

38. Paragraph 134 of the NPPF says that "[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 securing its optimum viable use".

39. In paragraph 40 of his report on the second application the Chief Planning Officer recorded the view of the Council's Conservation Officer:

> "In the light of my previous comments and of the additional comment set out above, I consider that the proposed development would not cause substantial harm or loss of significance to the Conservation Area or to the setting of any of the listed buildings in the vicinity of the application site. This is the 'test' set out in the NPPF and relevant legislation, policies and other guidance."

40. In paragraphs 117 to 142 of his report the Chief Planning Officer discussed the likely impact of the proposed development on the character of the village, "including surrounding heritage assets". He referred to the provisions of sections 66 and 72 of the Listed Buildings Act (paragraph 119), and to national policy. He quoted from paragraph 132 of the NPPF, including the reference there to "great weight" being given to the conservation of heritage assets (paragraph 120). He went on to consider the likely effect of the proposed development on the conservation area (paragraphs 122 to 129), and on the settings of four listed buildings: the Church of St John the Baptist, Forge Garage, Star House and The Birches (paragraphs 130 to 141).

41. In paragraph 142 the officer stated his conclusions on the likely effects of the development on the conservation area and the settings of listed buildings:

> "In summary, I would conclude that some harm to the character and appearance of the conservation area would occur through the interruption of views across the river valley and the loss of some open land within the conservation area as a setting to built form. In addition, some harm to the setting of Forge Garage as a listed building would occur, due to the impact of the development on the view of this property from the west. In accordance with Sections 66 and 72 of [the Listed Buildings Act], special regard must be given to the desirability of preserving surrounding listed buildings and the character or appearance of the Penshurst Conservation Area. In my opinion, the harm as identified above would be limited. The majority of Forge [Field] would remain undeveloped and as such the built form of the village would continue to enjoy an open attractive setting on the approach from the south west, and the new houses would be set back from Forge

Garage, thus retaining views of the flank wall to this property. I also consider that the impact on the setting of the conservation area would be limited as the development would represent a small extension to the village, it would be seen in the context of existing built form within the conservation area, and has been well designed to respect this built form. The interruption of views would be limited and would not affect viewpoints as identified in the conservation area appraisal. Such limited harm would result in some conflict with policies EN23 of the local plan and SP1 of the Core Strategy. However, whilst having special regard to the desirability of preserving listed buildings and the character or appearance of the conservation area, I consider that the harm arising from the development would represent less than substantial harm to the significance of the heritage asset under paragraph 134 of the NPPF. This states that less than substantial harm should be weighed against the public benefits of the proposal. This balancing exercise is considered later in the report in addition to the test under SP4 as to whether such harm is overriding."

42. In paragraphs 163 to 166 of the report the officer came to his conclusions on the impacts of the proposed development "using Policy SP4(c), applying the statutory test set out in Sections 66 and 72 of [the Listed Buildings Act] and advice in the NPPF". In paragraph 166 he said:

> "Paragraph 134 of the NPPF states that 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 securing its optimum viable use. Whilst I acknowledge the legislative duty placed on a local planning authority to have special regard to the preservation of conservation areas and listed buildings, in this instance and following the advice in paragraph 134 of the NPPF, the proposal would bring substantial public benefits through the provision of affordable local housing to meet an identified need. I consider that this benefit is capable of carrying greater weight than the limited harm identified to heritage assets, and that the impact on heritage assets would not be overriding under Policy SP4(c)."

43. In paragraph 182, in his "Conclusion", the officer said that he did not consider that the "limited harm" outweighed the benefits of providing local needs affordable housing, and that on this basis he concluded that the proposal "would accord with Policy SP4 of the Core Strategy and with the advice contained on heritage assets within the NPPF".

44. At the meeting, according to the minutes, the members were told that the officer's report had found "some limited harm" to the conservation area and to the setting of Forge Garage, that the "[the] statutory test required that special regard be had to the to the desirability of preserving or enhancing these", but that the Chief Planning Officer did not consider that this "limited harm", taken together with the "limited harm" to the AONB, "outweighed the benefits of providing local needs affordable housing".

