

**R. (ON THE APPLICATION OF LIVERPOOL OPEN  
AND GREEN SPACES COMMUNITY INTEREST  
CO) v LIVERPOOL CITY COUNCIL**

COURT OF APPEAL (CIVIL DIVISION)

Rafferty, Lindblom and Newey LJJ: 9 July 2020

[2020] EWCA Civ 861; [2021] 1 P. & C.R. 10

☞ Appeals; Green wedge; Listed buildings; Planning permission; Planning policy; Public interest; Residential development

H1 *Town and country planning—planning permission—residential development—green wedge—Grade 2 listed buildings—permission granted—application for judicial review—development plan policies—whether regard had to preservation of building or setting—Planning (Listed Buildings and Conservation Areas) Act 1990 s.66(1)—application granted—appeal discontinued by developer—whether appeal academic*

H2 The appellant council granted planning permission to the first interested party for the construction of 39 dwellings and the conversion of two Grade II listed buildings into 12 apartments. The site was within a green wedge and an area of green space and occupied by a miniature railway and a facility for disabled children. The council also granted permission to the second interested party to relocate the miniature railway. The respondent’s applications for judicial review of both permissions were granted by Kerr J [2019] EWHC 55 (Admin) on the grounds that: (i) in granting each of the permissions, the council had misinterpreted and misapplied policy OE3 of the Liverpool Unitary Development Plan for development proposed within a green wedge; and (ii) in granting permission for the proposed development, it had failed to comply with the duty in s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to “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”. After obtaining permission to appeal, the developer lodged a notice of discontinuance. The council, however, maintained its appeal. The respondent claimed that, given the developer’s withdrawal, the council’s appeal was academic and should not be heard.

H3 **Held**, allowing the appeal in part, that:

(i) in determining whether the appeal was academic, three requirements had to be satisfied:

(a) the appeal raised a point of some general importance;

- (b) the respondent agreed to it proceeding or was at least partially indemnified on costs and was not otherwise inappropriately prejudiced; and
  - (c) both sides of the argument would be fully and properly ventilated (per Lord Neuberger in *Hutcheson v Popdog Ltd* [2012] 1 W.L.R. 782). The court had a narrow discretion to be exercised with caution. The second and third requirements were, or could be, satisfied. Although the respondent company resisted the appeal, it did not dispute that it could be suitably indemnified on costs. Nor could it say that its interests were prejudiced. Also, both sides of the argument had been “fully and properly ventilated” in the appeal. The policy OE3 issue was a question of policy interpretation, not previously considered, with significance in other areas where similar policies were in place. This was a point of some general importance, whose determination was likely to be of benefit elsewhere. The appeal was not wholly academic and it was in the public interest that it be heard. It followed that the appeal as a whole, including the s.66(1) issue, must be entertained;
- (ii) principles clarified in previous cases concerned with national policy for the Green Belt had some bearing on the issue here, albeit that it concerned local policy for a green wedge. The importance of preserving the openness of the Green Belt was not a concept of law but a broad concept of policy, the meaning of which was to be derived from the words used by the policymaker, read sensibly in their proper context. Applying the policy imperative of preserving the openness of the Green Belt required realism and common sense, which involved the exercise of planning judgment, and an unduly legalistic approach must be avoided. However, if an error of law was shown the court would intervene. The visual effects of a development could be relevant as a matter of planning judgment as to whether it would preserve the openness of the Green Belt. Context governed the policy’s meaning. In the instant case, Policy OE3 had been applied in a sequence of rational and clearly reasoned conclusions and the local planning authority had not misunderstood a policy in its own development plan. Policy OE3 was directed to achieving the council’s objective of protecting and improving the open character, landscape, recreational and ecological quality of the green wedges. It was not as restrictive as Policy OE2. It was not drafted in terms of a requirement for “very special circumstances” to be shown for planning permission to be granted for the construction of new buildings. Nor did it state a “very strong presumption against built development”. Whether the development would “affect the predominantly open character” of the green wedge was a matter of planning judgment. That judgment was not limited by Policy OE3 to a consideration of its physical or spatial effects, excluding visual impact. A realistic assessment of the impact of the development was required and whether that impact was acceptable was for the council as decision-maker. There was no basis for contending that the council had failed to interpret Policy OE3 correctly when making its decisions. The appeal on this ground should be allowed; and

- (iii) the judge had been right to conclude that the planning officer's failure to tell the planning committee of the strong conservation objections raised by the Urban Design and Heritage Conservation team was enough to displace the presumption that the duty under s.66(1) of the 1990 Act had been met. Both the fact of that objection and its substance constituted an "obviously material" consideration of the kind referred to *In re Findlay* [1985] A.C. 318. Apart from the s.66(1) duty, this was a matter to which the council must have regard in reaching its decision and the failure to do so was an error of law. The appeal on this ground should be dismissed.

#### H4 Cases referred to:

- Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303; 89 L.G.R. 834; (1991) 62 P. & C.R. 565 CA (Civ Div)
- Bolton MBC v Secretary of State for the Environment* [2017] P.T.S.R. 1063; (1991) 61 P. & C.R. 343; [1991] J.P.L. 241 CA (Civ Div)
- East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137; [2015] 1 W.L.R. 45; [2014] 1 P. & C.R. 22
- East Staffordshire BC v Secretary of State for Communities and Local Government* [2017] EWCA Civ 893; [2018] P.T.S.R. 88; [2018] 1 P. & C.R. 4
- Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447; 1998 S.C. (H.L.) 33; 1998 S.L.T. 120 HL (SC)
- Findlay, Re* [1985] A.C. 318; [1984] 3 W.L.R. 1159; [1985] Crim. L.R. 154 HL
- Hamnett v Essex CC* [2017] EWCA Civ 6; [2017] 1 W.L.R. 1155; [2017] R.T.R. 13
- Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486; [2020] J.P.L. 1260
- Hutcheson (formerly WER) v Popdog Ltd (formerly REW)* [2011] EWCA Civ 1580; [2012] 1 W.L.R. 782; [2012] C.P. Rep. 13
- Jones v Mordue* [2015] EWCA Civ 1243; [2016] 1 W.L.R. 2682; [2016] 1 P. & C.R. 12
- Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314; [2019] P.T.S.R. 1452; [2018] J.P.L. 176
- R. v Mendip DC Ex p. Fabre* [2017] P.T.S.R. 1112; (2000) 80 P. & C.R. 500; [2000] J.P.L. 810 QBD
- R. v Secretary of State for the Home Department Ex p. Salem* [1999] 1 A.C. 450; [1999] 2 W.L.R. 483; (1999) 11 Admin. L.R. 194 HL
- R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508; [2020] J.P.L. 1277
- R. (on the application of Heath & Hampstead Society) v Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P. & C.R. 19; [2007] J.P.L. 1529
- R. (on the application of Irving) v Mid-Sussex DC* [2016] EWHC 1529 (Admin); [2016] P.T.S.R. 1365
- R. (on the application of Lee Valley Regional Park Authority) v Epping Forest DC* [2016] EWCA Civ 404; [2016] Env. L.R. 30; [2016] J.P.L. 1009
- R. (on the application of Lensbury Ltd) v Richmond Upon Thames LBC* [2016] EWCA Civ 814; [2017] J.P.L. 96
- R. (on the application of Loader) v Rother DC* [2016] EWCA Civ 795; [2017] J.P.L. 25

*R. (on the application of Palmer) v Herefordshire Council* [2016] EWCA Civ 1061; [2017] 1 W.L.R. 411

*R. (on the application of Tewkesbury BC) v Secretary of State for Communities, Housing and Local Government* [2019] EWHC 1775 (Admin); [2019] P.T.S.R. 2144; [2020] J.P.L. 62

*Samuel Smith Old Brewery (Tadcaster) v North Yorkshire CC* [2018] EWCA Civ 489

*South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141; [1992] 2 W.L.R. 204; (1992) 64 P. & C.R. 128 HL

*Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983; 2012 S.C. (U.K.S.C.) 278

*Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin); [2016] J.P.L. 171

*Turner v Secretary of State for Communities and Local Government* [2016] EWCA Civ 466; [2017] 2 P. & C.R. 1; [2016] J.P.L. 1092

#### H5 **Legislation referred to:**

Planning and Compulsory Purchase Act 2004 s.38

Planning (Listed Buildings and Conservation Areas) Act 1990 ss.16 and 66

Senior Courts Act 1981 s.31

H6 **Appeal** by the defendant, Liverpool City Council, from an order of Kerr J dated 4 February 2019. The learned judge thereby held in favour of the claimant, Liverpool Open and Green Spaces Community Interest Company, and quashed two planning permissions granted by the council for development on its own land. The facts are stated in the judgment of Lindblom LJ.

