Neutral Citation Number: [2014] EWHC 3543 (Admin)

Case No: CO/1894/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 31st October 2014

Before:

THE HONOURABLE MRS JUSTICE LANG DBE

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Between:

THE QUEEN
on the application of

EAST MEON FORGE AND CRICKET GROUND PROTECTION ASSOCIATION
(acting by its Chairman GEORGE BARTLETT)

Claimant

- and -

(1) EAST HAMPSHIRE DISTRICT COUNCIL
(2) SOUTH DOWNS NATIONAL PARK AUTHORITY

Defendants

(1) J. CROUCHER
(2) I. CROUCHER

Interested Parties

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Robert Fookes (instructed by **Prospect Law Ltd**) for the **Claimant**
David Forsdick QC (instructed by **East Hampshire District Council Legal Services Department**) for the **First Defendant**
The **Second Defendant** did not appear and was not represented
The **First Interested Party** did not appear and was not represented
The **Second Interested Party** appeared in person

Hearing dates: 23rd & 24th October 2014

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Approved Judgment

Mrs Justice Lang:

Introduction

1. The Claimant applies for judicial review of the Defendants' decision, dated 7th April 2014, to grant planning permission to make alterations and additions to the property known as The Forge, High Street, East Meon, Petersfield, Hampshire GU32 1QD, by constructing a first floor residential flat, with a deck to the rear.

2. The East Meon Forge and Cricket Ground Protection Association is an unincorporated association, formed in September 2013, with the aim of protecting both The Forge and the use of the adjoining recreation ground for the playing of cricket. It now has about 150 members, who are local residents.

3. The planning authority is the South Downs National Park Authority, but the application for planning permission was determined by East Hampshire District Council (hereinafter "the Council") under an agency agreement.

4. The Interested Parties are the owners of The Forge who successfully applied for planning permission, at the third attempt. They had previously withdrawn their first application in March 2013. Their second application was granted by the Council, but quashed by consent on 22nd April 2014 in the Claimant's first claim for judicial review.

5. Collins J. granted the Claimant permission to apply for judicial review in this claim on 5th June 2014.

6. At the hearing, the Claimant re-formulated its grounds to some extent, and did not pursue its original grounds 5, 8, 9 and 10. It did not pursue an application to add a further ground.

7. On 23rd June 2014, Mitting J. granted the Claimant an injunction restraining the Interested Parties from carrying out development before the judicial review claim had been determined. There was evidence that the floor had been excavated by a digger and that a chimney had been smashed.

8. The Interested Parties subsequently applied to vary this order to allow "vital repairs" to be carried out, following service of a letter from the Council's Building Control Surveyor, headed 'Building Act 1984 Section 77/78 Dangerous Structure', stating that signs of movement of an exterior wall meant that the structure was in imminent danger of collapse. The application was opposed by the Claimant because of the irreparable damage it would do to the building. The application was adjourned by Sales J. because he was not satisfied that the proposed works, which included removal of the roof and partial demolition of the walls, were urgently required. Sales J. ordered that the Claimant and the Interested Parties obtain independent surveyors' reports. When the surveyors inspected the property it was agreed that (1) the bowing of the exterior wall was not recent; (2) any further movement could be prevented by timber ties to the underside of the roof; and (3) there was no imminent danger of collapse. The Interested Parties did not renew their application. The costs were reserved. I am satisfied that the Interested Parties ought to pay the Claimant's costs in respect of that application.

9. On 23rd June 2014, Mitting J. also imposed a stay on the Council restraining it from determining matters reserved for further approval under conditions.

The Forge

10. The Forge was the site of the village blacksmith, and it is an important part of the local heritage. It was in use as a wrought iron workshop until about 2010. Since then it has been empty. It is a single storey vernacular industrial building of simple design. It is small (about 71.13 sq. metres or 765 sq. feet, according to the Valuation Office) and low in height (only 5.4 metres or 17.7. feet) to the ridge line of its pitched roof. The building is L-shaped, following the line of the two roads which it abuts: the High Street and Frogmore/ Mill Lane. The current building dates from the 19th century, though it is believed that the site has been used as a smithy for much longer than that. It is constructed of brick, with a tile gabled roof. There is a small modern lean-to extension which houses an office and WC. The building is in a poor state of repair.

11. It is on a small plot, comprising an area of hard standing, some rough grass and a large sycamore tree at the boundary with the recreation ground.

12. The proposed development will retain the ground floor for an industrial use (carpentry), and build a new residential flat above it, to be occupied as a live/work unit. The flat will comprise a bedroom, bathroom, open plan living room and kitchen, utility room, store and separate WC. The evidence of dimensions is incomplete and contradictory, but Mr Mitchell, chartered surveyor for the Claimant, estimated the proposed development would provide approximately 1,700 sq ft over 2 floors. This would more than double its size, adding an additional 935 sq ft.

13. Access to the first floor unit will be via external steps, leading on to a wooden deck, some 10 feet deep. looking towards the recreation ground. The solid front door will lead from the deck into the living room. The living room will have floor to ceiling sliding patio doors on to the deck. The deck will continue around the side of the first floor, creating a veranda, in front of two large floor to ceiling windows, also looking towards the recreation ground. Windows from other rooms and some Velux roof lights will overlook the deck. The deck, the steps and the windows will all potentially be at risk from cricket balls coming from the recreation ground.