45. Mr Strachan submitted that in determining the second application the Council failed – as it had in determining the first – to comply with its duties under sections 66 and 72 of the Listed Buildings Act. Its error was similar to the one made by the inspector in *Barnwell*. Having "special regard" to the desirability of preserving the setting of a listed building under section 66, and paying "special attention" to the desirability of preserving or enhancing the character and appearance of a conservation area under section 72, involves more than merely giving weight to those matters in the planning balance. "Preserving" in both contexts means doing no harm (see the speech of Lord Bridge of Harwich in *South Lakeland District Council v*

Secretary of State for the Environment [1992] 2 A.C. 141, at p.150 A-G). There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area. The officer acknowledged in his report, and the members clearly accepted, that the proposed development would harm both the setting of Forge Garage as a listed building and the Penshurst Conservation Area. Even if this was only "limited" or "less than substantial harm" – harm of the kind referred to in paragraph 134 of the NPPF – the Council should have given it considerable importance and weight. It did not do that. It applied the presumption in favour of granting planning permission in Policy SP4(c) of the core strategy, balancing the harm to the heritage assets against the benefit of providing affordable housing and concluding that the harm was not "overriding". This was a false approach. Its effect was to reverse the statutory presumption against approval.

46. Mr Booth submitted that the Court of Appeal's decision in *Barnwell* did not change the law, but reflected the familiar jurisprudence applied in a number of previous cases – for example, in *The Bath Society v Secretary of State* [1991] 1 W.L.R. 1303. The Council complied fully with the requirements of sections 66 and 72. The officer's conclusion that the harm to the setting of the listed building and to the character and appearance of the conservation area was only "limited" and thus "less than substantial" is not criticized as unreasonable, nor could it be. Following the policy in paragraph 134 of the NPPF, the officers weighed that less than substantial harm against the substantial public benefit of providing affordable housing to meet an identified need. There is no suggestion that they struck this balance unreasonably. They also found that the harm was not such as to be "overriding" under Policy SP4(c). This too was a reasonable planning judgment.

47. In my view Mr Strachan's submissions on this issue are right.

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.

50. In paragraph 22 of his judgment in *Barnwell* Sullivan L.J. said this:

"... I accept that ... 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 L.J.'s judgment [in *The Bath Society*] 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"".

51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in *South Lakeland* (at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area "there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character of 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"" (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings "should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise" (paragraph 24). Even if the harm would be "less than substantial", the balancing exercise must not ignore "the overarching statutory duty imposed by section 66(1), which properly understood ... requires considerable weight to be given ... to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" (paragraph 28). The error made by the inspector in *Barnwell* was that he had not given "considerable importance and weight" to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29).

52. I think there is force in Mr Strachan's submission that in this case the Council went wrong in a similar way to the inspector in *Barnwell.*

53. I bear in mind the cases – and there are many of them – in which the court has cautioned against reading committee reports in a more demanding way than is justified (see, for example, the judgment of Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Council* [2010] EWCA Civ 1286, at paragraphs 18 to 21).

54. Mr Strachan did not submit that the officer ought to have reached a different view about the degree of harm that the development would cause to the setting of the listed building and to the conservation area. He recognized that such criticism would have been beyond the scope of proceedings such as these, unless it could be supported on public law grounds. He pointed out that the Council's Conservation Officer seems to have misunderstood the relevant statutory provisions and the relevant policy and guidance, apparently thinking that there is a "test" of "substantial harm or loss of significance" to heritage assets both in the legislation and in the NPPF. But the main thrust of his argument went to the Chief Planning Officer's treatment of the acknowledged harm to heritage assets in the balancing exercise which he undertook. This, as Mr Strachan submitted, was the crucial part of the advice given to the members on this matter.