H7 *Paul Tucker QC* and *Constanze Bell* (instructed by Liverpool City Council Legal Services) for the appellant.

*Ned Westaway* and *Charles Streeton* (instructed by E. Rex Makin & Co Solicitors) for the respondent.

The interested parties did not appear and were not represented.

## JUDGMENT

### LINDBLOM LJ:

#### Introduction

1 When a local planning authority granted planning permission for a development of housing in two listed buildings and on land within their settings, did it misinterpret and misapply development plan policy for development proposed within a Green Wedge? And did it fail to comply with the duty in s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Listed Buildings Act)? Those are the two central questions in this case.

2 The appellant, Liverpool City Council, appeals against the order of Kerr J dated 4 February 2019, quashing two planning permissions granted by it for development on its own land. The first proposal, in an application submitted by the first interested party, Redrow Homes Ltd, was to demolish existing buildings and construct 39

dwellings on land at Harthill Road, adjoining Calderstones Park, and to convert Beechley House and Beechley Stables—both Grade II listed buildings—into 12 apartments. The site, of about five hectares, lies in the Calderstones/Woolton Green Wedge and an area of Green Space. It was occupied by a city council depot, a miniature railway, stabling for horses ridden by people with disabilities, and a facility for disabled children known as “Calder Kids”. Planning permission was granted on 9 January 2018. The second proposal, in an application submitted by the second interested party, Arthur Brooks, on behalf of Merseyside Live Steam and Model Engineers, was to relocate the miniature railway on land at Menlove Avenue. Planning permission was granted on 10 August 2017. The respondent, Liverpool Open and Green Spaces Community Interest Company, whose objects are “[to] preserve; enhance and support the green and/or open spaces ... of South Liverpool ...”, was an objector to both proposals. It challenged the two planning permissions in separate claims for judicial review.

- 3 The company’s challenge succeeded on two grounds: that, in granting each of the two planning permissions, the city council had misinterpreted and misapplied the policy for development proposed within a “Green Wedge”—saved Policy OE3 of the Liverpool Unitary Development Plan, adopted in November 2002 (the UDP)—and that, in granting planning permission for Redrow’s proposed development, it had also failed to comply with the duty in s.66(1) of the Listed Buildings Act. The city council and Redrow both sought permission to appeal, which the judge granted. On 25 March 2020, Redrow lodged a notice of discontinuance—effectively withdrawing its appeal. The city council, however, maintains its own appeal and seeks to have it determined.

### **The issues before us**

- 4 The two issues in the city council’s appeal correspond to those on which the judge allowed the claims. In a respondent’s notice the company raised a third, which concerned the status of the site as part of Calderstones Park, but that was not pursued before us. However, there is now a prior question for us to decide. Given Redrow’s withdrawal, the company says the city council’s appeal is academic and should not be entertained. With the parties’ agreement, we heard full argument from either side, both on that question and also on the issues in the appeal.

### **Is the appeal academic?**

- 5 The city council maintains that neither of the planning permissions will be implemented, but also contends that in a wider context the appeal is not academic. At the hearing it gave an undertaking to the court through its leading counsel, Mr Paul Tucker QC—foreshadowed by correspondence between its Principal Solicitor (Regulatory) and the company’s solicitor—“that, in the event of this appeal succeeding so that [the permission for the housing development] is reinstated, it will not commence any development under that permission or permit any other person from so doing [sic] insofar as that lies under its control”. This is intended to give effect to a statement made by the Mayor of Liverpool, Joe Anderson, published in the local press and online on 18 January 2019 and confirmed by him on BBC Radio Merseyside on 19 January 2019, that the housing scheme is “dead”. The undertaking does not satisfy the company, whose solicitor, in a letter to the city council dated 18 May 2020, says that “what is required is an undertaking that

regardless of the outcome of the appeal the land is only to be used as it is currently or as a park”.

- 6 The relevant legal principles are clear. In *R. v Secretary of State for the Home Department Ex p. Salem* [1999] 1 A.C. 450, Lord Slynn said (at 457A–B) that “... appeals which are academic ... should not be heard unless there is a good reason in the public interest for doing so ...”. In *Hutcheson v Popdog Ltd (News Group Newspapers Ltd, third party) (Practice Note)* [2012] 1 W.L.R. 782, Lord Neuberger of Abbotsbury MR (at [15]) identified “three requirements” that

“have to be satisfied before an appeal, which is academic between the parties, may ... be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; and (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated”.

And in *Hamnett v Essex CC* [2017] 1 W.L.R. 1155, Gross LJ (at [37]) noted that the authorities did not suggest any “inflexible rule”, but “point to the court having a narrow discretion to proceed, to be exercised with caution—even when a point of public law of some general importance is involved”.

- 7 For the company, Mr Ned Westaway and Mr Charles Streeten submitted that the requirements identified in *Hutcheson* are not satisfied here. They contended that neither of the issues in the appeal raises any point of “general importance”. The company did not agree to the appeal proceeding. But the city council ought in any event to pay its costs, and had not offered any indemnity. There was no dispute that both sides of the argument could be ventilated.
- 8 Mr Tucker submitted that the requirements in *Hutcheson* can all be met in this case. In particular, this court’s interpretation of Policy OE3 is of more general importance. It will influence many other decisions where the policy is engaged, and will have ramifications for decision-making by other authorities whose development plans contain policies for areas of Green Wedge or similar designation. The policy applies to large areas of land within the city. As of 5 May 2020, it was relevant to six current proposals for sites in a Green Wedge—at Merseyside Police Sports Club, Riversdale Road; at Otterspool Promenade; at Beechwood Road South; at Allerton Manor Golf Course; and at Woolton Road. Ascertaining what it means is in the wider public interest. At the moment, the city council is bound by Kerr J’s interpretation, which it believes is mistaken (cf., the judgment of Dove J in *R. (on the application of Tewkesbury BC) v Secretary of State for Communities, Housing and Local Government* [2019] P.T.S.R. 2144—where the disputed interpretation of policy was an inspector’s, not the court’s). Though the successor policy in the emerging local plan—draft Policy GI 2 of the Liverpool Local Plan 2013–2033 Pre-submission draft of January 2018—is in different terms, its effect is similar. That plan-making process still has a long way to run, the public examination having been suspended. Policy OE3 of the UDP will therefore be extant for some time to come.
- 9 In my view Mr Tucker’s submissions have force. The question here is not whether the appeal is academic between the parties, as seems to be so. It is whether, applying the three requirements in *Hutcheson* in this public law context, as in *Hamnett*, we should exercise our “narrow discretion” to hear an appeal said to have broader relevance and importance than to the case itself.

- 10 The second and third requirements are both satisfied now, or can be. The company resists the appeal being entertained, but does not dispute that it can be suitably indemnified on costs, whatever the outcome. Nor can it say that its own interests are prejudiced in some other way. And there is no doubt that both sides of the argument can be “fully and properly ventilated”. This has now happened. The appeal was thoroughly and impressively argued on either side.
- 11 As for the first requirement, as Mr Tucker conceded, there is no wider importance in the s.66(1) issue, which is already the subject of ample authority. But the Policy OE3 issue is of a different kind. It is a question of policy interpretation, not previously considered, not confined to the particular circumstances of this case, but with significance across the city and potential consequences in other areas where similar policies are in place—though the precise form of such policies will differ. Policy OE3 covers large areas of land designated as Green Wedge, and is often applied in development plan decisions. Is it as restrictive a policy as national and development plan policies for the Green Belt, or even more so? That is clearly a significant question in the planning of Liverpool. But it is also a point of some general importance, whose determination by this court is likely to be of benefit elsewhere. This is enough to support the conclusion that this appeal is not wholly academic, and, in the public interest, ought to be heard. It follows that the appeal as a whole, including the s.66(1) issue, must be entertained, because to succeed in overturning that part of the judge’s order by which he quashed the planning permission for Redrow’s proposal, the city council has to win on both issues.