14. The height of the extended building will increase by 2.2 metres to 7.6 metres (24.9 feet). The footprint of the building will also be enlarged because the deck and steps will extend out over the existing yard area, creating a covered area for parking and loading underneath.

15. The Forge is included in the Hampshire County Council list of 'Treasures' which are man-made features of public interest in the county, the destruction of which would represent serious loss to the heritage of the county.

16. In 2009, English Heritage decided that The Forge did not meet the national criteria for listing, mainly because of past alterations to the building and its fabric. The report commented:

> "It is undeniably true that the Forge adds to the picturesque aspect of East Meon, and is a valuable reminder of the

> importance of the forge or smithy in village life. For this reason the building is of local interest and its protection should lie in the local designations of conservation area, Area of Outstanding Natural Beauty and National Park."

17. On 6th March 2014, The Forge was listed as an asset of community value, pursuant to section 91(2) of the Localism Act 2011. The reason given was that it "has a special resonance for the local community and furthers the cultural interests of the community". The application, made by the Claimant, stated that it was a valuable reminder of the importance of the forge or smithy in village life, and should be retained for industrial use.

18. The Forge is in a prominent location in the village, at the corner of the High Street and the road to Frogmore. The Forge is within the East Meon Conservation Area. The boundary of the conservation area detours around The Forge, suggesting that it was specifically included. As the Conservation Officer said in his report:

> "It is a worthy candidate for inclusion in the conservation area due to its historical association, location and juxtaposition with other historic buildings, most notably Forge Cottage to the west, which is grade 11 listed. "

19. The East Meon Conservation Area is within the South Downs National Park.

20. The Forge is situated at an entrance to the village recreation ground: there is a track and farm gate leading to the recreation ground running along the side of the plot. The rear of the building backs onto the recreation ground, with a view obscured to some extent by the sycamore tree. The building is set down at a lower level than the recreation ground so that its eaves are close to the ground level of the recreation ground.

21. The recreation ground was created as a charitable foundation in 1894 specifically for the purpose of enabling cricket to be played on the ground, and cricket has been played there ever since. The East Meon Cricket Club is a flourishing club which plays there regularly. The cricket square is only 36 metres (just over 39 yards) from The Forge at present, and when the building is extended, the distance will be even less. Cricket balls already fly on to the roof of the building and the surrounding plot at present.

Submissions

22. The Claimant made three main submissions. First, that the Council erred by failing to determine the planning application in accordance with statutory requirements, the National Planning Policy Framework (NPPF) and the relevant local policies.

23. The Defendants submitted in response that the Council had correctly considered and applied the relevant statutory requirements and policies.

24. Second, the Claimant relied on the listing of The Forge as an asset of community value, and submitted that the officers failed to inform the Planning Committee that the Claimant had sufficient funds to enable the craft/industrial use of the building to

continue without the need for a residential floor to make it financially viable, despite an earlier assurance that the funding information would be made available to the Committee. This meant that the Conservation Officer's judgments, on which the Committee relied, were made on a flawed basis. The eventual decision was made on incomplete information and the Committee was misled.

25. The Defendants submitted in response that the Council was under no obligation to consider alternative schemes for use of The Forge, in the absence of exceptional circumstances, such as the proposed development giving rise to conspicuous adverse effects, which was not the case here. The listing as an asset of community value only has effect when the property is put up for sale, and does not give a right of first refusal, and so the officers rightly advised that it should be given negligible weight.

26. Third, the Claimant submitted that the Council failed to have proper regard to the representations made by Sport England, a statutory consultee, about the potential conflict between the use of the recreation ground for cricket and the residential use of The Forge, and the risk of damage to persons and property from cricket balls.

27. In response, the Defendants submitted that the Council gave full and careful consideration to the concerns of Sport England and arrived at a conclusion which, in its judgment, mitigated the risk to an acceptable extent.

28. There was a significant development during the course of the hearing when, in the light of information given by Mr I. Croucher, it emerged that the Defendants' submissions to me about the protective measures against damage to the window glass from cricket balls were incorrect. The Defendants had submitted, by reference to paragraph 8.11.16 of the officers' report, that it had been accepted that moveable shutters on the windows were not adequate protection because it was not possible to ensure that they would always be closed when a game was played. So the Council decided that permanent barriers such as guard railings should be installed over the windows, and planning permission was given on that basis. This was the effect of Condition 12, according to the Defendants.

29. However, once the documents were produced, it was clear that the scheme approved by the Council in June 2014, pursuant to Condition 12, permitted Mr Croucher to install moveable shutters over the windows, not barriers which were permanently in place.

30. Counsel for the Defendants submitted that the Council had simply made a mistake when approving the scheme. He further submitted that this was outside the scope of the current judicial review. The Claimant should have filed a further judicial review claim to challenge the lawfulness of the approved scheme, but was now out of time to do so.

31. Counsel for the Claimant submitted that the planning permission had been granted on an erroneous basis, on the assumption that Condition 12 would give effect to the stated intention to require permanent guard rails over the windows. However, the wording of Condition 12, which required the fitting of defensive guards to the windows, did not specify that they should be immoveable. Mr Croucher's assurances that the moveable shutters would be kept in the closed position were not enforceable and were unrealistic, as the outlook from the residence would be significantly

impaired. Moreover, the approved scheme did not require the shutters to be kept closed at all times; indeed, the notes on the plans referred to the shutters for the patio doors being retracted when matches were not being played.

