Case No: AC 2024-LON-004265

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

Neutral Citation Number: [2025] EWHC 1781 (Admin)

The Royal Courts of Justice,
Strand, London,
WC2A 2LL

Friday, 20 June 2025

BEFORE:
MR JUSTICE MOULD

BETWEEN:

THE KING
(on the application of)
CAMPAIGN FOR THE PROTECTION OF RURAL ENGLAND, KENT BRANCH

Claimant

-and-

1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) TUNBRIDGE WELLS BOROUGH COUNCIL

(3) BERKELEY HOMES (EASTERN COUNTIES) LIMITED

Defendants

-and-

CAMPAIGN FOR NATIONAL PARKS

Intervenor

EMMA DRING and **JACK BARBER** (instructed by Richard Buxton Solicitors) appeared on behalf of the Claimant.
TIM BULEY KC and **HUGH FLANAGAN** (instructed by Government Legal Department) appeared on behalf of the First Defendant.
JAMES MAURICI KC and **NICK GRANT** (instructed by Ashurst LLP) appeared on behalf of the Third Defendant.

JUDGMENT

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(Official Shorthand Writers to the Court)

MR JUSTICE MOULD:

Introduction

1. This is an application by the Claimant under section 288 of the Town and Country Planning Act 1990 ["**the 1990 Act**"] challenging the validity of the planning permission granted by the First Defendant on 22 November 2024 ["**the planning permission**"] for the development of land adjacent to Turnden, Hartley Road, Cranbrook, Kent ["**the site**"].

2. The development authorised by the planning permission is the construction of 165 new dwellings with associated access, car parking, refuse/recycling storage, landscaping, earthworks and other associated works in accordance with the planning application submitted by the Third Defendant on 11 March 2020. Planning permission was granted subject to 37 conditions.

3. The Third Defendant's planning application was made to the Second Defendant as local planning authority for the area within which the site is located. On 12 April 2021, the then Secretary of State called in the planning application for his own determination pursuant to section 77 of the 1990 Act. On 21 September 2021, an inspector opened a local inquiry into the planning application. That inquiry closed on 5 November 2021. On 4 April 2022, the inspector completed his report recommending the grant of planning permission, subject to conditions. On 6 April 2023, the then Secretary of State issued his determination of the planning application. On 6 October 2023, that determination was quashed by order of this court.

4. Having followed the procedure laid down by rule 19 of the Town and Country Planning Inquiry Procedure Rules 2000, the First Defendant made a fresh determination of the planning application and decided to grant the planning permission on the inspector's recommendation.

5. The Claimant is a registered charity. It is the Kent branch of the Campaign to Protect Rural England. The charity's principal objects are to promote and encourage for the benefit of the public the improvement and protection of the English countryside and, in particular, that of Kent. The Claimant appeared as a

rule 6 party at the local inquiry, objecting to the proposed development of the site and making the case for refusal of the planning permission.

The general duty

6. The appeal site is situated within the High Weald Area of Outstanding Natural Beauty ["**the AONB**"], a protected landscape originally designated under the National Parks and Access to the Countryside Act 1949 ["**the 1949 Act**"].

7. Section 85(A1) of the Countryside Act 2000 ["**the 2000 Act**"] imposes a general duty on relevant authorities in exercising or performing any functions in relation to land in an area of outstanding natural beauty. Following amendments made by virtue of section 245 of the Levelling-up and Regeneration Act 2023 ["**the 2023 Act**"], that general duty, as it applies to a relevant authority in England, is in the following terms:

> "85(A1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty in England, a relevant authority other than a devolved Welsh authority must seek to further the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty".

8. The First Defendant, as a Minister of the Crown, is a relevant authority (see section 85(2)(a) of the 2000 Act). In determining the Third Defendant's planning application for development of the site, the First Defendant was performing a function in relation to and so as to affect land in an AONB in England.

Grounds of challenge

9. In paragraph 29 of her decision letter dated 22 November 2024 ["**DL29**"], the First Defendant concluded that development of the site as proposed in the Third Defendant's planning application would result in harm to the landscape and scenic beauty of the AONB. Nevertheless, the First Defendant indicated that, in making her determination of the Third Defendant's planning application and granting planning permission, she had performed her section 85(A1) duty and sought to further the purpose of conserving and enhancing the natural beauty of the AONB.

10. By this challenge, the Claimant contends that, in granting permission for development of land in the AONB which will neither conserve nor enhance the natural landscape, but rather result in harm to the landscape and scenic beauty of the AONB, the First Defendant has failed to perform the duty under section 85(A1) of the 2000 Act. The Claimant says that the grant of planning permission for the development is, accordingly, unlawful and must be quashed.