### **The city council’s decisions**

- 12 Calderstones Park was partly acquired by the Liverpool Corporation in 1914. The land is now owned by the city council. It includes the site of Redrow’s proposal. The two listed buildings, Beechley House—a villa built in 1835, latterly a nursing home—and Beechley Stables, stand on its north-western side, next to the playing fields of Calderstones School. The entrance gateway and a ha-ha, about 30m to the south-east of the house, are also each listed at Grade II. The miniature railway is a short distance to the north.
- 13 In February 2015, the city council and Redrow entered into a partnership agreement for the proposed housing development. Redrow’s application for planning permission was submitted in August 2016. Together with three applications for listed building consent, it went before the city council’s Planning Committee on 14 February 2017.
- 14 In a lengthy report, the Interim Head of Planning recommended that planning permission be granted, subject to conditions and a legal agreement. In its “Conclusion”, he said the proposal had “generated significant objection”, and this was “a finely balanced application where any identified harm must be carefully weighed against the wider benefits that the proposal would bring”. He said that “[for] the reasons given earlier in this report, [he] considers that the scheme is, on balance, acceptable having regard to the wider public/regeneration benefits that it would deliver”, and

“... that matters relating to any identified impacts on openness/greenspace, highways, design, ecology, archaeology, trees and the amenity of nearby

occupiers are acceptable, having regard to the impact on the wider Green Wedge, and having regard to the particular characteristics of this part of the Green Wedge”.

He also said that “impacts on Heritage are considered to be outweighed by the public benefits identified within the report”. Finally, he confirmed that “[on] this basis, he [considered] the proposal accords with [National Planning Policy Framework (NPPF)] and the relevant development plan policies ...”. He was referring there to the original NPPF, published by the Government in March 2012, which was extant at the time. I shall do the same.

- 15 As the judge said (in [24] of his judgment), the minutes of the committee meeting record a “lively” debate, in which a “major area of dispute was whether the proposal would run counter to the policies in the UDP, in particular policies OE3 and OE11”. The committee resolved, however, to accept the officer’s recommendation.
- 16 The application for planning permission to relocate the miniature railway was submitted in January 2017. It was considered by the committee on 25 July 2017. Again, the members had before them a report recommending approval, and again they accepted that recommendation.

### **Did the city council misinterpret Policy OE3?**

- 17 In Ch.5 of the UDP, “STRATEGIC OBJECTIVES & POLICIES”, Policy GEN2, under the heading “OPEN ENVIRONMENT”, says

“[the] Plan aims to protect and enhance a network of open space throughout the City, with emphasis placed on the following ... i. protecting the City’s strategic open land (Green Belt and Green Wedges) from inappropriate development, ... [and] vii. designating a hierarchy of public open space to ensure that there is a convenient and accessible network of quality open space for all residents of the City ...”.

- 18 The supporting text for Policy GEN2 says that “Liverpool’s strategic open land/water comprises the Green Belt, Green Wedges and Mersey Estuary Site of Special Scientific Interest/Special Protection Area/Ramsar Site”; that “[within] the former there will be a very strong presumption against built development”; and that “[built] development will also be carefully controlled in the Green Wedges so as to maintain the physical and visual separation these strategic open areas provide between major residential communities” (para.5.20). It identifies “[a] second category of open land”, on which “development will be prevented that would harm the biological interest of the land”. It also refers to “[a] third category”, which “comprises recreational open space and greenspace”, and says “the Plan contains policies designed to maximise the recreational potential of this resource” (para.5.21).
- 19 Chapter 8 of the UDP contains policies for the “OPEN ENVIRONMENT”. Policy OE2, the policy for “DEVELOPMENT IN THE GREEN BELT”, states that

“[within] the Green Belt, the City Council will not grant planning permission for the construction of new buildings, except in very special circumstances, other than for the purposes of ... agriculture[,] forestry[,] outdoor sport and

recreation[,] cemeteries[,] or essential facilities for other uses of land which preserve the openness of the Green Belt and do not conflict with the purposes of including land within it”.

It also says that “[the] reuse of buildings within the Green Belt will only be permitted where ... the proposed use does not have a materially greater impact than the present use on the openness of the Green Belt and the purposes of including land within it ...”, and that “[proposals] for the extension of both existing and reused buildings ... should not conflict with the openness of the Green Belt and the purposes of including land within it ...”. As the supporting text confirms, the policy corresponded to national policy for the Green Belt in Planning Policy Guidance Note 2, current at the time of the adoption of the UDP. So,

“[apart] from a limited number of uses which are, in principle, appropriate to a Green Belt location, no other development ... will be allowed or supported unless the City Council can be persuaded that there are very special circumstances which offer overriding reasons why the development is essential and could not be located in the urban area” (para.8.16).

20 Policy OE3, under the heading “GREEN WEDGES”, states:

“The City Council will protect and improve the open character, landscape, recreational and ecological quality of the Green Wedges at Calderstones/Woolton and Otterspool by:

i not granting planning permission for proposals for new development that would affect the predominantly open character of the Green Wedges or reduce the physical separation between existing built up areas;  
 ii requiring that, where new built development is permitted (including conversion or extension) such development:

- has regard to the openness of the Green Wedge and the purposes of including land within it;
- should be in accordance with the criteria set down in policy HD18 [which sets criteria for ‘a high quality of design’] and, in particular, uses materials and built forms sympathetic to the character of the area;
- retains existing vegetation and special site features where appropriate; and
- provides and maintains a high standard of landscaping

iii retaining its own land in predominantly open use and supporting proposals which would:

- enhance tree cover by the retention of existing trees and replacement of older trees where necessary;
- enhance the recreational role of the Green Wedges; or
- offer uses and activities which accord with their open character, particularly those that secure the continued use of sports grounds surplus to the owner’s requirements, for open space purposes.”

21 The supporting text for Policy OE3, under the heading “The Function of Green Wedges”, says the policy “is designed to protect extensive linked areas of open

spaces of City-wide importance". The two Green Wedges "form the strategic open land in the City" and "provide a physical and visual break between major residential areas, and help to ensure that the City can continue to offer high quality environments in these areas" (para.8.24). They "also provide other important City-wide functions ..."—in that they "afford a valuable amenity for a large number of people", "provide diverse recreational facilities ...", "provide a mature ecological environment ...", "contain buildings of historical, architectural and educational interest", and "give the appearance of a 'parkway' approach to the City along particular transport routes" (para.8.25). They "represent a unique and irreplaceable asset within the overall structure of the City". The city council "is determined to protect and conserve [their] natural character ... and to maintain their integrity as predominantly open land against the encroachment of new development" (para.8.26).

- 22 In a passage headed "Development within a Green Wedge", the text says that "[strict] control of development is required to protect the function of Green Wedges", and "[where] new built development is permitted, the City Council will expect a high standard of design and require the development to meet the criteria in part (ii) of policy OE3". The fact that land has been "allowed to become derelict or is underused will not be regarded as sufficient reason for permitting inappropriate development" (para.8.27). The "Calderstones/Woolton Green Wedge" is described as "an area of special value, with the appearance and condition of the landscape being of particular importance", and "consists of 300 hectares of open land within Liverpool's southern suburbs" (para.8.29).
- 23 Policy OE11, under the heading "PROTECTION OF GREEN SPACE", says that "[planning] permission will not be granted for built development on part or all of any green space unless the proposed development can be accommodated without material harm" to the "recreational function of the green space ...", the "visual amenity of the green space ...", its "relationship to adjoining green spaces ..."; and "any known nature conservation value ...".
- 24 In his report for the committee meeting on 14 February 2017, in a section headed "Principle of development", the officer devoted some eight pages to the proposed development's "Impact on Green Wedge and Green Space". He reminded the members that the site, being within the Calderstones/Woolton Green Wedge and also designated as Green Space, is "covered by saved policies OE3 and OE11 which seek to protect [it] from inappropriate development".
- 25 Under the heading "Green Wedge", he tackled first the issue arising from subpara.(i) of Policy OE3. He told the committee that: "Green Wedges are key designations in the UDP and seek to protect those areas from unacceptable harm in terms of impacts by not granting planning permission for proposals which would affect the predominantly open character of the Green Wedge or reduce the physical separation between existing built up areas", and it was "therefore necessary to carefully assess the impacts of the proposed development on the openness of the Green Wedge, as a whole". He pointed out that "[the] area of the application site, some 5.24 hectares, constitutes approximately 6% of the entire Green Wedge and is located in a part that is characterised by having buildings and physical structures", which he described. He then said:

"It is considered therefore that this part of the Green Wedge is of a different character to other parts of the Green Wedge, by virtue of its more developed

nature containing substantial physical structures. As such, it is considered that the openness of this part of the Green Wedge is already somewhat compromised, including separation distances between the more intensive built development to the south west and north east given the number of built structures that extend into and across this part of the Green Wedge.