Planning officers' reports

32. The Claimant was highly critical of the Report provided by the planning officer to the Planning Committee.

33. Mr Forsdick submitted that the courts deprecate an unduly demanding reading of committee reports in much the same way as the courts deprecate the overly sophisticated reading of decision letters from Inspectors, exemplified in *Clarke Homes v. Secretary of State for the Environment* (1993) 66P&CR 263 at 271.

34. In *Oxton Farms v. Selby DC* [1997] EGCS 609 Judge LJ stated:

> "17. The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles and to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury….
>
> 18. In my judgment an application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."
>
> The issue for this Court is therefore whether the report to committee significantly misled on key issues. It is not whether the report could have been better worded or more clearly expressed."

The previous claim for judicial review

35. The Claimant submitted that the Report to the Planning Committee was defective in that it failed to explain exactly why the Council had consented to the quashing of the previous grant of planning permission. In my judgment, it was neither necessary nor appropriate for such details to be included in the Report on the fresh application for planning permission. There is a danger that it would distract the Committee from consideration of the fresh application with an open mind.

Statutory provisions

36. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004, read together with section 70(2) of the Town and Country Planning Act 1990.

37. The duty under the equivalent Scottish provision was explained by Lord Clyde in *Edinburgh City Council v. Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

38. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13.

39. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28 and *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W1.R 759, at 780. In *Tesco Stores* Lord Hoffmann said, at 780F-H, that the weight to be given to a material consideration was a question of planning judgment for the planning authority.

40. Section 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:

> "In the exercise, with respect to any building or other land in a conservation area, of any function under [the planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

41. In *South Lakeland District Council v Secretary of State for the Environment* [1992] 12 AC 141, the House of Lords considered the predecessor provision to section 72(1) which was in identical terms and held, per Lord Bridge at 146F:

> "There is no dispute that the intention of section 277(8) is that planning decisions in respect development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, 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. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

42. Later in his judgment Lord Bridge went on to consider whether, on a proper construction of section 277(8), it was necessary that the proposed development would make a positive contribution to the preservation of character or appearance. At 150E, he cited with approval a passage from the judgment of Mann LJ in the Court of Appeal who said:

> " "The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development, which leaves character or appearance unharmed, that is to say, preserved."

43. In *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] 1 P&CR 22, 387 Sullivan LJ held that section 72(1) imposed the same duty as section 66(1), in relation to listed buildings, despite the slight difference in wording. The term "preserving" in both enactments means doing no harm: see *South Lakeland DC*, per Lord Bridge at 150. Parliament's intention was that decision-makers should give "considerable importance and weight" to the "desirability of preserving or enhancing the character or appearance" of the conservation area when carrying out the balancing exercise. It was not open to decision-makers to afford this consideration less weight than this, in the exercise of their own planning judgment.

National Planning Policy Framework (NPPF)

44. Planning authorities must have regard to the presumption in favour of sustainable development (paragraph 14).

45. Section 12, headed 'Conserving and enhancing the historic environment' requires planning authorities to set out a positive strategy for the conservation and enjoyment of the historic environment, recognising that heritage assets are an irreplaceable resource (paragraph 126).

46. It was common ground before me that The Forge was a non-designated heritage asset for the purposes of the NPPF. It comes within the definition of 'heritage asset' in the Glossary by virtue of its listing by Hampshire County Council as a 'treasure':

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

47. Therefore paragraph 135 applies:

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighting applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

48. The East Meon Conservation Area is a designated heritage asset, and therefore more stringent tests apply. Under paragraph 133, where a proposed development will lead to substantial harm to or total loss of significance, consent should be refused unless substantial public benefits outweigh that harm or loss. Under paragraph 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.

49. Paragraph 138 provides:

> "Not all elements of a World Heritage Site or Conservation Area will necessarily contribute to its significance. Loss of a building or other element which makes a positive contribution to the significance of the Conservation Area or World Heritage Site should be treated either as substantial harm under paragraph 133 or less than substantial harm under paragraph 134, as appropriate, taking into account the relative significance of the element affected and its contribution to the significance of the Conservation Area or World Heritage Site as a whole. "

50. It seems to me that Mr Forsdick is correct in submitting that paragraph 138 only applies where there is a <u>loss</u> of a building or other element. Throughout section 12, it

is clear that 'harm' and 'loss' are different concepts. Although the development may harm the character and appearance of The Forge, there is no suggestion that it will be lost. However, I am unclear why the principle expressed in paragraph 138 should be confined to cases of loss, and so I am uncertain about the intended scope of this paragraph.

Development Plan

51. The Officer's report to committee ('the Report') correctly identified and considered the relevant provisions in the Development Plan, namely, policies HE2, HE5, HE6 and HE13 in the Local Plan.

52. HE2 states:

> "Alterations and extension to buildings will only be permitted if they are designed to take account of the design, scale and character of the original building, its plot size and its setting. The roof form of any extension or alteration should respect the form of the original building."

53. HE5 states:

> "An alteration or extension of an unlisted building in a Conservation Area will not be permitted unless it would preserve or enhance the character and appearance of the building and the Conservation Area by:
>
> a reflecting the scale, design, finishes and landscaping of the building;
>
> b. retaining and, where necessary, restoring traditional features such as shop fronts, boundary walls, paved surfaces and street furniture;
>
> c where appropriate, using materials traditionally characteristic of the area; and
>
> d improving the condition of the building and ensuring its continued use."