55. It is true, as Mr Booth stressed, that the committee report referred to the statutory provisions and also recited the relevant policy in the NPPF, including the guidance in paragraph 132 which says that "great weight" is to be given to the conservation of a designated heritage asset. But in the two passages of the report – in paragraphs 142 and 166 – which contain the substance of his consideration of the likely effects of the development on heritage assets, it seems to me that the officer equated "limited" or "less than substantial" harm with a limited or less than substantial objection. He appears to have carried out a simple balancing exercise between harm to heritage assets and countervailing planning benefits without heeding the strong presumption inherent in sections 66 and 72 of the Listed Buildings Act against planning permission being granted in a case such as this. The officer's finding of harm to the setting of Forge Garage and to the character and appearance of the Penshurst Conservation Area was not merely significant in the light of policy in the NPPF. There was also a statutory significance to it, which had to be reflected in the weight given to it in the balancing exercise. The officer's report does not show that this was done. Once he had found that there would be some harm to the setting of the listed building and some harm to the conservation area, the officer was obliged to give that harm considerable importance and weight in the planning balance. On a fair and not unduly severe reading of the report, as a whole, I do not believe that he did that. The members were told that there was a "legislative duty" on the Council "to have special regard to the preservation of conservation areas and listed buildings". But this was not the same thing as demonstrably applying the strong presumption against approval in the planning balance on which the written and oral advice given to the committee – and the committee's decision – was based.

56. There is a clear parallel here with the inspector's decision in *Barnwell*. In that case the inspector had explicitly referred in his decision letter both to the statutory duty in section 66(1) and to the relevant guidance, which at that time was to be found in the policies of the "PPS5 Planning for the Historic Environment: Historic Environment Planning Practice Guide" (see paragraphs 8 and 29 of Sullivan L.J.'s judgment). This, however, was not enough to demonstrate that in his assessment of the proposal before him he had applied the strong statutory presumption against approving development likely to harm a heritage asset. It was this basic error in the making of the decision which was fatal to the planning permission. I think the same defect can be seen in the approach which was taken in this case.

57. But that is not all. In my view the analysis provided to the committee by the officer was also flawed by his failure to reconcile the statutory presumption against development which would be harmful to heritage assets with the policy presumption in the development plan in favour of small-scale developments for affordable housing where there would be no "overriding" impacts.

58. In *Heatherington UK Ltd v Secretary of State for the Environment* (1995) 69 P. & C.R. 374 Mr David Keene Q.C., as he then was, sitting as a deputy judge of the High Court, emphasized that the duty under section 54A of the Town and Country Planning Act 1990 – now section 38(6) of the Planning and Compulsory Purchase Act 2004 – did not displace the duty in section 66 of the Listed Buildings Act. These are separate statutory duties. The strong presumption arising from section 66 still had to be applied even if it was in tension with a relevant policy in the development plan. The statutory obligation to have special regard to the desirability of preserving a listed building in its setting was still one to which considerable weight had to be given. This understanding of the relationship between the two statutory duties was endorsed by Sullivan L.J. in *Barnwell* (at paragraph 21).

59. As is clear from the final sentence of paragraph 166 of the committee report, not only did the officer weigh benefit against harm without considering whether the benefit was sufficient to outweigh the strong presumption against planning permission being granted. He also tested the impact on heritage assets by the test of "overriding" harm in Policy SP4(c). The reference in that policy to "overriding ... conservation ... impacts" does not weaken the statutory presumption in sections 66 and 72 of the Listed Buildings Act when it applies. It would have been open to the Council to conclude that in spite of the statutory presumption in sections 66 and 72 the policy presumption in Policy SP4 should in this case prevail. But it had to make its decision in the knowledge that there were two presumptions at work here, not just one. In my view it did not do that.

60. For those reasons the claim must succeed on this ground.

61. There is one more thing I should say before leaving this issue. As the parties agree, this was a case in which possible alternative sites for the development had to be considered. The Council's consideration of alternatives is the subject of another ground of the claim, and I shall deal with it separately. Clearly, however, these two parts of the claim bear on each other. 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 a suitably rigorous assessment of potential alternatives.

Issue (3) – national policy for the AONB

62. Paragraph 115 of the NPPF says that "[great] weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty". Paragraph 116 says that planning permission should be refused for "major developments" in these designated areas "except in exceptional circumstances and where it can be demonstrated they are in the public interest".