Given the specific characteristic of this part of the Green Wedge, coupled with its size in comparison to the wider Green Wedge area, it is considered that the redevelopment of this portion, with dwellings that have spacious areas around them, in the main, would not unduly impact on the predominantly open character of the wider Green Wedge. In this respect, the Interim Head of Planning considers that the proposal would not conflict with the aims and objectives of part (i) of Saved Policy OE3.”

- 26 He continued by stating that “[where] it is considered that development is appropriate in the Green Wedge, Saved Policy OE3 advises that such development should have regard to ...”. He went through each of the criteria in subparas (ii) and (iii) of the policy. On the first criterion in subpara.(ii)—“[has regard to the] openness of the Green Wedge and the purposes of including land within it”—he said:

“The proposed development will clearly involve built development, but has been designed having regard to the sensitive nature of the site to ensure that substantial green corridors are provided along the [site’s] boundaries and within it to try and maintain the [site’s] open character, bearing in mind the character of this part of the Green Wedge which includes areas of developed form, as described in earlier paragraphs. The built areas have sought to locate in those areas of the site, in the main, where physical structures exist, or have existed in the past.

The proposed layout of the development is spacious in character, being of low density and works with the existing landscape to minimise any losses or impact on the landscape value and retaining landscape features that will act as visual breaks and screens from the wider area. It is considered therefore that the proposal, and its design/layout, has had regard to the openness and characteristics of this part of the Green Wedge.

As well as having regard to the openness of the *Green Wedge*, paragraph 8.25 requires that it is also necessary to consider the proposal against the reasons for including land within the Green Wedge.”

He considered each of the relevant “reasons for including land within the Green Wedge” in para.8.25 of the UDP, finding no conflict with any of them. As for the second criterion in subpara.(ii) of the policy, he concluded that “the proposal will satisfy the aims and objectives of Saved Policy HD18”. And under the headings “Retain existing vegetation and special site features” and “Provides and maintains a high standard of landscaping”, he concluded, in effect, that the third and fourth criteria were also satisfied.

- 27 Subparagraph (iii) of Policy OE3 he described as a “statement of intent/aspiration for land retained within [the city council’s] ownership and for supporting proposals which enhance the openness of the Green Wedge”. Because the site was going to be transferred into private ownership, he did not give “any significant weight” to this consideration. But the development would, he said, “support the enhancement

of tree cover”. And the relocation of the stables and miniature railway, “as larger facilities, elsewhere in the Green Wedge”, would “enhance its wider recreational function”. He concluded, therefore, that “the relocation of the proposed uses as part of this application would maintain and enhance what are diverse recreational offers, keeping them within the Calderstones/Woolton Green Wedge”.

28 As for the effects on “Green Space”, the officer recognised that although “elements of [Policy OE11] overlap with [Policy OE3]”, it was “still necessary to consider the application against the tests contained within [Policy OE11]”. He found no conflict with any of those “tests”.

29 The conclusions in this section of the officer’s report were:

“... [The] Interim Head of Planning therefore considers that whilst the proposal constitutes development within the Green Wedge and Green Space, the application site is in part of the Green Wedge which is already characterised by built structures. He considers that the proposed development will have no significant impact on the character or openness of the wider Green Wedge/Green Space and where any limited impacts do exist, they would be outweighed by the identified wider public/regeneration benefits. As such, he considers that the proposal complies with the aims and objectives of saved policies OE3 and OE11 of the UDP.

Members will note that the application site was advertised as a departure under the precautionary principle. Having fully assessed the application, the Interim Head of Planning is satisfied that the proposed development does not constitute a departure from the UDP in relation to saved policies OE3 and OE11, given it is considered that there will be only limited impacts.”

30 The officer’s report on the proposed relocation of the miniature railway sets out a similar assessment. The proposal was, “on balance, acceptable and matters relating to impact on openness/greenspace ... are acceptable, having regard to the impact on the wider Green Wedge”.

31 Kerr J was persuaded that there was “a clear conflict between the proposals and policy OE3 and [the officer’s report] was wrong to conclude otherwise” ([102]). He did not think that “[subparagraph] ii permits planning judgment to allow what is prohibited under [subparagraph] i” ([103]). The “conflict with [Policy] OE3 here had to be openly acknowledged and expressly taken into account”. It was “indisputable and not disputed that these proposals would affect the open character of the [Green Wedge] land within and around the application site, whether or not ‘open character’ here is equated to ‘openness’ in [Green Belt] cases” ([104]). In a case such as this, the local planning authority had to “face up to the conflict” with the development plan, and, “if it decides to proceed, address itself under section 38(6) of the Planning and Compulsory Purchase Act 2004 to the incongruity between the development proposal and the development plan” ([109]). The officer’s report was

“wrong, without first acknowledging a conflict with [Policy] OE3 i, to concern itself with the planning judgment as to whether the development would ‘unduly’ or ‘in the main’ adversely affect the green wedge space; and was wrong to assess the extent of the adverse effect, the degree to which the open

character of the green wedge land was already compromised and the proportion, expressed as a percentage of the whole, of the green space affected” ([110]).

- 32 Before us, as in the court below, counsel referred to a number of cases where Green Belt policy has been contentious. We can concentrate on four decisions in which the concept of “openness” has been discussed: the decisions of this court in *R. (on the application of Lee Valley Regional Park Authority) v Epping Forest DC* [2016] Env. L.R. 30; *Turner v Secretary of State for Communities and Local Government* [2017] 2 P. & C.R. 1 and *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire CC* [2018] EWCA Civ 489, and the Supreme Court’s in *Samuel Smith*—though differing from this court in its analysis of the planning officer’s report ([2020] P.T.S.R. 221). Principles clarified in those three cases have some bearing on the issue here—with the caveat that we are concerned not with national policy for the Green Belt but with local policy for a Green Wedge, whose precise drafting may not be replicated elsewhere.
- 33 To enlarge on the basic points recently identified by this court in *Hook v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 486 (at [7]):
- (1) the imperative of preserving the “openness” of the Green Belt—a basic component of government policy for the Green Belt in the NPPF, as in previous statements of national policy—is not a concept of law; it is a broad concept of policy (see *Hook* at [7(1)]). As with other formulations of planning policy, its meaning is to be derived from the words the policy-maker has used, read sensibly in their “proper context”, and not as if they were the provisions of a statute or contract (see the judgment of Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] 2 P. & C.R. 9 at [18] and [19]);
  - (2) applying the policy imperative of preserving the “openness” of the Green Belt requires realism and common sense. As was emphasised both by this court in *Samuel Smith* (at [33], [38]–[40] and [50]), and by the Supreme Court (at [22] and [25]), it involves the exercise of planning judgment by the decision-maker. When it considers whether the decision-maker has exercised a lawful planning judgment in applying a planning policy, the court will not be taken beyond its limited role in a public law challenge (see the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at 1458G–1459D). As this court has often said, an unduly legalistic approach must be avoided (see, for example, *East Staffordshire BC v Secretary of State for Communities and Local Government* [2018] P.T.S.R. 88 at [50] and *Hook* at [7(2)]). But if an error of law is shown—such as a misinterpretation of policy leading to a failure to exercise a planning judgment that the policy requires—the court will intervene;
  - (3) the courts’ reasoning in *Lee Valley*; *Turner* and *Samuel Smith* dispels the fallacy that the visual effects of a development cannot be relevant to the question of whether it will preserve the “openness” of the Green Belt. In both *Turner* (at [13]–[18] and [26]) and *Samuel Smith* (at [19]–[22]) the Court of Appeal accepted that, in principle, such effects can be relevant to

this question, as a matter of planning judgment. And this was accepted by the Supreme Court in *Samuel Smith* (see [22], [25] and [40]);