54. HE6 states:

> "Planning permission for the change of use of a building in a Conservation Area will be permitted provided that it would neither:
>
> require any changes in the appearance or setting of the building other than those that will preserve or enhance the character or appearance of the area;

> nor harm the surroundings as a result of traffic generation, vehicle parking and servicing or noise"

55. HE13 states:

> "Proposals for Buildings of Local Architectural, Historic or Townscape Interest …. involving alterations, additions or other development, including changes of use, will be permitted provided that such development does not adversely affect the character or setting of the building."

56. These policies distinguish between the effect of a development on individual buildings and its effect on the conservation area. The Report correctly considered the building and the conservation area separately, as well as together.

The effect of the proposed development on The Forge

57. The Report correctly began by considering the effect of the works upon the character and appearance of the building, at 8.2.7 to 8.2.19. The Report concluded that the proposed development would conflict with policy HE2 and policy HE5 sub-paragraph (a) because of the increase in the scale of the building which would be significant. The additional storey would increase the height and overall size, and enlarge the footprint of the original building. Despite the mitigating factor of good design, the Report concluded, at paragraph 8.2.13,

> "Overall though, the additions to the building would not reflect the scale of the building and would harm its existing character and appearance".

58. At paragraph 8.2.32, the Report also advised that the proposed development was in conflict with HE13.

59. The Report advised that the proposed development did not conflict with any other parts of policy HE5.

60. Contrary to Mr Forsdick's submission, I consider that this case is distinguishable from *R (Cummins) v London Borough of Camden* [2001] EWHC Admin 1116 and *R (TW Logistics) v Tendring District Council* [2013] EWCA Civ 9 because here the Council was not considering differing policies in the Development Plan which appeared contradictory or pulled in different directions. Although there was only conflict with one part of HE5, the factors in HE5 are not alternatives. Each represents an equally important consideration. On a proper interpretation, the Council has to consider each part in turn, which it did. Whether or not there is conflict with the policy will depend on the Council's assessment of the proposal in any particular case. Here, the planning officer (and the conservation officer) concluded that the harm to the character and appearance of the building was significant. The Report advised that the development was contrary to HE2, HE3 and partially contrary to HE5. This was a judgment, which Mr Forsdick had to defend, rather than seek to re-interpret.

61. The officer should have advised on the application of paragraph 135 NPPF in relation to The Forge as a non-designated heritage asset, but he did not do so. I note that the

conservation officer did expressly consider paragraph 135 at paragraph 4(e). However, in the conclusions at paragraph 9.1 of the Report, the officer said:

> "Having had regard to the Conservation Officer's comments, the relevant policies in the local plan and NPPF criteria, officers recommend that the positive benefits of securing the future condition and use of the building would maintain the significance of the Forge and outweigh the harm from the acknowledged effects to its existing character and appearance"

62. In my view, this assessment, read together with the conservation officer's assessment, indicated that the officer was correctly directing himself on the need to make a balanced judgment on the effect of the development on The Forge, in accordance with paragraph 135.

The effect of the proposed development on the Conservation Area

63. The Committee had the benefit of detailed advice from the conservation officer, which was set out in the Report. The conservation officer acknowledged that "the proposal will .. materially alter the character of the building both in scale and visual appearance" and that "the proposal was at the margins of acceptability". It was a "radical adaptation" which would result in a "marked change to the local townscape". His opinion was that "the site is capable of taking this larger scale building without detriment to the conservation area or setting of the listed building [Forge Cottage]".

64. He accorded "considerable weight" to "the continuance of the craft tradition on this site", stating:

> "There are really two choices, to limit the building to its current configuration, size and scale or to accept enlargement to accommodate a live-work unit. It is difficult to envisage the investment coming forward to repair the building for its previously permitted, or similar workshop use. The role and use of the building as I say, is itself important to the conservation area. This is a very fine judgment given the site sensitivities."

65. The conservation officer concluded:

> "This is a prominent site at one of the main gateways to the village. I place considerable weight on the retention of the craft use. I see the current proposal as the best means of securing the necessary investment and accordingly support more robust intervention than would normally be the case…. I do not pretend implementation will not result in a marked change to the local townscape. However, if executed to a high standard, using good quality materials it has the potential to make a positive contribution to the conservation area…"

66. At paragraphs 8.2.20 to 8.2.26, the Report considered the implications of the proposed development for preserving or enhancing the significance of the conservation area under policy HE5 and the NPPF.

67. The officer considered that paragraph 138 NPPF applied which, as I have already explained, may have been mistaken, as there was no 'loss' of a building within the conservation area. Consideration of the conservation area as a designated heritage asset should have begun at paragraph 132 NPPF. I doubt whether the error was material since, on my reading of the report, whichever route he took, the relevant test was at paragraph 134, which applies in cases where the development will lead to less than substantial harm.

68. The Report had regard to the conservation officer's advice but even if and insofar as the conservation officer had concluded that there was 'no harm' to the conservation area (as Mr Forsdick submitted), I consider that the planning officer took a different approach. In paragraph 8.2.23 of the Report he advised:

> "The impact from the alterations will affect the character and appearance of the Conservation Area. Officers do not consider the effects of the scheme upon the existing character of the building to represent substantial harm to the Conservation Area: any effects, positive or negative, should be judged in the context of the significance of the Conservation Area (covering a wider area) much of which is not influenced by this site."