11. The Claimant advances two grounds of challenge:

> (1) On a proper construction of the duty now enacted under section 85(A1) of the 2000 Act, the only decision lawfully open to the First Defendant, in determining the planning application, was to refuse planning permission. To grant planning permission for development that will result in harm to the natural beauty of the landscape is not capable in law of discharging the duty to seek to further the purpose of conserving and enhancing the natural beauty of the AONB.
>
> (2) Alternatively, even if the grant of planning permission for such a development was, in principle, capable of being a lawful performance of the duty under section 85(A1) of the 2000 Act, the First Defendant has nevertheless failed to give proper, adequate and intelligible reasons for concluding that she has complied with that duty.

12. On 2 April 2025 I gave permission for the Claimant to bring this statutory challenge. In doing so, I observed that the main issue raised by the claim as to the interpretation and application of section 85(A1) of the 2000 Act is an issue of some general significance to the operation of the town and country planning system. For that reason, I directed some expedition.

13. I also directed that the claim should be heard together with Wadhurst Parish Council v Secretary of State for Housing, Communities and Local Government [2025] EWHC 1735 (Admin) which raised issues of some similarity to those raised in the present claim. I heard both claims together over two days on 18 and 19 June 2025. Ms Emma Dring and Mr Jack Barber represented the Claimant. Mr Tim Buley KC and Mr Hugh Flanagan represented the First Defendant. Mr James

Maurici KC and Mr Nick Grant represented the Third Defendant. I am very grateful to them all for their helpful written and oral submissions.

The site and its proposed development

14. There is a brief description of the site in paragraph 4 of the inspector's report **["IR4"]**:

> "The application site is located to the south of the A229 Hartley Road on the northern side of the Crane Valley. It measures some 23.94ha and comprises fields enclosed by hedgerows, trees and scrub which form part of the landholding associated with the adjacent Turnden Farmstead to the west. The site lies to the south-west of the town of Cranbrook and north-east of the village of Hartley. The settlement pattern in the area has evolved over time with some 20th Century ribbon development along the A229, although Cranbrook and Hartley retain their separate identities".

15. The inspector went on to say that land adjoining the site to the north-east has outline planning permission for 180 homes and forms part of housing allocation AL/CR4 in what was then the Tunbridge Wells Borough Site Allocations Local Plan (July 2016). The inspector further observed that the site wraps around but excludes another adjoining parcel of land that at that time had planning permission for residential development, known as Turnden Farmstead. At the time of writing his report, that development was in the process of being implemented. I understand that by the time the First Defendant made her decision to grant planning permission for the development in the present case in late November 2024, that scheme of development had either approached completion or already been completed.

16. At IR14, the inspector said this:

> "The Tunbridge Wells Borough Landscape Character Area Assessment 2017, which is adopted by the Council as a Supplementary Planning Document (SPD), identifies a series of Landscape Character Areas (LCAs). The site falls within LCA 4 Cranbrook Fruit Belt, which amongst other things is referred to in this SPD as a diverse zone of transition and typical of the High Weald landscape, with strong yet diverse character incorporating elements of fruit belts, forested plateau and wooded farmland and the historic town of Cranbrook".

17. The site itself is the subject of a proposed allocation in the emerging Tunbridge Wells Local Plan (2020 – 2038) under the label “AL/CRS-3 Turnden Farm". The proposal describes the allocation of a site "for residential development providing approximately 200-204 (164-168 new additional) dwellings, of which 40 percent shall be affordable housing, and significant green infrastructure". The area of the site allocation shown on the draft proposals map broadly corresponds to the red line of the planning application which is the subject of the present claim.

18. The inspector described the scheme of development authorised by the planning permission under challenge in IR42 to IR51. At IR42, he said that this was an application for full planning permission. The scheme had been amended during the course of the application process. In its current form it is for the construction of 165 new dwellings with associated access, car parking and other associated ancillary elements. He said the proposed homes would be a mix of 1 and 2 bedroom apartments and 2, 3, 4 and 5 bedroom houses. They would include affordable homes at a rate of 40 per cent, with a 50/50 split of rented and shared ownership. One of the 2 bedroom and three of the 1 bedroom homes would be wheelchair accessible.

19. At IR45, he said that, in broad terms, the developed site would have two distinct parts, referred to in the evidence before him as the “development area” and the “wider land holding”, which respectively make up some 39.43% and 60.57% of the site. He said the development area is where the proposed housing would be located, positioned between the approved housing development sites to the north-east and to the south-west. Those parts of the site that are not within the development area but within the wider land holding are located to the south and west of the overall site.

20. At IR47 the inspector said that, within the development area, the area occupied by houses and roads, excluding open space, would amount to some 4.7ha, with a density of 35.1 dwellings per hectare. He then described the open space which was proposed within the development area.

