

Case Name: *Safe Rottingdean Ltd v Brighton And Hove City Council* [2019] EWHC 2632 (Admin) (08 October 2019)

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Commentary:

A judicial review brought by a community group of the Council's decision to grant planning permission on grounds that the officer's report significantly misled the Planning Committee, including on the application of heritage policies in the local plan and NPPF, was dismissed.

The first ground concerned the application of the heritage policies in the local plan. The claimant suggested that the officer's report misled the committee because the relevant policies would be breached by the development as harm had been identified to the setting of listed buildings and the conservation area. However, there were also significant benefits so the effect overall was concluded not to be harmful. The Court held that in applying these policies, it was the overall conclusion on harm that was relevant and therefore the policies were not breached. The officer's report had stated that there was less than substantial harm within the meaning of the NPPF and carried out the balancing exercise under paragraph 196. The claimant argued that the finding of less than substantial harm meant that there must have been a breach of the local plan policies. However, the Court held that these were two distinct issues. The local policies apply to overall harm while the NPPF policy requires a first stage of identifying whether there is harm and the second stage is whether public benefits weigh against this harm, including the of "securing its optimum viable use" as a factor against which the less than substantial harm has to be weighed.

The second ground was that there was a failure to consider ss66 and 72 of the Listed Building Act and paragraph 193 of the NPPF. The judgment reviews the recent case law on the statutory duties under these sections noting Lewison J's summary of the position in *R (Palmer) v Herefordshire Council* that "Preserving" the building or setting meant doing no harm to it. The degree of harm was a matter of judgment for the decision-maker, but if there was harm, he was not entitled to give it such weight as he thought fit, but instead had to give it considerable weight. But that weight was not uniform and could vary with the degree of harm to the value of the asset and that "where proposed development would affect a listed building or its settings in different ways, some positive and some negative, but the decision-maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting.". In dismissing the Claimant's argument the Judge said "I do not think that giving considerable weight to the desirability of achieving the statutory duty requires separate views to be reached on each part, and then the beneficial parts to be put to one side where there is some harm, however relatively unimportant. It would be an irrational thought process, not sanctioned by statutory wording, to require significant weight to be given to the benefit, and significant weight to the harm, without the two being brought into a single balance under the statute, and then requiring only significant weight to be given to the harm."

In *Palmer* Lewison LJ said "The existence of the statutory duty under section 66(1) does not

alter the approach that the court takes to an examination of the reasons for the decision given by the decision-maker: *Mordue v Secretary of State for Communities and Local Government* [2016] 1 WLR 2682. It is not for the decision-maker to demonstrate positively that he has complied with that duty: it is for the challenger to demonstrate that at the very least there is substantial doubt whether he has." The Judge stated that the second sentence was not a test to be applied to the question of whether the City Council (and Planning Committee) had complied with its statutory duties. It was for the Claimant to demonstrate that the Officer's Report did not advise the Planning Committee correctly, "on the balance of probabilities, and on a fair reading of the OR as a whole, and correctly interpreting the various policies. It is not sufficient for the Claimant to demonstrate that there is a substantial doubt about that, falling short of a probability that that was so. The first part of what Lewison LJ was saying shows that this is related to the duty to give reasons on an appeal decision, the nature of which had been at issue in relation to these statutory duties in a decision discussed in *Mordue*. It demonstrates that reasons may not satisfy the legal duty to give reasons for a decision, where they leave a substantial doubt as to what the conclusion was on a principal point of controversy, or whether it was itself legally flawed. But he does not say, and I would have been surprised if he had, that the same applied to the demonstration of the sort of legal error alleged here: that the relevant statutory duties were not performed, and that the Framework was misinterpreted or ignored."

Although the officer's report had not expressly referred to the statutory provisions, the officer's report plainly gave special regard to the desirability of preserving the listed building, its setting and its features of interest. The achievement of the desirable object of its preservation- building, features and setting- was one of the chief issues at the heart of the decision to grant permission for this development as a whole. In respect of section 72 concerning conservation areas, section 72 only applies to buildings or land in a conservation area but the NPPF goes further because it also applies to the setting of a conservation area. The officer's report had found that there was no harm to the conservation area so section 72 on its terms was irrelevant. There was harm to the setting of the conservation area but it was clear that the officer's report had concluded that there was an overall and significant benefit to the conservation area, allowing for the harm to its setting. The second ground was dismissed.

The final ground was that the report failed to apply s38(6) of the Planning and Compulsory Purchase Act 2004, the 2004 Act, which requires decisions to be made in accordance with the development plan unless material considerations indicate otherwise. However, the Judge was satisfied that on a fair reading of the officer's report, and with the policies in mind, that the officer's report did reach the decision or judgment that the proposal was in accordance with the development plan as a whole. Its text conveys that adequately, so that those who adopted the recommendation would also have understood that that was the decision which they were adopting, on whether the proposal accorded with the development plan. The third ground was also dismissed.

Case summary prepared by Susannah Herbert