69. On my reading of the report, this paragraph has to be read in the context of paragraph 8.2.21 where the officer advised on the approach to be taken under paragraph 133, 134 and 138 of the NPPF. In paragraph 8.2.23, the officer was advising the Committee that (1) the development would affect the character and appearance of the conservation area; and (2) it would affect the existing character of the building; and (3) these effects did not amount to "substantial harm"; (4) there were positive and negative effects which had to be judged in the context of the significance of the conservation area as a whole. My understanding is that the officer was advising that there were potentially some adverse effects and that the Committee ought to apply the test under paragraph 134 NPPF, applicable where a development proposal will lead to "less than substantial harm" to the significance of the conservation area.

70. At paragraph 8.2.24, the Report then set out the conservation officer's advice that the development would not cause detriment to the conservation area and, if executed to a high standard, could itself make a positive contribution.

71. The report concluded this section, at paragraph 8.2.25:

> "Officers agree that the resulting extended building will integrate acceptably in its own right within its available plot space and context. It will have a sufficiently sympathetic relationship within High Street and with the recreation ground. The scheme will preserve the character of the Conservation Area for the purposes of HE5."

72. It is then necessary to read on to the 'Conclusions on heritage effects' at paragraphs 8.2.32 – 34 which stated:

> "Officers agree with the Conservation Officer's analysis that this is a prominent site and that considerable weight should be placed on securing the use and this solution is a means of securing a continuing business use on the site and investment necessary to achieve this. It is acknowledged that there would be significant changes to the building and that the impact will result in a marked change to the local landscape and for these reasons the scheme is in conflict with criteria a) in Local Plan policies HE5, and with HE2 and HE13.
>
> Overall, however, having regard to the Conservation Officer's comments it is clear that, well executed, the development would in fact make a positive contribution to the character and appearance of the Conservation Area. … On balance of the issues the scheme would be acceptable on these merits."

73. I see the force of Mr Fookes' submission that the potential harm to the conservation area arising from the change to the character and appearance of a prominent and historic building was not adequately taken into account when the effect on the conservation area was considered. But in my view it had been adequately considered in the detailed advice from the conservation officer, set out earlier in the report, and referenced at paragraph 8.2.24. In this section, the officer noted, at paragraph 8.2.22, the prominence of The Forge, visible from the highway and the recreation ground, and the fact that the alterations would significantly increase its scale and its physical presence. The effect on the character and appearance of the conservation area and the building were both acknowledged in paragraph 8.2.23. In the final conclusions, at paragraph 8.2.32, the officer reiterated the earlier findings of significant changes to the building which conflicted with parts of the Local Plan. Reading the report as a whole, I do not consider that the report was so inadequate as to mislead the Committee.

74. Mr Fookes submitted that the advice from officers was fundamentally flawed because it was contradictory. It found that the development would have harmful effects on The Forge, and to the conservation area, but that the harm to the conservation area would be overridden by the positive effects of the development. In my view, the advice sufficiently explained the reasoning behind the advice given. Essentially, in so far as harm was caused by the development, to the building and/or the conservation area, it was outweighed by the greater benefit to the conservation area conferred by the restoration of The Forge and its traditional 'craft' use. Although controversial, I do not consider that this advice was wholly illogical.

75. Mr Fookes submitted that the Report failed to advise the Committee on the application of the duty under section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990 to pay "special attention to the desirability of preserving or enhancing the character or appearance" of the conservation area, which means giving it considerable importance and weight. The statutory duty had been identified earlier at paragraph 6.5.1. I agree that the officer ought to have returned to it under his heading "Whether the development would preserve or enhance the

significance of the Conservation Area" at paragraph 8.2.20 onwards. However, as the terms of section 72(1) are fully reflected in policy HE5, it would not have made any difference to the advice given. The Report gave detailed consideration to the desirability of preserving or enhancing the character or appearance of the conservation area, and there is no reason to doubt that the Committee did too. The decision made was justified on the basis that, looked at overall, the development did preserve or enhance the character or appearance of the conservation area, as the benefits to the conservation area outweighed the adverse effects.

Material considerations

Alternative schemes

76. The Committee was advised that it was not necessary to consider alternative schemes because the proposed development was not likely to have significant adverse effects and would make a positive contribution to the Conservation Area. At paragraph 8.11.20, the Report stated:

> "Overall it is not considered that the proposals are likely to have significant adverse effects and in particular make a positive contribution to the Conservation Area while appropriately securing a desirable use. The EMFCGPA has offered to purchase, refurbish and bring the Forge into beneficial use. Given the above conclusions it is not necessary to consider an alternative solution. However, this section proceeds on the basis that it were appropriate to consider alternative solutions, what officers' advice would be."

77. The correct approach to consideration of alternatives sites (as opposed to alternative schemes for the same site) was considered in *R (L) v. North Warwickshire District Council* [2001] EWCA Civ 315. Having reviewed the authorities, Laws LJ said, at [30]:

> "…all these materials point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking – and I lay down no fixed rule, any more than Oliver LJ or Simon Brown J - such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question".

78. In *Derbyshire Dales DC & Ors v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin), Carnwath LJ held, at [28], that the test was whether the alternative site issue had to be taken into account as a relevant consideration, as a matter of legal obligation.

79. In *The Governing Body of Langley Park School for Girls v London Borough of Bromley* [2009] EWCA Civ 734 the Court of Appeal quashed the grant of planning permission because an alternative scheme for proposed new buildings at the same site was a relevant consideration which had not been considered. The Court held that the authorities on alternative sites applied (at [46]).