21. In IR50 the inspector identified proposals for the wider land holding, which included a field immediately to the west of Turnden Farmhouse comprising of a

newly planted woodland and crossed by permissive paths connecting with a public right of way; publicly accessible land, with permissive paths set within meadow grassland, scrub to the field margins and field trees in the field immediately to the south-east of and abutting the residential development of Hartley; and the southernmost field located between Hennicker Pit and the Crane tributary valley which would be subdivided by new hedgerows, with hedgerow trees aligning to historic field boundaries. Stockproof fencing and gates would be installed to support grazing by livestock. A permissive path was also proposed through these fields, connecting the development area and the Brick Kiln Farm site with a public right of way. Along the northern edge of the field, new areas of woodland would connect Hennicker Pit to woodland south of the Turnden Farm development.

22. The inspector said that the application was accompanied by a Landscape & Ecological Management Plan which contained proposals for land management.

The legal framework

Determining planning applications

23. The function of determining an application for planning permission is ordinarily performed by a local planning authority under section 70 of the 1990 Act. In particular, section 70(1) and (2) provides as follows (omitting certain passages):

> "(1) Where an application is made to a local planning authority for planning permission—
>
> > (a) … they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
> >
> > (b) they may refuse planning permission …
>
> (2) In dealing with an application for planning permission … the authority shall have regard to (a) the provisions of the development plan, so far as material to the application …; and (c) any other material considerations".

24. Section 77 of the 1990 Act enables the First Defendant to call in the planning application for her own consideration. Section 77(1) provides:

> "(1) The Secretary of State may give directions requiring applications for planning permission … to be referred to him instead of being dealt with by local planning authorities".

Subsection 77(4) provides:

> "(4) Subject to subsection (5) –
> (a) where an application for planning permission is referred to the Secretary of State under this section, sections 70, 72(1) and (5), 73 and 73A shall apply, with any necessary modifications, as they apply to such an application which falls to be determined by the local planning authority …
>
> (5) Before determining an application referred to him under this section, the Secretary of State shall, if either the applicant or the local planning authority wish, give each of them an opportunity of appearing before, and being heard by, a person appointed by the Secretary of State for the purpose".

25. Section 38(6) of the Planning and Compulsory Purchase Act 2004 **["the 2004 Act"]** provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

The general duty before and following amendment

26. Prior to amendment under section 245 of the 2023 Act, the duty under section 85(1) of the 2000 Act was as follows:

> "In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."

27. The inspector completed his report on the planning application on 4 April 2022. On that date, the section 85(1) duty remained in force in its former terms, requiring a relevant authority to have regard to the purpose of conserving and enhancing the natural beauty of the AONB.

28. The duty came into effect in the terms now found in section 85(A1) of the 2000 Act on 26 December 2023. By the date of the decision letter, therefore, the First Defendant was required to discharge the duty in its amended terms when performing her function of determining the Third Defendant's planning application.

29. In New Forest National Park Authority v Secretary of State for Housing, Communities, Local Government and Another [2025] EWHC 726 (Admin) ["***New Forest***"], it was necessary for me to consider the effect of amendments made in essentially the same terms by section 245 of the 2023 Act to the corresponding general duty under 11A(1A) of the 1949 Act in respect of national parks:

> "In exercising or performing any functions in relation to, or so as to affect, land in any National Park in England, a relevant authority other than a devolved Welsh authority must seek to further the purposes specified in section 5(1) and if it appears that there is a conflict between those purposes, must attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park".

The purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park is a reference to the first stated purpose in section 5(1) of the 1949 Act.

30. At [58] in *New Forest* I said:

> "The Claimant characterises the more forceful expression of a relevant authority's duty under section 11A(1A) of the 1949 Act as the *'strengthened'* statutory duty. That seems to me to be a fair way of characterising the change from a requirement to have regard to the statutory purposes, to being required to seek to further those purposes".

31. In the present case, the parties did not take issue with that characterisation. The legislative intention was to strengthen the general duty imposed by section 85(1) of the 2000 Act. The issue is how that strengthened duty was to be applied by the First Defendant in determining an application for planning permission for development of land in an AONB, being development which she found to give rise to harm to the natural beauty of the landscape.