- (4) those three cases demonstrate the importance of context to a true understanding of the policy being considered. Context governs the policy’s meaning. Thus, for example, the aim of preserving the “openness” of the Green Belt was not limited by the proposition in para.79 of the NPPF that one of the “essential characteristics” of Green Belts is their “openness”—a concept whose meaning, in that context, goes to the mere physical presence, or otherwise, of buildings, regardless of any visual impact they might have (see *Lee Valley* at [7] and *Hook* at [7(3)]). As this court said in *Lee Valley* (at [7]), specifically in the context of para.79, “[the] concept of ‘openness’ here means the state of being free from built development, the absence of buildings—as distinct from the absence of visual impact”. But this does not mean that, in the context of the development control policies in paras 87–90, harm to “openness” cannot be caused by forms of development other than buildings—such as those referred to in para.90, which contains a proviso that they “preserve the openness of the Green Belt”; or cannot be caused by a development’s visual impact on “openness”. If it were otherwise, those policies would not make sense; and
- (5) there was no indication in paras 87–90 of the NPPF that the aim of preserving the openness of the Green Belt excludes consideration of visual as well as physical or spatial impact. On the contrary, as Sales LJ said in *Turner*, “[the] word ‘openness’ is open-textured and a number of factors are capable of being relevant when it comes to applying it to the particular facts of a specific case” ([14]); “[the] question of visual impact is implicitly part of the concept of [the] ‘openness of the Green Belt’ as a matter of the natural meaning of the language used in para.89 of the NPPF” ([15]); and “it does not follow from the fact that there may be other harms with a visual dimension apart from harm to the openness of the Green Belt that the concept of openness of the Green Belt has no visual dimension itself” ([16]). The correctness of those observations was not doubted by the Supreme Court in *Samuel Smith*.

34 Mr Tucker submitted that the city council had to establish for itself, on a correct understanding of the relevant policies in the development plan, including Policy OE3, whether the proposal accorded with the plan “as a whole” (see the recent decision of this court in *R. (on the application of Corbett) v Cornwall Council* [2020] EWCA Civ 508 at [40]–[42]; and the judgment of Patterson J in *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at [27]–[36]). And it did so. The judge’s interpretation of Policy OE3 was incorrect. It wrongly elevated “open character” to an absolute concept. Subparagraph (i) of the policy refers to development affecting the “predominantly open character” of a Green Wedge. This is a qualified concept—and one that does not appear in Green Belt policy. Policy OE3 does not mean that all built development in a Green Wedge must be regarded as causing—in the officer’s words—“unacceptable harm”. Some “harm” by the reduction of unbuilt-upon land may be acceptable, and not contrary to Policy OE3, if it does not conflict with the aims and objectives of the policy. An impact less than “unacceptable harm” is not unacceptable. Assessing whether a particular proposal is contrary to the policy will

always be a matter of planning judgment for the decision-maker. Here, the city council, in the lawful exercise of its planning judgment, was satisfied that the development would not have an unacceptable impact on the “predominantly open character” of the Green Wedge, and that it complied with Policy OE3 in its totality. It did not misinterpret the policy.

- 35 Mr Streeten urged us to accept the judge’s interpretation of Policy OE3. He submitted that the concepts of “open character” and “openness” in the policy are synonymous, and the same as the concept of “openness” in policy for the Green Belt, and for Metropolitan Open Land: the absence of built development, the counterpart of urban sprawl (see *Lee Valley; Samuel Smith; R. (on the application of Heath and Hampstead Society) v Camden LBC* [2007] 2 P. & C.R. 19 and *R. (on the application of Lensbury Ltd) v Richmond upon Thames LBC* [2016] EWCA Civ 814). This understanding of Policy OE3, he said, is consistent with the origins of the policy in the “Green Wedge Policy” document of 1988, and the Issues Paper of October 2002.
- 36 As Mr Streeten acknowledged, Policy OE3 does not contain the concept of “very special circumstances” justifying “inappropriate development”. And he did not maintain the suggestion in the company’s skeleton argument that the policy “prohibits inappropriate development in the Green Wedge”, submitting instead that it creates a “presumption” against development that would harm the “open character”—or “openness”—of the Green Wedge. If such development were tolerated, “openness” would be compromised and a precedent set—leading to “the death of a thousand cuts” referred to by Sullivan J in *Heath and Hampstead Society* (at [37]). The only built development permissible under Policy OE3, Mr Streeten argued, is development not caught by subpara.(i)—development that does not affect the “predominantly open character” of the Green Wedges or reduce the physical separation between existing built-up areas. Such development—for example, conversions, extensions, sports and recreation facilities—is not “inappropriate” and is permitted under subpara.(ii), subject to the criteria laid down.
- 37 Mr Streeten submitted that the Interim Head of Planning had misinterpreted Policy OE3. The adverb “predominantly” in the expression “predominantly open character” does not allow the decision-maker to consider—as the officer did—whether a development, “in the main, would not unduly impact” on the predominantly open character of the Green Wedge, or to consider whether a development would harm the “wider Green Wedge” by taking into account the proportion of land in the Green Wedge that would be affected (see *R. (on the application of Irving) v Mid-Sussex DC* [2016] P.T.S.R. 1365 at [56]–[58]). As was conceded below, the officer accepted there would be “harm” to the Green Wedge. Any such “harm” would be contrary to Policy OE3. So the proposal “necessarily conflicts” with the policy. This was the only rational conclusion open to the members.
- 38 Unlike the judge, I cannot accept that argument. In my view, the officer’s assessment of the proposal against the provisions of Policy OE3 was based on a correct interpretation of that policy, and the policy was lawfully applied in a sequence of rational and clearly reasoned conclusions. This is not one of those cases where a local planning authority has misunderstood a policy in its own development plan (see *Corbett* at [65] and [66]).
- 39 In the supporting text for Policy GEN2 the city’s hierarchy of “open land” is established. A distinction is drawn between the “very strong presumption” against

built development in the Green Belt and the principle that built development will be “carefully controlled” in the Green Wedges. Chapter 8 of the UDP contains separate and very differently framed policies for the Green Belt—Policy OE2; the Green Wedges—Policy OE3; and Green Space—Policy OE11. The divergent drafting of those three policies is deliberate. The strategic objectives in Policy GEN2 and its supporting text are translated into individual policies for three different types of “open land”. For each, a specific regime is laid down for the making of development control decisions in which the relevant policy is engaged. The three policies set a descending scale of restriction, reflecting the hierarchy described in the text for Policy GEN2.

- 40 Policy OE2 is a classic Green Belt policy, broadly consistent with national policy in the NPPF. It presumes strongly against proposals for new buildings in the Green Belt other than the five types of building specified, stating that the city council will not grant planning permission for the construction of new buildings “except in very special circumstances”. It also restricts the re-use and extension of buildings, so as to preserve the “openness of the Green Belt” and avoid conflict with “the purposes of including land within it”. It thus achieves the “very strong presumption against built development” referred to in the text for Policy GEN2.
- 41 Policy OE3 is not as restrictive a policy as Policy OE2. Though its supporting text says “[strict] control of development is required to protect the function of Green Wedges”, the policy differs materially from government policy for the Green Belt in the NPPF, and is conspicuously unlike Policy OE2. It is not drafted in terms of a requirement for “very special circumstances” to be shown if planning permission is to be granted for the construction of new buildings outside specified exceptions. It does not state—nor does its text—a “very strong presumption against built development”. It is directed to achieving the city council’s objective stated in the opening words: to “protect and improve” four attributes of the Green Wedges—their “open character”, their “landscape”, their “recreational [quality]” and their “ecological quality”.
- 42 The three subparagraphs following those opening words explain how the city council will achieve that objective. Subparagraph (i) is a general requirement. It relates simply to “new development”—which includes buildings. It does not say that planning permission will be refused for all “new development” in a Green Wedge, or for all new “built development”, or that only development within certain exceptions will be approved, or that development outside those exceptions will only be approved if “very special circumstances” are demonstrated. Had any such prohibition or restriction been intended, this part of the policy would not have been expressed as it is. On a straightforward reading of the words the city council has used as policy-maker, subpara.(i) poses two questions for it as decision-maker: first, whether the development proposed would “affect the predominantly open character” of the Green Wedge in which it would be located; and secondly, whether it would “reduce the physical separation between existing built up areas”.
- 43 That second question is largely a question of fact. The first, however, is quintessentially a matter of planning judgment. The “predominantly open character” of a Green Wedge is itself something for the decision-maker to judge. This is, as Mr Tucker put it, a “qualified” concept. Implicit in it is a recognition that the Green Wedges, as designated, were by no means free from built development. The task given to the decision-maker is to consider the likely consequences of the proposed development for that “predominantly open character”. Subparagraph (i) does not

rule out any reduction, or net reduction, in unbuilt-upon land within a Green Wedge—a reading of Policy OE3 that would render it even more restrictive than policy for the Green Belt. Under this provision, as Mr Tucker argued, the mere fact of an increase in built development does not mean that the development proposed will necessarily have an unacceptable impact on the “predominantly open character” of the Green Wedge, and so be contrary to the policy. Some physical change of that kind is allowed for—possibly, as here, through the removal of existing development and its replacement with new buildings—so long as the impact on the “predominantly open character” of the Green Wedge is not, in the decision-maker’s planning judgment, unacceptable, having regard to the objectives of the policy.