63. In paragraph 143 to 150 of his report on the second application the officer discussed the likely impact of the development on the "wider landscape within an AONB". In paragraph 143 he acknowledged that the NPPF "states that great weight should be given to conserving landscape and scenic beauty within AONBs, which have the highest status of protection in relation to landscape and scenic beauty". He also referred to the representations made by the High Weald AONB Unit, with which he did not entirely agree (paragraphs 146 to 149). His conclusion on the likely effect of the development on the AONB, in paragraph 150, was that the development "would undoubtedly have a localised impact on the appearance of the village and landscape", that this would be "of limited harm to the landscape", but that there would therefore be "some conflict with Policy LO8 of the Core Strategy." In paragraph 165 of the report the officer said this:

> "With regard to the impact upon the AONB, I have concluded that any harm to the landscape would be localised and of limited harm. Whilst I acknowledge that AONBs are afforded the highest status of protection in relation to landscape and scenic beauty", I do not consider the harm identified to be overriding under Policy SP4(c)".

64. In his "Late Observation Sheet" the officer referred to the presumption against "major developments" in Areas of Outstanding Natural Beauty. He noted that the NPPF "does not define major development", but that the Town and Country Planning (Development Management Procedure) Order 2010 ("the Development Management Procedure Order") "defines major residential development as 10 or more dwellinghouses". On this definition he did not regard the scheme as major development of the kind to which paragraph 116 of the NPPF would apply.

65. Mr Strachan made two main submissions on this ground. First, the Council failed properly to apply national policy in paragraphs 115 and 116 of the NPPF. The officer tested the likely damage to the AONB by the criterion of "overriding" harm in Policy SP4(c). This was the wrong approach. It was necessary to give "great weight" to the harm the development would cause to the AONB. Mr Strachan's second submission was that the officer also misdirected the committee on the question of whether the proposal was for "major development" in the AONB. As was held in *R. (on the application of Aston) v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin), this is not a question to be decided merely by using the definition of major development in article 2(1) of the Development Management Procedure Order.

66. I cannot accept either of those submissions.

67. The first submission cannot overcome the basic principle that matters of planning judgment are for the decision-maker, subject only to review by the court on *Wednesbury* grounds. The officer was patently aware of relevant national policy. With the benefit of the advice provided by the High Weald AONB Unit and in the light of his own detailed assessment, he judged the likely harm to the AONB to be acceptable. His conclusion that the harm would be "localised" and "limited", which was evidently shared by the members, was the result of a classic exercise of planning judgment. It could only be impugned in proceedings such as these if it was manifestly unreasonable, which it was not.

68. Mr Strachan's second submission, that the Council ought to have treated this development of six affordable dwellings as a "major development" in the AONB, is not an attractive argument either. Nor, in my view, is it supported by the decision of Wyn Williams J. in *Aston*.

69. The officer's advice in the "Late Observation Sheet" that the proposed development was not "major development" within the scope of policy in paragraph 116 of the NPPF was consistent with common sense, and also with the view of the inspector in *Aston* that a scheme for 14 dwellings was not "major development". In his judgment in that case (at paragraphs 91 to 95) Wyn Williams J. rejected the submission that the term "major development" when used in paragraph 116 of the NPPF had the same meaning as it does when used in the Development Management Procedure Order. As he said (at paragraph 91), the NPPF "does not define or seek to illustrate the meaning of the phrase "major developments"". In his view, with which I agree, that concept should be understood in the context of the document in which it appears, and in paragraphs 115 and 116 of the NPPF the context militates against importing the definition of "major development" in the Development Management Procedure Order. In this context I think "major developments" would normally be projects much larger than six dwellings on a site the size of Forge Field. But in any event it was clearly open to the Council to conclude that the proposed development in this case was not a major development to which the policy in paragraph 116 applied. This too was an entirely reasonable exercise of planning judgment, and the court should not interfere with it.