32. The purpose to which the strengthened duty is directed is the conservation and enhancement of the natural landscape. At [77] and [79] in *New Forest* I said:

> " 77…in my view it is beyond argument that '*conserving'* in [section 5(1)(a) of the 1949 Act] is used in its ordinary English meaning. It means *'to preserve intact or to maintain in an existing state'* and *'to prevent something of natural or environmental importance from being damaged or destroyed'*: *Oxford English Dictionary, 2nd ed, OED Online – revised entry (2010)* …
>
> 79. … Where a planning application proposes development of land in a National Park which is found at least to leave the Park's natural beauty, wildlife and cultural heritage unharmed, that provides a proper basis for the decision maker to conclude that the development will further the section 5(1)(a) purpose of conserving and enhancing those characteristic features of the Park. That conclusion suffices as a proper discharge of the decision maker's duty under section 11A(1A) of the 1949 Act in determining that planning application".

33. In [76]-[79] in *New Forest*, I founded that approach upon the well-known judgment of the House of Lords in *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141,150B-F which considered the statutory duty imposed under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 in relation to conservation areas. I also followed the judgment of Collins J at [10] in *R (Great Trippetts Estate Ltd) v Secretary of State for Communities and Local Government* [2010] EWHC 1677 (Admin).

34. I did not understand the parties in this case to quarrel with my approach at [79] in *New Forest* as to what is required in order to conserve and enhance, in the context of section 11A(1A) of the 1949 Act. Nor did counsel submit that the concept of conservation and enhancement of the natural beauty of an AONB in section 85(A1) of the 2000 Act carries a different meaning.

35. I note that section 85(1A) of the 2000 Act empowers the Secretary of State by regulations to make provision about how a relevant authority is to comply with the section 85(A1) duty, including provision about things that the authority may, must or must not do to comply with the duty. No such regulations have as yet been made.

36. However, on 16 December 2024, the Department for Environment, Food and Rural Affairs (DEFRA) issued non-statutory guidance entitled "Guidance for relevant authorities on seeking to further the purposes of Protected Landscapes". In that guidance the following is stated:

> "This guidance sets out how the Protected Landscapes duty is intended to operate and provides broad principles to guide relevant authorities in complying with it. …
>
> The duty is intended to facilitate better outcomes for England's Protected Landscapes, which are in line with their statutory purposes. The duty does not prevent relevant authorities from undertaking their statutory functions and discharging their legal duties and other responsibilities. The duty is intended to complement these requirements by ensuring that the purposes for which Protected Landscapes are designated for are recognised in reaching decisions and undertaking activities that impact these areas.
>
> Consideration of what is reasonable and proportionate in the context of fulfilling the duty is decided by the relevant authority and should take account of the context of the specific function being exercised".

37. Later in the guidance, under the heading, "When to apply the duty", the following guidance is given:

> " Relevant authorities will need to apply the duty when undertaking any function in relation to, or so as to affect, land in a Protected Landscape.
>
> This may include:
>
> - the preparation of Development Plans and associated assessments and documents
> - decision making in respect of development management, planning applications and nationally significant infrastructure projects …".

The guidance has a further heading "What a relevant authority should do" which includes the following:

> "The duty is an active duty, not passive, which means:

- a relevant authority should take appropriate, reasonable, and proportionate steps to explore measures which further the statutory purposes of Protected Landscapes

- as far as is reasonably practical, relevant authorities should seek to avoid harm and contribute to the conservation and enhancement of the natural beauty, special qualities, and key characteristics of Protected Landscapes

…

- for development plan making and development management decisions affecting a Protected Landscape, a relevant authority should seek to further the purposes of the Protected Landscape - in so doing, the relevant authority should consider whether such measures can be embedded in the design of plans and proposals, where reasonably practical and operationally feasible …".

38. Since 2012, the National Planning Policy Framework [**"the Framework"**] has had a relatively settled policy on development management decision-making in relation to land which lies within an area of outstanding natural beauty. The 2023 edition of the Framework was in force at the date of the First Defendant's decision under challenge. Under the heading "Conserving and enhancing the natural environment", the 2023 edition included the following statement of policy –

> "180. Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> (a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);
>
> …
>
> 182. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of

development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on designated areas.

183. When considering applications for development within National Parks, the Broads and Areas of Outstanding Natural Beauty, permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:

(a) the need for the development, including in terms of any national considerations and the impact of permitting it, or refusing it, upon the local economy;

(b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and

(c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated".

39. Footnote 64 to paragraph 183 stated:

"For the purposes of paragraphs 182 and 183, whether a proposal is 'major development' is matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined".

40. The 2023 edition of the Framework has since been superseded by the current version, which was published in December 2024. Paragraphs 187(a), 189 and 190 of the current edition are in essentially the same terms as paragraphs 180(a), 182 and 183 of the 2023 edition. I note that paragraphs 187 to 191 of the 2024 edition have not been amended to any significant degree following the coming into effect of section 85(A1) of the 2000 Act on 26 December 2023.