- 44 When the city council is considering whether a development would “affect the predominantly open character” of a Green Wedge, the planning judgment required is not limited by Policy OE3 to a consideration of its physical or spatial effects alone, excluding visual impact. Whether it would “affect the predominantly open character” is not an automatic result of its physical presence in the Green Wedge, or of the fact that it will be visible. What is required is a realistic assessment of the impact that this development, on this site, and in its own surroundings, will have on the “the predominantly open character” of the Green Wedge. Whether that impact is acceptable, or not, is for the city council to judge, as decision-maker.
- 45 Subparagraph (ii) relates explicitly to “built development”. Its inclusion in the policy goes to confirm the interpretation of subpara.(i) that I think is correct. If subpara.(i), or any other part of Policy OE3, had been intended to preclude—or “prohibit”—the construction of new buildings in a Green Wedge, there would have been no need to insert a provision setting out criteria for judging the acceptability of “built development”. And the reference to the “conversion or extension” of buildings being included is not to limit the scope of potentially acceptable “built development” to such development, but to make clear that this provision relates to all “new built development”, including conversions and extensions to existing buildings.
- 46 Where the proposal is for “built development”, the requirements in subpara.(ii) are in play, as well as the restrictions in subpara.(i). If a proposed “built development” does not offend subpara.(i), it must also satisfy the four criteria in subpara.(ii), and the further criteria for “a high quality of design” in Policy HD18. The first criterion in subpara.(ii), that regard is had to “the openness of the Green Wedge and the purposes of including land within it”, reinforces the protection for the “predominantly open character” of the Green Wedge in subpara.(i). In this way Policy OE3 achieves the relevant objective in the supporting text to Policy GEN2—that “[built] development will ... be carefully controlled in the Green Wedges ...”.
- 47 I should add that I see no distinction between the concept of “predominantly open character” in subpara.(i) and the concept of “openness” in the context of subpara.(ii).
- 48 Subparagraph (iii) relates specifically to land owned by the city council in the Green Wedges, and, where it is relevant, applies in addition to subparas (i) and (ii).
- 49 On a fair reading of the officer’s reports, I see no basis for contending that the city council failed to interpret Policy OE3 correctly when making its decisions on the two proposals.

- 50 The officer worked through the requisite series of planning judgments, tracking the provisions of the policy. He began by applying subpara.(i). He reminded the committee of the two interests that this part of the policy is meant to protect, including the “predominantly open character” of the Green Wedge. He directed himself, rightly, that it was necessary to consider the impact of the development on the Green Wedge “as a whole”. In doing this, he had in mind the area of the site and the proportion of the Green Wedge it represents. There is nothing in the policy to suggest this was an irrelevant consideration in assessing the acceptability of the impact on the Green Wedge “as a whole”. In having regard to it the officer did not commit the kind of error that occurred in *Irving*, where harm to only to a small part of a conservation area was seen as of no potential significance to the preservation of its character and appearance (see the judgment of Gilbert J at [58]). He also took into account the particular characteristics of this portion of the Green Wedge, including “its more developed nature containing substantial physical structures”, and its “openness” being “already somewhat compromised”.
- 51 In coming to his conclusion on the proposal’s compliance with subpara.(i), he assessed the impact on “the predominantly open character of *the wider Green Wedge*” (my emphasis). This was a matter of planning judgment for him, and ultimately for the committee itself. Ingredients in that planning judgment were the “specific characteristics of this part of the Green Wedge”, its “size in comparison to the wider Green Wedge area”, and the fact that the proposal was for a “redevelopment” of the site, by the construction of “dwellings that have spacious areas around them, in the main”—a point repeated in the officer’s later observation that “the scheme has been designed in the main to have properties with large rear gardens ...”. These were all legitimate factors to take into account in judging whether the proposal was in accord with subpara.(i). Indeed, I think the officer would have been at fault if he had not done this.
- 52 The officer’s decisive planning judgment was unimpeachable. It dealt squarely with the requirements of subpara.(i). It was expressed in two linked propositions: first, that the development “would not unduly impact on the predominantly open character of the wider Green Wedge”; and secondly, that “[in] this respect, ... the proposal would not conflict with the aims and objectives of part (i) of Saved Policy OE3”. This is a clear, reasonable and lawful conclusion on the proposal’s compliance with subpara.(i). It embodies a legitimate planning judgment, based on a true understanding of the policy. The officer faced the crucial question: whether the impact the proposed development would have on the “predominantly open character” of the Green Wedge was acceptable. He found it was acceptable, and the proposal compliant with subpara.(i). This conclusion was confirmed when he went on to say that there would be “no significant impact on the character or openness of the wider Green Wedge/Green Space ...”, and that he was “satisfied that the proposed development does not constitute a departure from the UDP in relation to saved policies OE3 and OE11, given it is considered that there will only be limited impacts”. And it was also embraced in the “Conclusion” of the report, where he said that “the proposal accords with ... the relevant development plan policies ...”.
- 53 The rest of the officer’s conclusions in applying Policy OE3 are also beyond criticism. He did not make the mistake of thinking that subpara.(ii) operates instead of subpara.(i) where the proposal is for “built development”, or that compliance with one of these subparagraphs is enough to satisfy the requirements of the other.

He did not sidestep either provision. He applied both. Having concluded as he did on the proposal's compliance with subpara.(i), he then considered whether it complied also with the criteria specifically for "built development" in subpara.(ii). He went one by one through those criteria, and the relevant criteria in para.8.25, and found each of them satisfied. None of the planning judgments in this part of his assessment shows any error of law. The same may also be said of his conclusions on the proposal's compliance with subpara.(iii).

- 54 No error is alleged in the interpretation and application of Policy OE11, and I can see none.
- 55 On this ground, therefore, I think the appeal is good.

### **Did the city council fail to apply the duty in s.66(1) of the Listed Buildings Act?**

- 56 Section 66 of the Listed Buildings Act provides the "[general] duty as respects listed buildings in exercise of planning functions". Subsection (1) states:

"(1) In considering whether to grant planning permission or permission in principle 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."

- 57 There are several decisions of this court on the effect of the duty in s.66(1). There is also authority on the parallel duty, in s.72, for development affecting conservation areas, including the House of Lords' decision in *South Lakeland DC v Secretary of State for the Environment* [1992] 2 A.C. 141, and the decision of this court in *Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303. The essential principles are set out by Sullivan LJ, with whom Maurice Kay and Rafferty LJ agreed, in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 45. In Sullivan LJ's view, Glidewell LJ's judgment in *The Bath Society* was "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'" ([22]). Lord Bridge's observation in *South Lakeland* (at 146E–G) that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area was consistent with the approach Glidewell LJ had indicated ([23]). The s.66(1) duty "requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" ([28]). In *East Northamptonshire* the inspector appeared to have "treated the less than substantial harm to the setting of the listed buildings ... as a less than substantial objection to the grant of planning permission". He had not acknowledged the need, if he found harm to the setting of the listed buildings, to give "considerable weight" to the desirability of preserving their setting, and this was a "fatal flaw" in his decision ([29]).
- 58 In *Mordue v Secretary of State for Communities and Local Government* [2016] 1 W.L.R. 2682, Sales LJ observed (at [28]) that "[paragraph] 134 of the NPPF appears as part of the fasciculus of paragraphs ... which lay down an approach

which corresponds with the duty in section 66(1)”, and “[generally], a decisionmaker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty”. Thus “[when] an expert planning inspector refers to a paragraph within that grouping of provisions ... then—absent some positive contrary indication in other parts of the text of his reasons—the appropriate inference is that he has taken properly into account all those provisions ...”.