70. I therefore reject this ground of the claim.

Issue (4) – alternative sites

71. In their letter of 17 July 2013 Winckworth Sherwood identified as one of the three main themes of the Society's objection the contention that alternative sites for the proposed development had not been thoroughly considered. The letter said that a "far more rigorous exercise" was necessary to show there were no alternative sites on which the need for affordable housing in Penshurst could be met. The Council's reasons for rejecting the proposal for affordable housing on Becket's Field in October 2012 could all be overcome. One of the reasons for refusal was that the Forge Field proposal had been approved, but that permission was now "liable to be quashed". And there were no others "which could not be addressed through minor amendments to the Becket's Field proposal". The Becket Trust had decided not to appeal against the refusal of its application, relying on "commitments" given in a letter dated 15 November 2012 from West Kent's Chief Executive, Mr Frank Czarnowski to Mr Jeremy Leathers, the then Chairman of the Becket Trust, written after the Council had refused the Becket Trust's application and confirming that the Becket Trust would work with West Kent to develop an alternative scheme for Becket's Field. A copy of that letter was provided. Winckworth Sherwood also mooted "a joint site scheme", in which two dwellings would be constructed on Forge Field and three or four on Becket's Field.

72. Mr Czarnowski's letter of 15 November 2012 referred to meetings that had taken place between West Kent and the Becket Trust, and said:

> "... There is a shortage of affordable housing, in particular in rural communities in Kent such as Penshurst and [West Kent] is happy to work with anyone to produce more affordable housing to meet that need. We have successfully worked in partnership with many land owners to provide additional affordable housing.
>
> We would be happy to work with you to see what could be done at Becket's Field, to benefit residents at Becket's Field and the wider community of the village of Penshurst. We both acknowledged the lead time that would be involved in any development. We agreed that it is important that we start working together soon, so that a development could be realised in a reasonable timescale.
>
> In our discussion I made it clear that this offer to work with you is not conditional on the final outcome and any possible judicial review of our planning application for the development at Forge Field.
>
> There has been much strain placed on the residents of the village during the planning process for Forge Field and Becket's Field. I would welcome the opportunity to help heal some of these wounds and would look to help set up a joint meeting with the Parish Council to help begin this process if this is the decision of you and your Trustees.
>
> ...".

73. In their letter of 5 September 2013, in which they commented on the draft officer's report, Winckworth Sherwood elaborated on the points made in their letter of 17 July 2013. The Council's officers, they said, had not undertaken a "proper and meaningful consideration of

alternative sites for affordable housing development in this settlement and finding solutions based on an alternative". They went on to say this:

> "... [The] Council continues to ignore or fail to explore the potential for a joint affordable housing development on the [Becket's] Field site/Glebelands Garages site undertaken by the [Becket Trust] and [West Kent] as originally set out in [West Kent's] letter dated 15 November 2012 [to the Becket Trust]".

The officers also seemed to have dismissed the possibility of "a compromise option on ... Forge Field and the [Becket Trust] site". And there were at least four sites owned by the Penshurst Place Estate which had been dismissed as alternatives but were likely to become available for development if the present scheme was rejected. Winckworth Sherwood added:

> "... [The] report and approach is fundamentally flawed in circumstances where officers have not properly explored the merits, details and timescales for a joint development on an environmentally less sensitive site at [Becket's] Field prior to determination of this application or the other alternative sites and purported reasons why a stated landowner may not be willing to develop. ...".

The shortcomings in the Council's assessment of alternative sites could not be overcome by redrafting the officer's report but required "a basic[,] fair, objective and enquiring assessment of alternatives which has simply not been carried out to date".

74. In his report for the committee meeting on 3 October 2013 the Chief Planning Officer said the Council had considered "numerous other sites in the parish", but that no alternative site had been put forward which was "capable of accommodating the six houses of this application" (paragraph 91).

75. "Alternative sites" were considered as a separate matter in paragraphs 167 to 175 of the report. The officer referred to the "extensive consideration" which had been given to finding a suitable site for the affordable housing in Penshurst since 2009. A "steering group" had been set up for this purpose. It had considered possible locations for the development of affordable housing, "the key issue being that they should be available and potentially suitable for development". A "large number of sites" that had been "discounted on the basis that they were not available (i.e. the landowner didn't want to sell/develop) or that they were not suitable for development ...". The officer referred to a number of sites individually and "the fundamental reasons why they were discounted". One of these was the "Bank" site, which was said to be "not available for sale/development". Another was the "Glebelands garage site", the land at Becket's Field owned by West Kent. This site was, said the officer, "... well located, but limited in size and potential for impact on neighbours. Too small to cater for identified need. 5 out of 9 garages occupied" (paragraph 169). The outcome of the whole exercise was that only Forge Field had emerged as "potentially available, capable of accommodating the development, and without fundamental locational constraints (i.e. not in an isolated location)" (paragraph 170).