41. Returning briefly to *New Forest*, at [92] I concluded that the planning inspector had found that the development under consideration in that case would leave the specified characteristics of the New Forest National Park unharmed. In allowing the planning appeal on that basis, the inspector had fulfilled the general duty under section 11A(1A) of the 1949 Act, since the landscape and cultural heritage of the park would be conserved. It was, therefore, not strictly necessary for me to consider what was required in order lawfully to discharge the duty in a case in which the proposed development is found to cause harm to the statutorily protected landscape. Nevertheless, at [61] to [63] I did offer the following analysis of what the duty under section 11A(1A) of the 1949 Act requires in such a case.

> "61. As a matter of ordinary English, to *'further'* a stated purpose is to promote or to facilitate that purpose. Therefore, the duty imposed by section 11A(1A) of the 1949 Act upon a planning authority determining a planning application requires more than merely weighing the effect of the proposed development on the section 5(1) purposes in the overall balance. In order to discharge the strengthened duty, the planning authority must determine whether the proposed development is consistent with the promotion of the statutory purposes. If the planning authority determines that the proposed development is in conflict with the statutory purposes or would undermine the fulfilment of the section 5(1) purposes, they must consider whether the grant of planning permission would be in accordance with their duty to seek to further those purposes.
>
> 62. The strengthened duty is expressed in qualified terms. The planning authority is required *'to seek to further'* the section 5(1) purposes. It is not under a duty necessarily to fulfil those purposes. Nevertheless, in my view, in any case in which the planning authority determines that a planning application proposes development which is in conflict with the section 5(1) purposes or will undermine their fulfilment, the authority ought both to consider whether and to explain why they have decided that planning permission may justifiably be granted. The planning authority's consideration of those matters will necessarily be informed by the circumstances of the given case, including the size and scale of the development under consideration and the extent and severity of its conflict with the section 5(1) purposes. These are matters of judgment, but a duty *'to seek to further'* the section 5(1) purposes necessarily invests the planning decision maker with the responsibility to judge, firstly, whether the planning application before them for decision proposes development which interferes with the fulfilment of those purposes; and if it does, whether and if so why the grant of planning permission is justified.
>
> 63.The planning authority may need to consider whether and if so, how the proposed development may be mitigated in order to address the identified conflict with the statutory purposes. They may need to consider whether

any compensatory measures are available which might offset the identified conflict with the statutory purposes. They will need to consider the imposition of conditions or the need to obtain planning obligations to secure such measures".

Ground 1

Submissions

42. For the Claimant, Ms Dring submitted that the statutory language of the duty under section 85(A1) of the 2000 Act required a relevant authority to seek to further the purpose of conserving and enhancing the natural beauty of the AONB. She drew attention to the sense in which Parliament had chosen to use the verb "to seek" in this context. As defined in the Oxford English Dictionary, it means “to make it one's aim, to try or to attempt to do something or to bring something about". In the context of section 85(A1), when performing a function relating to land in the AONB, the duty was to make it the relevant authority's aim to further the purpose of conserving and enhancing the area's natural beauty. The relevant authority was obliged to try to further the purpose of conservation and enhancement. That necessarily entailed performing its relevant functions so as to avoid causing harm to the natural beauty of the AONB.

43. Not only was that a relevant authority's duty on the ordinary language of section 85(A1) of the 2000 Act, but also that approach plainly reflected the legislative intention behind the enactment of the strengthened duty. Accordingly, Ms Dring submitted, a relevant authority must both exercise its functions consistently with the purpose of conserving and enhancing the natural beauty of the protected landscape and deliver or achieve that purpose so far as it is possible to do so. Deploying the established meaning of conserve in this statutory context as the avoidance of harm, it was submitted that the duty requires the relevant authority to try, aim and attempt to avoid harm to the natural beauty of the protected landscape.

44. Ms Dring acknowledged and accepted that a duty to seek to further the purpose of conserving and enhancing the natural beauty of the protected landscape must be understood to be limited to that which is achievable in the exercise of the relevant authority's statutory powers. It was accepted that it may transpire, following the

relevant authority's exercise of its functions, that the action which it has taken in the performance of its duty under section 85(A1) has not, in fact, achieved the statutory purpose of conservation and enhancement. It was accepted that the statutory duty should not be construed as requiring a relevant authority to do the impossible or to foresee all eventualities.

45. Nonetheless, it was the Claimant's case that a duty to seek to further the purpose of conservation and enhancement cannot be interpreted as enabling a relevant authority to exercise its functions in a way that results in harm and thereby fails to conserve and enhance the natural beauty of a protected landscape, simply because other factors are considered to justify that outcome. Counsel submitted that the statutory language was incapable of bearing that broad construction and effect.