59 In *R. (on the application of Palmer) v Herefordshire Council* [2017] 1 W.L.R. 411, Lewison LJ said (at [7]) that “[it] is not for the decision-maker to demonstrate positively that he has complied with [the duty in section 66(1)]: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has”.

60 Paragraph 129 of the NPPF stated:

“129. Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise ... .”

That policy is complemented by guidance given by the Government in the Planning Practice Guidance issued in March 2014 (at para.18a-010-20140306):

“In most cases the assessment of the significance of the heritage asset by the local planning authority is likely to need expert advice. ... Advice may be sought from appropriately qualified staff and experienced in-house experts ..., complemented as appropriate by consultation with National Amenity Societies and other statutory consultees.”

61 Paragraphs 132 and 134 of the NPPF stated:

“132. 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. Substantial harm to or loss of a grade II listed building ... should be exceptional ...

...

134. 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.”

62 Policy HD5 of the UDP says “[planning] permission will only be granted for development affecting the setting of a listed building, which preserves the setting and important views of the building”.

63 Before the application was put before the Planning Committee on 14 February 2017, it was subject to public notification, and to internal and external consultation. The internal consultation included the city council’s Urban Design and Heritage Conservation team. Their response, dated 24 October 2016 and submitted by Wendy Morgan, the city council’s Principal Conservation Officer, raised “no conservation objection in principle” to the “construction of houses on land on Harthill Road,

adjacent to the grounds of Beechley”, the “conversion to apartments of the Grade II listed villa ...”, the “demolition of the non-listed modern buildings ...”, or the “erection of dwellings” on that part of the site. But it also said:

“However there are strong conservation objections to the proposal to erect 3 of the houses within the grounds and setting of Beechley.”

Under the heading “Grounds of Beechley to SE of Main House”, it referred to the proposed erection of “[three] detached houses ... in a row in front of shelter belt of mature trees which enclose whole grounds”, and “linked to development to N by access road through the shelter belt to NE”. It expanded on the objection in this way:

“Level of harm would be less than substantial but alteration not acceptable due to impact on setting of main house and Ha Ha. Grounds have remained substantially [intact] and in single ownership. Only built structure in area now proposed for 3 houses was mid-C20 pavilion for use in connection with recreation facilities, footprint of which was located next to shelter belt trees.

...

The land below the terrace and Ha Ha ... presently used as a paddock has always been an integral part of the setting of the villa and Ha Ha which have elevated views over it. Like many villas of the period its grounds are a ‘stately home in miniature’ and originally had all the necessary elements identifying them as such ... All these features were included in the grounds of Beechley ... and all those extant contribute positively to the significance of its setting and the setting of the Ha Ha.

...

The HS makes some reference to the future improvement of this situation. ... No reference is made to the maintenance of the [remainder] of the grounds and there are conservation concerns about the possible continued deterioration of the shelter belt and the three large trees in the paddock, two of which are probably part of the Victorian planting scheme and in further imitation of larger estate landscape design.

...

... [The] majority of the landscape within the boundary walls continues to comprise the setting: it is still an undeveloped planned Victorian buffer between the house and the wider environment, ... retaining the sense of a ‘stately home in miniature’ created by its Victorian owners.

The adverse effect these changes would have on the setting of Beechley means that this aspect of the application is not supported from a conservation point of view. Furthermore, the future of ... all the land within the historic curtilage of Beechley, which forms the principle [sic] setting of all its listed buildings, should be ensured by appropriate management of the whole landscape, not just the areas close to the main house and entrance.”

The “Recommendation” at the end of the consultation response said:

“... [The] proposed planning application would not be supported from a conservation point of view at present because of the adverse impact which one aspect of it would have on the setting of the Grade II listed house. As

stated in NPPF paragraph 134, it is for the decision-maker to consider the public benefits of the scheme against the identified harm to the significance of the listed buildings and structures at the Beechley site.”

64 In his report for the committee meeting on 14 February 2017 the officer summarised the “Internal Consultee Responses” from “Environmental Health”, “Highways” and “Drainage”. But he did not mention the response from the Urban Design and Heritage Conservation team. Recording the views of “External Consultees”, he referred to the response from Historic England, who had “[advised] that they do not wish to make any detailed comments regarding the planning and listed building applications but welcome the reuse of Beechley”. He also summarised local objections, including those relating to “Designated Heritage Assets”.

65 In the section of his report headed “Planning Policy” the officer distilled the policies on heritage assets in paras 129–134 of the NPPF, stating:

“... Great weight is given to the designated [asset’s] conservation; where harm is identified, the application should be refused however where there would be less than substantial harm, this must be weighed against the public benefits.”

And in the same section of the report he referred to s.66(1), in this way:

“Planning (Listed Buildings and Conservation Areas) Act 1990, Section 66(1) and 16(2): which deal with matters of impact on setting.”

66 He returned to the NPPF policies in a section headed “... Character and Setting of the Listed Buildings”, advising the members that “[the] NPPF sets out a tiered system for considering the impact of a proposed development on the significance of a designated heritage asset and for apportioning the amount of weight to be given to conserving the heritage asset”, based on five principles, the fifth being that “[where] a development would lead to *less than substantial harm* to the significance of a heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use”.

67 He considered the effects of the development on the listed buildings, concluding that the “level of harm” from the proposed works to Beechley House, the entrance gates and Beechley Stables would, in each case, be “less than substantial”. On each, he said that “in order to outweigh such harm, as required by paragraph 134 of the NPPF, the scheme would provide a public benefit in securing [the building’s] optimum viable use”, and that “this part of the scheme is acceptable and accords ... with the NPPF”. The ha-ha would be repaired “on a like-for-like basis”. The “level of harm” resulting from the demolition of the outdoor riding arena and constructing four mews houses in its place would be “neutral in terms of its impact on the designated heritage assets”.

68 Under the heading “Erection of three detached houses within the grounds”, the officer acknowledged that “the erection of these three houses in the historic grounds of Beechley would result in some harm to its setting and also the Ha Ha”, but said this was “considered to be categorised as less than substantial”. He accepted that “this element of the scheme will inevitably have a greater impact than other impacts to other heritage assets discussed earlier, as it will introduce built development within the historic grounds of Beechley”. He had

“considered this aspect of the scheme in some depth and, whilst accepting that the erection of the three houses would cause less than substantial harm, [had] weighed up the planning balance of the proposal against the wider public benefits/regeneration merits that it would deliver, as provided for under para.134 of the NPPF”.

The benefits to which he referred were “[bringing] Beechley back into use”, the “[repair] of the listed Ha Ha”, and the “[relocation] and enhancement” of the “disabled riding stables”, the miniature railway, and Calder Kids. He “accepted that the proposed three dwellings within the grounds of Beechley, whilst having been designed to be located as far away from the Listed Building/structure as possible, including additional tree and hedge planting, for the purposes of Pt (i) of Policy HD5, would still be somewhat visible through the retained landscaping”.

69 The officer continued:

“Notwithstanding this, the Interim Head of Planning is of the view that in this instance, the less than substantial harm to the setting of the heritage assets is outweighed by the abovementioned public benefits.”

He added, however, that he “would not wish to see the proposed three dwellings carried out without securing the preservation and enhancement of the heritage assets on the site”. A condition would therefore be imposed, stipulating “that the three dwellings cannot be occupied until such a time when substantial works in connection with the conversion of Beechley have been carried out”.

70 Concluding this section of his report, the officer said:

“Overall ... the proposed conversion and alterations of the designated heritage assets ... will sustain and enhance their significance and ... any harm to the setting of Beechley and any other heritage assets would be classed as less than substantial, being outweighed by the wider public/regeneration benefits delivered from the proposed development as a whole, in accordance with paragraph 134 of the NPPF.”

71 The minutes record advice given by officers at the meeting that the development would “deliver benefits through the restoration of the Listed ‘Ha Ha’ landscape feature and of Beechley House itself”. While “there would be some harm caused to the setting of Beechley House”, this was “not such as to be considered significant” and “on balance the level of benefits ... outweighed [it] in terms of the relocation of and provision of new enhanced facilities for Beechley Riding Stables and the Model Railway”. The design had been “assessed by [the city council’s] in-house fully qualified design specialist ...”. But there was no reference to the Urban Design and Heritage Conservation team’s consultation response. And Mr Tucker told us it was not made available to the members at the meeting.