76. The officer also referred to the Becket Trust's previous scheme for six affordable dwellings on its land at Becket's Field. This had been refused permission "on various grounds including scale, height, design, and impact upon neighbouring amenities", and because it "failed to secure the development as local needs housing and, together with the Forge Field development (as approved by Members), would have [led] to an overprovision of local needs housing in the parish" (paragraph 171). In paragraph 172 of the report the officer said:

"In my opinion, the site at [Becket's] Field is particularly limited by the small area of available and developable land, and the relationship between this land and the existing bungalows at [Becket's Field]. Whilst some objectors have suggested that an alternative scheme for [Becket's Field] could be viable, I would be concerned that there is simply not sufficient space or scope to develop this land in isolation with a sufficient number of units to meet the level of local needs housing."

77. For several reasons the suggestion of splitting the development "to provide a smaller number of units on [Becket's] Field, and potentially two units to the rear of Forge Garage" was not, in the officer's view, "a viable alternative" to the development proposed (paragraph 173).

78. Concluding this part of the report, the officer reminded the committee that he had "identified some harm", which, he accepted, "does relate to national planning designations, being the AONB and designated Heritage Assets" (paragraph 174). He continued:

"Whilst these designations are of national importance, I consider that the identified harm would not be substantial, and would not be sufficient for the development to be in conflict with Policy SP4 of the Core Strategy, or advice in the NPPF ... Given my view that the development would not result in overriding impacts and would accord with Policy SP4 and government advice (relating to heritage assets), I would conclude that the potential existence of alternative sites would, in this instance, carry limited weight. In any event, no other site had been identified that is available and considered suitable by the Council to accommodate the identified need for local affordable housing. This is despite the fact that this process in Penshurst has now been ongoing since 2009."

79. The officer went on to say that he did "not consider the alternative site argument to be compelling in this instance", given his conclusion "that the development would not result in any significant harm, nor would it be in conflict with the Council's rural exceptions policy SP4" (paragraph 175).

80. In a joint witness statement dated 25 March 2014 – initially lodged with the court, undated and unsigned, on 3 March 2014 – Mr Barraud and Mr Rees amplified the Society's concerns about the Council's consideration of alternative sites. This drew a response from the Council in Mr Byrne's second witness statement and a witness statement of Mr Czarnowski, both dated 18 March 2014. In his witness statement Mr Czarnowski says that "[devising] a plan to resolve the parking issues associated with any redevelopment at Becket's Field would be complex, problematic and not quick", that this "might not be possible" (paragraph 8); that in his letter of 15 November 2012 to Mr Leathers he had referred to "more affordable housing" and "additional housing", rather than to an "alternative" proposal; and that "[to] assert that the site at Becket's Field is a viable alternative site to Forge Field and is available for development and deliverable is wrong" (paragraph 14). In his second witness statement Mr Byrne says "there are still no plans [for West Kent] to dispose of the garage site as part of a joint development" (paragraph 6). In 2012 the "combined site" had been "discarded" by the Becket Trust itself (paragraph 8). This, says Mr Byrne, "is not a viable alternative development to Forge Field and has not been presented to the Council as one" (paragraph 9). The "Bank" site had been considered as part of the site selection process before the Forge Field proposal was first submitted, and it was made clear by the Penshurst Place Estate that the site was not available for development (paragraphs 10 to 13). Mr Byrne sets out a lengthy rebuttal of the general criticism advanced by the claimants that the Council failed to consider alternative sites properly (paragraphs 14 to 26).

