Case Name: *Kinnersley, R (On the Application Of) v Maidstone Borough Council* [2022] EWHC 1825 (Admin) (14 July 2022)

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Commentary: This was a judgment dismissing a claim for judicial review in respect of the Council's (the "defendant") decision to grant planning permission for two new dwellings on the site of existing built form (currently in commercial use) and alterations to a garden wall and sunken garden within the curtilage of a Grade II listed building. This followed the quashing of the permission previously granted by the Council in respect of this proposal. The challenge was brought by the occupier of the listed building (the "claimant"), and was advanced on four grounds.

The first ground was that the Council had misunderstood Policy DM5 of the Local Plan, which addresses development on brownfield land. The policy supports proposals on brownfield land which does not have a "high environmental value". Here, the policy had been applied to the part of the site which had existing built form, but had not been applied to the existing residential garden. It was argued on behalf of the claimant that if the policy had been applied to the entire site, there would have been a policy conflict. Alternatively, they submitted that the policy did not apply to the development at all and the proposal should have been assessed instead against policies which restrict development within the countryside. The defendant was able to point to wording in the supporting text which specifically excluded residential gardens from the ambit of policy DM5. HHJ Walden-Smith concluded that the policy did apply to the assessment of the proposal, but did not apply to the part of the site which was (and would remain following development) a residential garden. Accordingly, the first ground failed.

The second ground concerned inconsistency in the officers' approach to assessing the contribution made by the existing buildings to the setting of the listed building, which (it was alleged) caused the assessment of the proposal's impact on the listed building to be unreliable. During the consideration of the application in 2018 (prior to the quashing of the permission), the officer's report opined that the existing buildings were a neutral presence within the setting of the listed building. On the re-consideration of the application, the officer found that the existing buildings had a negative impact on the setting of the listed building, but there was no explanation or justification for this change of position. With reference to the judgment in North Wiltshire District Council v Secretary of State [1993] 65 P. & C.R. 137, HHJ Walden-Smith found that the impact of the existing buildings on setting was "a relevant but not a critical aspect of the decision making". She further concluded that, even if this was a material matter on which the Planning Committee should have been directed, it would not have altered the decision that the Committee ultimately reached. Ground two was therefore unsuccessful.

Ground three turned on whether the Council had properly observed its statutory duty under section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

The basis for this argument was swiftly dispatched by the judge as a merits challenge, with which the court would not become involved. The second part of this ground sought to establish that the defendant had conflated “less than substantial harm” with a less than substantial objection, but again the judge concluded that the officer’s report revealed no error of law which was properly open to challenge and so ground three failed.

The final ground addressed the relevance of an alternative proposal for the existing buildings, which had been suggested by the claimant. It was argued that this alternative proposal was a material consideration which the defendant had failed to have regard to. The alternative had, however, been mentioned in the officer’s report, and the judge found that the officer was entitled to deal with it briefly and to give it such weight as they thought appropriate in exercise of their planning judgment. Ground four was consequently dismissed.

Case summary prepared by Aline Hyde