46. Ms Dring submitted that the Claimant's approach to construction of the section 85(A1) duty gave proper effect to Parliament's intention to strengthen that duty; and thereby to secure the fulfilment of the statutory purpose of conservation and enhancement of the natural beauty of protected landscapes, in the discharge of functions which might otherwise result in harm to such landscapes.

Discussion

47. As Mr Buley KC submitted on behalf of the First Defendant, the duty under section 85(A1) of the 2000 Act will be engaged in relation to a wide range of statutory functions performed by relevant authorities. The DEFRA guidance lists a series of such functions. There will no doubt be others not included in that list. However, that duty does not supplant the particular statutory function by which it is engaged. The statutory language requires the relevant authority to fulfil the section 85(A1) duty in exercising or performing the function which engages that duty. It does not, however, displace the performance of that function in accordance with the terms in which it is to be exercised or performed under the statutory provisions under which it arises.

48. The statutory arrangements for the exercise or performance of the manifold functions which may relate to or affect land in an AONB will, of course, vary.

Here, however, we are concerned with the statutory arrangements which govern the function of determining planning applications under Part 3 of the 1990 Act, whether by a local planning authority or following a call-in by First Defendant.

49. The function of determining an application for planning permission is to be performed in accordance with section 70 of the 1990 Act and section 38(6) of the 2004 Act. As was common ground, the courses of action available to a local planning authority under 70(1) of the 1990 Act are, (i) to grant planning permission with or without conditions or; (ii) to refuse planning permission. In deciding which of those courses of action is appropriate in response to any given planning application, the local planning authority must act in accordance with section 70(2) of the 1990 Act. The same provisions apply to the First Defendant on a call-in application.

50. The challenge in the present case is the determination of an application for planning permission on a site situated within an area of protected landscape, the AONB. The First Defendant was nevertheless required to make her determination in accordance with section 70 of the 1990 Act. In this case as in any other, she was able to grant planning permission either unconditionally or subject to conditions; or to refuse planning permission. As in any other case, she was required in making that determination to have regard to the provisions of the development plan so far as relevant to the application and to any other material considerations. She was required to make her determination in accordance with the development plan unless material considerations indicate otherwise.

51. The task of determining an application for planning permission is thus an evaluative one. It requires the planning authority to identify the relevant policies of the development plan and any other material considerations, to attribute appropriate weight to those various considerations and to draw the planning balance between them. No single factor is afforded determinative weight by the 1990 Act or the 2004 Act; nor do they direct the decision maker as to the degree of weight to be given to any one or other material consideration. To the contrary, in determining a planning application, the decision maker is required to draw a balance between competing considerations of policy and other land-use matters in order to arrive at a judgment as to whether planning permission may be granted. It is well settled on

the authorities that the attribution of appropriate weight to relevant policies and other material considerations is for the planning authority to determine (see Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759). That established principle is unaffected by section 38(6) of the 2004 Act, as was held in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1458G-H. Section 38(6) of the 2004 Act introduces a requirement to recognise that priority is to be given to the development plan. However, as Glidewell LJ said in Loup v Secretary of State for the Environment (1995) 71 P&CR 175, 186:

> "What section [38(6)] does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations".

52. As both Mr Buley KC submitted, on the Claimant's construction of the duty under section 85(A1) of the 2000 Act, in a case in which the planning authority finds the planning application to propose development that will result in harm to the natural beauty of the protected landscape that cannot be avoided by the imposition of conditions or planning obligations, that evaluative determination of relevant policy and other material considerations is entirely displaced. The resulting harm is not simply given appropriate weight as one such consideration in the evaluative determination of the planning application. Instead the presence of that harm is determinative of the planning application. On the Claimant's argument, in order to discharge their duty under section 85(A1) in any such case, the planning authority is obliged to refuse planning permission. It was not enough that great weight would be given to that harm in accordance with national policy under the Framework. On the Claimant's case, proper performance of the section 85(A1) duty must lead inexorably to the refusal of planning permission.

53. It would, of course, be open to Parliament to legislate to that effect. Parliament might do so because, in its view, protected landscapes have been so degraded by damaging development projects, that a firm and clear line must now be drawn; that only development that leaves the natural beauty of such landscapes unharmed may legitimately be accepted. However, in my judgment, given the established statutory regime for determination of applications for planning permission, which applies in areas of statutorily protected landscapes just as it does generally

throughout England and Wales, clear language would be needed to give effect to that radical shift from the current statutory arrangements.