81. After the hearing several residents of Glebelands who are not parties in these proceedings sent letters to the court asserting that there were various obstacles to West Kent's land at Becket's Field being developed. When given the opportunity to comment on this correspondence both the claimants and the Council pointed out that it had not been submitted to the court in accordance with the Civil Procedure Rules and said that if it was admitted as evidence the hearing of the claim would have to be re-opened, with consequent delay and increased cost for the parties. These seem to me to be good reasons for not admitting the correspondence as evidence or having regard to it, and I have not done so.

82. Mr Strachan submitted that the Council's assessment of alternatives in the committee report was unsound and incomplete. Some of the sites rejected as unavailable, such as the "Bank" site, were in the same ownership as Forge Field and would not necessarily be unavailable if the Forge Field proposal was rejected. But the most striking error was the Council's failure to consider the obvious potential alternative to Forge Field – a site at Becket's Field combining land owned by the Becket Trust with land owned by West Kent. This could be developed without harm to the conservation area, the setting of the listed building, or the AONB. The Council ignored the possibility of these two registered providers of affordable housing co-operating to promote a suitable scheme for a development of six affordable dwellings at Becket's Field. This was an alternative which it should have considered.

83. Mr Booth submitted that the Council's consideration of alternatives was realistic and thorough. There was no reason to think that if the proposal for Forge Field were rejected any of the other sites owned by Viscount De L'Isle would be made available for the development of affordable housing. It was not up to the Council to speculate about that. The officer's report did consider the possibility of development at Becket's Field. And, as Mr Byrne and Mr Czarnowski had explained in their evidence, the combined site now suggested by the claimants is not in fact available, because West Kent is unwilling to make its land at Becket's Field available for development.

84. The relevant law is familiar. A local planning authority does not normally need to take into account alternative sites for the development it is considering. Where, however, there are clear planning benefits associated with the development but also clear objections to it, the authority may have to consider whether there is a more appropriate site for it (see, for example, the judgment of Simon Brown J., as he then was, in *Trusthouse Forte Hotels Ltd. v Secretary of State for the Environment* (1986) P. & C.R. 239).

85. As I have said, it is common ground that in this case alternative sites had to be considered, for two main reasons: first, the acknowledged need for about six affordable dwellings to be provided in Penshurst, and secondly, the harm which it was acknowledged the proposed development would cause to the setting of a listed building – Forge Garage, the character and appearance of the Penshurst Conservation Area, and the AONB. It was in this context that the Council accepted it had to consider alternative sites. The issue for the court is whether it did so in a legally satisfactory way.

86. I do not accept that the Council erred in failing to consider whether any other sites owned by Viscount de L'Isle might become available if the proposal for Forge Field were to be rejected. The officer's report referred to several sites, including the "Bank" site, which were unavailable because of the landowner's unwillingness to develop his land or to release it for development. There is nothing to suggest that the information the officer gave the members on those sites was inaccurate or incomplete.

87. It is clear from the officer's report that a large number of possible alternative sites had been considered, among them West Kent's land at Becket's Field – the Glebelands garages site – and, separately, the adjacent land owned by the Becket Trust. The report referred to the previous proposal for six affordable dwellings on the Becket Trust's land, which had been rejected for reasons including its unacceptable design and the likely effect of the development on the living conditions of local residents. The officer dismissed the possibility of a satisfactory scheme on the Becket Trust's land "in isolation" because that site might not be large enough to accommodate the required number of affordable dwellings in an acceptable scheme.

88. But Mr Strachan's main submission on this issue was based on a different concept, which was identified in Winckworth Sherwood's letters to the Council of 17 July 2013 and 5 September 2013, and supported – as Winckworth Sherwood contended – by the offer of co-operation in West Kent's letter to the Becket Trust of 15 November 2012. What was suggested was a new proposal for affordable housing at Becket's Field, on a site combining land owned by West Kent with land owned by the Becket Trust. The Society's complaint was, and is, that the Council had ignored, or failed to investigate, the potential for a development of affordable housing at Becket's Field, jointly promoted by the Becket Trust and West Kent. And this suggestion was made, one must remember, in correspondence stimulated by the Council in its request for comments on the draft officer's report.