72 Kerr J accepted that it could be inferred that the committee was “properly [apprised] of and properly carried out its section 66(1) duty, unless contra-indications rebutting the inference raise at least a substantial doubt that they did so”. But in his view there were “contra-indications” ([70]): the officer’s failure to mention the consultation response of the Urban Design and Heritage Conservation team, which stated “strong conservation objections” to the three dwellings proposed within the setting of Beechley House and the ha-ha ([71]–[78]); the “mantra-like formulation of the balancing exercise”, with “no reference to any weighting”; the

emphasis on the policy in para.134 of the NPPF for cases of “less than substantial harm” without mentioning the policy in para.132; the repetition of an “unweighted formulation of the balancing exercise” ([79]–[81]); and, finally, the notion that “*being* outweighed by the public benefits contributes to characterisation of the harm as less than substantial” ([82]–[84]). He was therefore “very far from comforted by the assurances of [counsel] that the committee can be taken to have remembered the isolated reference to ‘great weight’ and ‘clear and convincing justification’ earlier in the [report]”, or that the officer had “avoided watering down the duty under section 66(1)”. He was “left with, at the very least, a substantial doubt on the point” ([85]). He did not accept the argument under s.31(2A) of the Senior Courts Act 1981 that it was “highly likely that the outcome ... would not have been substantially different” if this error, and the error he had found in the interpretation of Policy OE3, had not been made ([135]–[138]).

- 73 Mr Tucker submitted that the judge had adopted an “overly analytical” approach to the officer’s report, had applied an “incorrect test”, contrary to the test of “substantial doubt” set by this court in *Palmer*, and had not recognised the committee’s own expertise and its experience of making decisions on proposals affecting heritage assets (see *R. v Mendip DC Ex p. Fabre* (2000) 80 P. & C.R. 500). The omission to report the objection of the Urban Design and Heritage Conservation team was not a “positive factor” capable of displacing the presumption that the s.66(1) duty had been performed. It was not clear what other factors the judge had seen as relevant “contra-indications”.
- 74 I cannot accept those submissions. As Mr Westaway submitted, the judge was rightly troubled by the officer’s failure to tell the committee of the “strong conservation objections” raised by the Urban Design and Heritage Conservation team to the construction of three houses in the setting of Beechley House, and right to conclude that this was enough to displace the presumption that the s.66(1) duty had been properly performed.
- 75 I acknowledge that the Urban Design and Heritage Conservation team objected only to this element of the scheme; and that, having made their observations, they recognised it was for the city council as decision-maker “to consider the public benefits of the scheme against the identified harm to the significance of the listed buildings and structures at the Beechley site”—an exercise not within their remit. I also acknowledge that it would have been open to the Interim Head of Planning—when reporting to the Planning Committee—and to the members themselves, to differ from the opinion of the Urban Design and Heritage Conservation team, or to find that it would not be enough to justify refusing planning permission.
- 76 However, this was an objection provided in response to the formal consultation of a team of professional officers employed by the city council for their expertise in the conservation of heritage assets, including listed buildings and their settings. The purpose of the consultation was to draw upon that expertise so that it could assist the city council in discharging its duty under s.66(1) when making its decision on the application for planning permission. This was consistent with the policy in para.129 of the NPPF referring to the need for authorities to take into account “any necessary expertise”, and with the guidance in the Planning Practice Guidance stressing the value of “expert advice”, and the seeking of “[advice] ... from appropriately qualified staff and experienced in-house experts ...”. Omitting to take into account the response of the Urban Design and Heritage Conservation

team was not only to ignore their objection. It was also to disregard national policy and guidance relevant to the s.66(1) duty.

- 77 Whether the failure to bring the objection to the attention of the members was simply an oversight or deliberate does not matter. It is the more striking because the officer took care to refer in his report to three other internal consultation responses. And it was, I think, a significant omission (see *Mansell v Tonbridge and Malling BC* [2019] P.T.S.R. 1452 at [42(3)]). This was not a perfunctory response to consultation. It was a detailed and carefully considered assessment of the effects the development would have on the listed buildings and their settings. It differed from the assessment presented to the committee by the Interim Head of Planning, and in a significant way. It articulated “strong conservation objections” to the proposed construction of three houses within the setting of Beechley House. That the Interim Head of Planning himself acknowledged there would be some harm to the setting of the listed building does not overcome the omission. The fact remains that the city council’s own conservation officers had expressed a firm objection, which was neither confronted nor even noted in the officer’s report or in debate at the committee meeting.
- 78 In my view, that objection—both the fact of it and its substance—was, in the circumstances, an “obviously material” consideration of the kind referred to in *re Findlay* [1985] A.C. 318 (see the speech of Lord Scarman at 333 and 334; and also the judgment of Glidewell LJ in *Bolton MBC v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P. & C.R. 343 at 352). Quite apart from the s.66(1) duty, this was a matter to which the city council had to have regard in reaching its decision on the application for planning permission, giving it such weight as it saw fit. It could have made a difference to the outcome. But it was overlooked. That was an error of law.
- 79 There is some similarity here with the circumstances in *R. (on the application of Loader) v Rother DC* [2016] EWCA Civ 795. In that case the proposed development was in the setting of a Grade II listed Victorian terrace. The officer’s report had indicated that the Victorian Society, which had objected to a previous application, had made no comments on the new proposal. In fact, they had not been consulted. The appellant argued that the committee might have been left, wrongly, with the impression that the Victorian Society were now satisfied with the revised design. This court accepted that “[in] the context of the duty [in section 66(1)], ... in taking this misinformation into account, [the committee] could be said to have proceeded on the basis of an error of fact”, but that “the unlawfulness [was] better described as the taking into account of an immaterial consideration” ([57]). This was enough to justify quashing the planning permission ([58]).
- 80 The error in this case was not the same as in *Loader*. Its potential effect, however, was no less significant. As in *Loader*, it was liable—seriously, though innocently—to mislead the members when making their decision. It implied the absence of objection from a consultee with specific responsibility for the conservation of heritage assets: in *Loader* a national amenity society; here the city council’s own “experienced in-house experts”. In that case, it was not known what the Victorian Society would have said had they been consulted. They might have said nothing. Here, however, the court knows there was an objection from the city council’s Urban Design and Heritage Conservation team, which was not dealt with by the officer in his advice to the Planning Committee or grappled with by the members.

- 81 The error was not merely a failure to have regard to a material consideration. It was also a significant default in the city council’s performance of its duty under s.66(1). It indicates that despite the reference made in the officer’s report to the statutory duty, the policies in paras 132 and 134 of the NPPF and Policy HD5 of the UDP, the duty to have “special regard” to the desirability of preserving the setting of the listed building was not complied with. Even if one could excuse the other shortcomings to which the judge referred—including the “unweighted formulation of the balancing exercise” in the officer’s assessment—I think this would be a sufficiently powerful “contra-indication” on its own to displace the presumption that the s.66(1) duty was discharged. For this reason, like the judge, I am left in “substantial doubt” that the duty was performed.
- 82 This “substantial doubt” is only strengthened by the absence, at least from the section of the officer’s report in which his assessment is set out, of any steer to the members that a finding of harm to the setting of the listed building was a consideration to which they must give “considerable importance and weight”. I think the judge’s conclusions here were right.
- 83 I also agree with the judge that the court is not in a position to conclude, under s.31(2A) of the Senior Courts Act, that it is “highly likely that the outcome ... would not have been substantially different” if the s.66(1) duty had been complied with, and the Planning Committee, when performing that duty, had considered the objection of the Urban Design and Heritage Conservation team, giving it appropriate weight.
- 84 In my view therefore, on this ground Kerr J was right to uphold the challenge to the planning permission for Redrow’s proposal.

### **Conclusion**

- 85 For the reasons I have given, I would allow the appeal only in so far as it seeks to overturn the judge’s order quashing the planning permission for the relocation of the miniature railway, otherwise dismiss it, and not disturb the order quashing the permission for the development proposed by Redrow.

### **NEWHEY LJ:**

- 86 I agree.

### **RAFFERTY LJ:**

- 87 I also agree.

David Stott.