54. As Mr Maurici KC submitted, on the Claimant's case, planning permission must be refused for any development of land which is found to be in any way harmful to the natural beauty of a protected landscape, however limited and temporary that residual harm and regardless of the contribution that that development would otherwise make to the social and economic needs of the community and the benefits that would result from its delivery. I cannot accept that the qualified language of section 85(A1) of the 2000 Act, even in its strengthened terms, can be construed in such a way as to have that effect. The qualified duty to seek to further the purpose of conserving and enhancing the natural beauty of the protected landscape is simply incapable of being read in that way. Nor is it possible to discern in the qualified terms in which the section 85(A1) duty is expressed, a legislative intention to displace the essentially evaluative basis for determination of planning applications under section 70 of the 1990 Act and 38(6) of the 2004 Act in the way in which the Claimant contends.

55. My conclusion is reinforced by consideration of the examples which Ms Dring proposes, of circumstances in the planning context which might render it impossible to perform the section 85(A1) duty to seek to further the purposes of conservation and enhancement of the natural beauty of the protected landscape.

56. Ms Dring posited the situation in which an unauthorised development or use of a site within an area of protected landscape had become immune from enforcement action, by operation of the time limits enacted under section 171B of the 1990 Act. In such a case, although the planning authority would be aware that the presence of the development or the continuation of the use would be in conflict with the statutory purpose of conservation and enhancement of the protected landscape, it would no longer be possible for the authority to take action in the exercise of its statutory enforcement powers under Part 7 of the 1990 Act to secure the removal of the harmful development.

57. However, that illustrative scenario proves too much. Why should it be assumed to be impossible for the local planning authority to perform the duty in such

circumstances? The planning authority would have the power to make a discontinuance order under section 102 of the 1990 Act requiring the harmful use to be discontinued. That power is discretionary; but on the logic of the Claimant's case, the section 85(A1) duty would oblige the planning authority to deploy it as a possible remedy to the harm caused to the natural beauty of the protected landscape. Moreover, by the same logic, the First Defendant would be obliged to confirm the discontinuance order. It is well established that when considering whether to make or confirm a discontinuance order, a planning authority and the First Defendant are able to take account of any material considerations including the resource implications of doing so, such as the burden of the compensation which might be claimed under section 115 of the 1990 Act if the order were to be confirmed. On the Claimant's analysis, such considerations would be displaced by the overarching and determinative effect of the duty under section 85(A1) of the 2000 Act.

58. It is to be noted that the example given by the Claimant assumes that in any case in which the time limits for enforcement action have not expired, performance of the section 85(A1) duty would be determinative of the expediency of taking such action under section 172 of the 1990 Act. That is a further indication of how the Claimant's interpretation of section 85(A1) would result in a radical shift in the planning authority's performance of its statutory planning functions under the 1990 Act; again replacing an essentially evaluative determination with a single determinative factor – that is to say, the existence of some harm to the natural beauty of the protected landscape.

59. As an example of unforeseen circumstances, Ms Dring pointed to the situation in which a planning condition, designed to address aspects of development that would otherwise be harmful to the natural beauty of the protected landscape, is later found not to have been effective in achieving that purpose. However, as Mr Maurici KC submitted, it might well yet be possible for the planning authority to exercise its powers of discontinuance or revocation of planning permission; and, on the Claimant's case, the planning authority would be obliged to deploy those powers in order to fulfil the section 85(A1) duty.

60. The socio-economic consequences of the Claimant's approach to section 85(A1) of the 2000 Act would be truly remarkable. Whether in the context of development plan-making, development control or enforcement, the current statutory arrangements - which leave the planning authority with the function of evaluating the planning balance between the benefits and contribution to social, economic and environmental need offered by development and the adverse impacts of that development - would be reduced to a single determining factor on any land within an area of protected landscape. Will the proposed allocation or development result in some unavoidable harm to the natural beauty of that landscape? If so, the proposed allocation may not lawfully be adopted, the planning application may not lawfully be granted, and enforcement action must be taken against unauthorised development. I cannot accept that the section 85(A1) duty, albeit strengthened, can bear the heavy burden of so radical a change in the performance of these statutory planning functions, long since established under Parts 3 and 7 of the 1990 Act and under the 2004 Act.

61. As Mr Maurici KC further submitted, where there is a legislative intention to cut sharply across the evaluative nature of planning decision-taking, it is done in clear terms. He offered the example of regulation 63 of the Conservation of Habitats and Species Regulations 2017 [**"the 2017 Regulations"**]. Under that regulation, projects judged to be likely to have a significant effect on certain classes of protected nature conservation sites must be appropriately assessed for their implications for the protected site or sites in question. Regulation 63(5) states –

"In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be)".