89. The evidence now submitted to the court by the Council and by West Kent does not encourage one to think that a jointly promoted development at Becket's Field would come forward if the proposal for Forge Field were rejected. I acknowledge that. It is also true that the details of such a scheme were not described by Winckworth Sherwood in their correspondence with the Council, nor did the Council ask for those details. But the alternatives were not being considered as specific proposals. Each of them was being considered, in the circumstances as they were at the time, as a site for which a suitable scheme of affordable housing might be devised. This was the basis on which Winckworth Sherwood were pressing the Council to look at the potential for a joint development at Becket's Field which would overcome the objections to the previous scheme promoted by the Becket Trust on its own. That development would involve the collaboration of two registered providers of affordable housing, and would have, it was said, an obvious advantage over the proposed development at Forge Field because it would avoid harm to the settings of listed buildings, to the conservation area, and to the AONB.

90. It is not for the court to judge whether such development might be feasible and, if so, whether it would be preferable in planning terms to the project for Forge Field. These were questions for the Council to grapple with. And it had to be done when the Council was making its decision on the application for planning permission – not after the event in the light of the further correspondence and information which has emerged in the course of these proceedings.

91. The Council did not do that. The officer's report did not squarely address, or dismiss, Winkworth Sherwood's suggestion of a development involving the co-operation between West Kent and the Becket Trust indicated in West Kent's letter of 15 November 2012. This was not on the face of it a fanciful proposition. One would have expected to see the officer coming to grips with it in his report and reaching a distinct conclusion about it. The officer recognized that West Kent's land at Becket's Field – the Glebelands garages site – was "well located", though too small on its own for all of the affordable housing that was needed. He

did not say that the impact on neighbours would necessarily be unacceptable if that land, or part of it, and adjoining land owned by the Becket Trust were developed with the required number of affordable dwellings. And he did not say that West Kent would be unable or unwilling to make its land available for development. Similar points may be made about the Becket Trust's land. The officer's doubts about an "alternative scheme" on that land were due, it seems, to his concern that the site was not big enough and not to any objection in principle to its being developed. He did not say the reasons for refusal relating to the design and layout of the previous proposal would be insuperable on a site enlarged by the addition of land owned by West Kent. The other two reasons for the rejection of the previous scheme – the absence of a section 106 obligation to ensure the development would be affordable housing and the over-provision of affordable dwellings in Penshurst which would result from granting planning permission both at Forge Field and at Becket's Field – did not make Becket's Field an unsuitable location for such development. In short, the officer's advice does not rule out an acceptable scheme coming forward on a site put together by the Becket Trust and West Kent at Becket's Field.

92. It follows, in my view, that the Council's assessment of alternative sites in October 2013 was deficient. This was an error of law. It compounds the Council's failure to apply the strong statutory presumption against planning permission being granted for development which would harm either the setting of a listed building or a conservation area, or, as in this case, both. I accept that if the Council had considered the possibility of a joint scheme of affordable housing at Becket's Field it might not have seen this as a preferable alternative to the proposal for Forge Field. But even in the light of the evidence the Council has given to the court I cannot be certain of that.

93. On this ground too, therefore, the claim must succeed.

Issue (5) – irrationality

94. Mr Strachan submitted that, taken together, the errors committed by the Council in determining the second application amount to irrationality. These were not simply a series of planning judgments with which the claimants disagree. This is one of those cases in which the decision was one that no reasonable local planning authority could have made.

95. I reject that submission. As Mr Booth submitted, this ground is entirely parasitic on the others. To the extent that those other grounds have merit the claim will succeed. In two respects – its treatment of the likely impact of the development on the setting of Forge Garage and on the conservation area, and its consideration of alternative sites – the Council made errors of law. But those errors do not amount to irrationality, and this ground of the claim must therefore fail.

Conclusion

96. Both claims for judicial review succeed. Whether this success will lead to a different decision on the planning merits is in my view doubtful, to say the least. The claimants should not expect that it will. But they are entitled to a lawfully taken decision on West Kent's proposal for Forge Field. The planning permissions granted by the Council on 25 October 2012 and 4 October 2013 will therefore be quashed, and both applications will have to be determined again.