80. In my judgment, this was an exceptional case on the facts in which alternative schemes for use of The Forge were a relevant consideration which the Committee was required to consider because they were central to the reasoning of the conservation officer and the planning officer, as set out in the Report.

81. The Report explained at paragraph 8.11.22 that the argument put forward by the applicant in support of the application for planning permission was that the repair and refurbishment of The Forge for industrial use was not commercially viable and so additional residential accommodation was essential.

82. The conservation officer said:

> " East Meon has over time lost the majority of its service industries .. Such uses can .. positively contribute to the conservation area. The continuance of the craft tradition on this site is a matter to which I accord considerable weight"
>
> "I am persuaded that some fairly radical adaptation to secure the long term viability for a craft use is required."
>
> "There are really two choices, to limit the building to its current configuration, size and scale or to accept enlargement to accommodate a live-work unit. It is difficult to envisage the investment coming forward to repair the building for its previously permitted, or similar workshop use. The role and use of the building as I say, is itself important to the conservation area."
>
> "I see the current proposal as the best means of securing the necessary investment and accordingly support more robust intervention than would normally be the case."

83. The planning officer referred to the conservation officer's advice, at paragraph 8.2.17, and concluded, at paragraph 8.2.32:

> "Officers agree with the Conservation Officer's analysis that this is a prominent site and that considerable weight should be placed on securing the use and this solution is a means of securing a continuing business use on the site and investment necessary to achieve this."

84. The advice given to the Committee by the conservation officer and the planning officer was that there was no realistic prospect of restoration of The Forge for use as a workshop because it was economically unviable.

85. As part of the consultation process, the planning officer had received representations from the Claimant about the financial viability of The Forge, and alternative options, including purchase and renovation by the Claimant. In his supplementary comments, the conservation officer said:

> "It seems to me that repair and refurbishment of the present structure is uneconomic and unviable on the likely return received. It may be something that a philanthropic association may be willing to take on and EMFCGPS may be such an organisation. "

86. In my view, it would have been misleading for the officer to withhold this information from the Committee when both he and the conservation officer were supporting the application on the basis that it was the only financially viable option for The Forge's restoration. In order to make an informed judgment, the Committee had to have access to all the relevant information. Obviously the current owners could not have been obliged to restore the building for workshop use only, nor to sell to The Forge to the Claimant or anyone else, if they did not wish to do so. However, in principle, planning permission for such a major addition and alteration, with a change to residential use, might not have been granted if the Committee did not accept the premise that this was the only route by which The Forge would ever be restored as a workshop.

87. Fortunately, the Report did give a lengthy summary of the evidence relating to the financial viability of The Forge, including the alternative options presented by the Claimant. I do not decide the question whether the Committee would have given this evidence due consideration after having been advised that it was unnecessary to do so.

88. The Claimant complains that the Report was misleading in an important respect. At paragraphs 8.11.21, the Report stated:

> "The Association asserts that voluntary contributions mean that their proposal is fully costed, funded and deliverable. Officers have asked for details but none have been provided in respect of funding."

89. When Mr Selby, the Treasurer of the Claimant Association saw this, he sent an email to Mr Jarvis, the Principal Planning Officer, stating:

> "In para 8.11.21 it is said that officers have asked for details of the Association's assertion that its proposal is fully funded but no details have been provided. I am not aware of any such request. The position, however, contrary to the impression that you seek to give, is that the Association's bank account is in credit to the amount of £160,000. Should you wish this to be certified I will arrange for this to be done. I should be grateful if you would draw this to the immediate attention of Councillors."

90. Mr Jarvis replied by email on the same day, saying:

> "In my email to William Bartlett of the 18th December which followed notification of the offer and other email correspondence I wrote "you state your client's alternative proposal "is fully costed, funded and deliverable". I have not see any information to support this yet." We did in fact receive information in response but this only considered viability including an estimate for refurbishment costs and thereafter nothing was submitted concerning the aspect of funding.
>
> I hope this clarifies the comment in the report. I don't believe that these further details affect the conclusion of the report. In any event we will include your comments in the written committee updates as per our standard practice ensuring that members of the committee are aware of them."

91. Mr S. Martin, Deputy Chairman of the Claimant Association, stated in his third witness statement that, in response to Mr Jarvis's email of 18th December, the Claimant submitted detailed viability reports and 'Further Matters' submissions, dated 4th and 25th February 2014. In the first set of submissions the Claimant confirmed that it had "contribution commitments … more than sufficient to cover" its proposed acquisition of the property and works. In the second set of submissions, it reiterated that "the Association is ready, and funded" to restore the building. The Claimant did not receive any further response from Mr Jarvis, and assumed that Mr Jarvis accepted that it had the funding available.

92. In the light of Mr Jarvis' assurance that he would inform the Committee of Mr Selby's email, to the effect that the Claimant had £160,000 in its account, the Claimant took no further steps. The evidence before the court includes a bank statement for an account in the name of the Claimant, dated 4th April, showing a balance of £160,100, since 24th February 2014.

93. Contrary to his assurances, Mr Jarvis did not include the confirmation of funding in the supplementary report to the Committee. Mr Martin attended the meeting of the Planning Committee on 3rd April 2014 and has given evidence that Mr Jarvis did not bring it to the attention of the Committee in his presentation to them.

94. In my judgment, Mr Jarvis was at fault in not informing the Committee about the communication from Mr Selby to the effect that the Claimant had £160,000 in its bank account and could certify that sum if required. This was poor professional practice. However, I do not consider that it is a sufficient basis upon which to grant judicial review of the grant of planning permission. The Committee knew that the Claimant was offering to fund its proposed scheme from voluntary contributions. This was the key piece of information. Proof of the amount of money in the Claimant's bank account as at April 2014 was not likely to influence its deliberations one way or the other.

Asset of Community Value registration

95. The Claimant submitted that the Council erred in failing to take into account a material consideration, namely, its own decision to register The Forge as an asset of community value, under the Localism Act 2011.

96. The purpose of registration is to allow communities the opportunity to take control of assets and facilities in their neighbourhoods. The Government Policy Statement (September 2011) advises that:

> " ... it is open to the Local Planning Authority to decide that listing as an asset of community value is a material consideration if an application for change of use is submitted, considering all the circumstances of the case".

97. A property such as this can only be registered under section 88(2) if, in the opinion of the local authority:

i) there is a time in the recent past when an actual use of the building furthered the social wellbeing or interests of the local community, and

ii) it is realistic to think that there is a time in the next five years when there could be non-ancillary use of the building that would further the social wellbeing or social interests of the local community.

98. The Report advised the Committee about the registration of The Forge as an asset of community value at paragraphs 8.11.33 – 34. It set out the effect of the registration, which is that a community group will be given a window of opportunity to bid for the asset in the event that the owner decides to dispose of it. The owner is not obliged to sell to the community group.

99. The officer concluded that the designation as an asset of community value had very little bearing on the proposed development and should be given negligible weight.

100. In so far as this advice was based upon the erroneous view it was not necessary nor appropriate to consider alternative schemes, then it was flawed for the reasons I have already set out above. But in so far as it was based upon the inherent limitations of the community asset scheme, it was a matter for the Committee to decide upon in the exercise of its planning judgment. Accordingly, the officers could properly so advise.

Conflict with the use of the recreation ground for cricket

101. The Claimant submitted that the Council failed to have proper regard to the representations of Sport England, a statutory consultee by virtue of schedule 5, paragraph (za) to the Town and Country Planning (Development Management Procedure) Order 2010 on the ground that the development was "likely to prejudice the use, or lead to the loss of use, of land being used as a playing field".

102. The Report advised that potential conflict with the use of the recreation ground for cricket was a material consideration, and considered it at paragraphs 8.11.1 to 8.11.19. It summarised the concerns of the Cricket Club and the Claimant that the proposed residential use of The Forge, in particular the open deck, external steps and large areas of glazing looking towards the recreation ground, would increase the potential liability to the Club for damage to property and personal injury. An increase in insurance premiums could impact on the viability of the Club.

103. The Report accepted that, given the distance of the boundary and the orientation of the pitches, cricket balls would hit The Forge regularly. Currently they hit The Forge once every other match, on average. There have been more than 20 home matches per season in recent years.

104. Local Plan policy HC1 and Emerging policy CP15 restrict development which results in loss of recreational and sports facilities.

105. Labosport conducted an assessment on behalf of the Cricket Club and found as follows:

i) The boundary at the shortest distance is about 36 metres. 45.72 metres is the English Cricket Board recommended minimum boundary distance.

ii) Cricket balls commonly travel in excess of 70 metres, at all levels and abilities.

iii) The height of a cricket ball at a boundary distance of 36 metres is often greater than 20 metres in height.

iv) At a distance of 36 metres, the ball can still be travelling at a velocity in excess of 20 m/s.

v) A barrier system, typically nets, would have to be not less than 12 metres high, possibly higher.

106. Mr Croucher proposed a range of protective measures, such as 4 metre high net to be erected on match days; window and door shutters; and a protective net and an awning for the deck. He proposed that these should be capable of remote control by the cricket club in case the residents of The Forge did not implement them.

107. In its representations, Sport England advised that the measures proposed by Mr Croucher, whilst positive, were not enforceable through the planning system. The only means of enforceable mitigation would be a ball-stop fence, permanently installed, with a planning condition requiring it to be erected and maintained in perpetuity. Even this would not absolve the club from legal liability if damage occurred. In subsequent communications Sport England made it clear to the Council that it was aware of the proposed override mechanism to enable the club to control protective measures on match days but confirmed that it did not alter its basis of objection.

108. The Report rejected Sport England's advice and recommendation without giving any or any adequate reasons. In *Shadwell Estates Ltd. v Breckland DC* [2013] EWHC 12 (Admin) Beatson J. said at [72]:

> "a decision-maker should give the views of statutory consultees, in this context the "appropriate nature conservation bodies", "great" or "considerable" weight. A departure from those views requires "cogent and compelling reasons": see *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) per Sullivan J. at

> [49] and *R (Akester) v DEFRA* [2010] EWHC 232 (Admin) per Owen J. at [112], [115]."

109. The officer also failed to advise the Planning Committee that Sport England was a statutory consultee whose views should be given considerable weight and only departed from for good reason. In consequence the Planning Committee granted planning permission and imposed conditions without due regard to the recommendations and advice of Sport England.

110. The Report rejected Mr Croucher's proposals for the cricket club to have remote control over the protective measures at The Forge on the grounds that it would be complex to operate in practice, and there was uncertainty regarding system failure and backup provisions. Such a system might be achievable but might also be beyond the scope of a planning condition.

111. The Report did not recommend any conditions for a net of any height, whether permanent or removable. It thus failed to act on the proposals of Labosport, Sport England and Mr Croucher. No explanation was given for this omission. No such condition was imposed by the Planning Committee. The existing fence is a post and rail fence made of timber, probably about 3 feet high. Plainly it will not provide any protection against cricket balls.

112. At paragraph 8.11.16, the Report summarised the measures which it advised the Planning Committee to impose by way of conditions to protect the windows:

> "8.11.16 …The use of barriers (shutters) is already proposed as an intermittent measure. Permanent barriers (such as guard railings) would not have any significant effect on the character and appearance of the development or area and could be fixed permanently to fenestration to protect them from damage. The detailed design, capability and method of opening of such can also be controlled to ensure that any windows or doors that can open do so in a manner which does not create an opening for cricket balls…"

113. The Report recommended the following condition which was duly imposed by the Committee when it granted permission. Condition 12 provides:

> "No development shall commence until a detailed scheme of defensive guards to be fitted to fenestration (which includes windows, doors and rooflights) in the approved scheme has been submitted to and approved in writing by the Local Planning Authority. The approved defensive guards shall be fitted concurrent with the first installation of fenestration in the development, and shall thereafter be retained at all times including in the event that any replacement fenestration is fitted."

114. Mr Forsdick explained to me, at some length in answer to my questions, that the meaning of paragraph 8.11.16 was that the officer had decided that the window shutters were not a sufficient protective measure because it was not possible to ensure

that they would always be in the closed position when cricket was being played. Therefore a condition was imposed by the Committee, on the recommendation of the planning officer, providing for permanent barriers i.e. guard railings which would be permanently fixed in front of all glazed openings, preventing cricket balls from reaching the glass.

115. However, when Mr Croucher made his oral submissions to me, he explained that in June 2014 the Council had approved his scheme for shutters and discharged condition 12. The scheme provides for louvred wooden shutters for the patio doors from the living room on to the deck which would slide to one side when not in use. There will be removable louvred wooden shutters fitted to the outside of the floor to ceiling windows on the north east elevation, accessed from the deck veranda. The louvres have been designed so that they are fixed in position, narrow enough to ensure that a cricket ball cannot pass through them. The Velux roof windows will be fitted with metal shutters operated electrically.

116. The plans for the scheme were produced, which confirmed what Mr Croucher said. Written on the plans were the words "Louvre panels shown retracted for non- cricket occasions, also demountable for off- season".

117. Mr Croucher seemed unaware of any requirement for guard rails. When I asked him why he had been permitted to have removable shutters, he said that they would be kept in place at all times. I found this quite unrealistic. The occupants would only have a very limited outlook through the louvres, and reduced natural light. There are very few windows on the street side of the building. They would also be unable to use the patio doors. If the shutters were kept permanently down on the Velux roof windows, there would be no light or air. I have no doubt that the occupants will leave the shutters open. Whether or not they close them on match days will be a matter for them to decide, if they remember to do so, and if they are there. The club will be liable for any damage to the windows.

118. Mr Forsdick submitted that the Council had simply made a mistake when approving the scheme. This seems unlikely, given the history of this application. I do not accept that the approval of the reserved matters has no relevance to the current judicial review claim. I accept the submission of Mr Fookes that the planning permission was granted on an erroneous basis, on the assumption that Condition 12 would give effect to the stated intention to require permanent guard rails over the windows. However, the ambiguous wording of Condition 12, which only required the fitting of "defensive guards" to the windows, left open the possibility that shutters would be installed instead of guard rails, and did not specify that the "defensive guards" should be fixed not moveable.

119. At paragraph 8.11.17, the Report summarised the measures which it advised the Planning Committee to impose by way of conditions to protect users of the deck:

> "8.11.17 The deck would provide protection to users on the ground floor during cricket matches. Its use as an amenity area should, however, be prevented and instead it should be used wholly for external access. Sporadic access across a much smaller gangway will not significantly increase the risk to safely. A planning condition can limit the use of the deck and

> secure a railing to reasonably limit access to the remaining deck area. The unit is a one bedroom flat and has immediate access onto public open space; this restriction will not unacceptably reduce the access to amenities for the development…."

120. The Report recommended the following condition which was duly imposed by the Committee when it granted permission. Condition 13 provides:

> "Notwithstanding the approved plans the first floor deck area shall not be used at any time as an amenity area, or for any purpose other than as a private route of access to the first floor residential unit...railings or other measures (to prevent the use of the deck for the aforementioned purpose) shall be installed in accordance with details ....." "

121. I accept Mr Fookes' submission that both the Report and the condition fail to address the fact that the extensive decked area is intended as an amenity area, with patio doors leading on to it from the living room. Realistically, the occupants cannot be prevented from using the deck for amenity purposes.

122. Furthermore, as the only access to the flat is via external steps and across the deck, the occupants and visitors to the flat will be at risk of injury when entering or leaving the premises during cricket matches.

123. The representations made by Sports England, that the proposed mitigating measures were unenforceable and a permanent ball-stop fence was required, were sound. In my judgment, the officers and the Planning Committee failed to have proper regard to the representations of Sport England in its capacity as statutory consultee. In consequence the proposed development creates unacceptable risks for its future occupants and for the cricket club.

124. Therefore the claim is allowed and the planning permission must be quashed.