Regulation 64(1) of the 2017 Regulations provides –

"If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), maybe of a social or economic nature), it

may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be)"

62. Regulation 63 of the 2017 Regulations and section 85(A1) of the 2000 Act have as their purpose the protection of designated areas of particular nature conservation and environmental value. To achieve that purpose, statutory duties are imposed on planning decision-takers in order to achieve a measure of special control on development which may affect those protected areas. In the case of protected nature conservation sites, regulation 63(5) of the 2017 Regulations imposes a clear prohibition on the grant of planning permission for such development unless, following appropriate assessment, the planning authority is certain that the integrity of the protected site will not be harmed. Regulation 64(1) expressly circumscribes those cases in which that prohibition may be overridden by other factors. That legislation may be contrasted with the qualified terms in which the duty is imposed under section 85(A1) of the 2000 Act. The language of section 85(A1) of the 2000 Act imposes no prohibition on the grant of planning permission for development which fails to conserve and enhance the natural beauty of a protected landscape. Yet on the Claimant's argument, section 85(A1) is to be construed as imposing a stricter degree of constraint on development in an Area of Outstanding Natural Beauty than is imposed by Regulations 63 and 64 of the 2017 Regulations on development affecting protected nature conservation sites. In my view, the contrast between those statutory provisions is illuminating; and does add weight to the Defendants' argument that the Claimant's construction of section 85(A1) of the 2000 Act cannot be sustained.

Conclusions

63. For these reasons, I reject ground 1. I remain of the view that the approach I set out in [61] to [63] of my judgment in *New Forest* is correct. That approach recognises that in a case where development is found to result in harm to the natural beauty of a protected landscape, the duty imposed by section 85(A1) of the 2000 Act requires certain matters to be addressed by planning decision-makers. It is an approach which is essentially reflected in the guidance issued by DEFRA in December 2024. It is also correct to say that, following that approach, no conflict

arises with the policy currently stated in paragraphs 187(a), 189 and 190 of the Framework in relation to development management decision-taking in Areas of Outstanding Natural Beauty. In the context of policy, it is appropriate that matters should be expressed in terms of weight; since, as I have explained, the section 85(A1) duty does not and is not intended to displace the established evaluative character of the determination of planning applications, which arises from the long-established principles that govern such decisions under sections 70 of the 1990 Act and 38(6) of the 2004 Act.

Ground 2

Submissions

64. Under this ground, the Claimant contended that the First Defendant had failed to give adequate reasons for concluding that the grant of planning permission in this case was compliant with her duty under section 85(A1) of the 2000 Act. It was insufficient merely to mention that statutory duty or to assert that it had been complied with. The question was one of substance and not of form. On a fair reading of the decision letter, the First Defendant had failed to grapple with the fact that she was granting planning permission for a major development which was in conflict with the statutory purpose of conserving and enhancing the natural beauty of the AONB. She had given no adequate explanation of how she had resolved that conflict. Nor had she explained on what proper basis she had concluded that she was able to grant planning permission in accordance with her duty under section 85(A1) of the 2000 Act.

Discussion

65. I accept that the First Defendant was required to give proper, adequate and intelligible reasons to show that she has complied with the duty imposed on her by section 85(A1) of the 2000 Act.

66. In R (Palmer) v Herefordshire Council [2016] EWCA Civ 1061; [2017] 1 WLR 411 at [7] Lewison LJ said:

> "The existence of the statutory duty under section 66(1) of the Planning (Listed Building and Conservation Areas) Act 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. Where the decision-maker refers to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan there is an inference that he has complied with it, absent some positive indication to the contrary: *Mordue's* case, para 28".

In carrying out that analysis, Lewison LJ referred to the central importance of examining the actual reasons given for a decision.

67. I am satisfied the First Defendant fulfilled her duty to give proper, intelligible and adequate reasons in this case. The Claimant's contention that her reasoning is inadequate and gives rise to a substantial doubt that she has indeed properly complied with the duty imposed by section 85(A1) of the 2000 Act is not justified.

68. The relevant standard is very well known. It is summarised in the speech of Lord Brown of Eaton-under-Heywood at [36] in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953. I do not need to quote that paragraph in this judgment.

69. It is necessary to refer briefly to some paragraphs in the decision letter. Firstly, DL29 and DL30:

> "29. Overall, the Secretary of State agreed with the Inspector at IR823 that there would be some harm to the HWAONB, which would be limited, and that the harm to the landscape and scenic beauty of the HWAONB attracts great weight.
>
> 30. The Secretary of State has kept her duty under section 85 of the Countryside and Rights of Way Act 2000, to seek to further the purpose of conserving and enhancing the AONB's natural beauty, in mind when assessing the impact of harm on the AONB and applying weight to it. This duty has been considered along with the other changes identified in paragraph 25 above. In the particular context of this case, she concludes that the harm to the HWAONB is limited, and this harm attracts great weight".

70. Under the heading "Housing need and delivery", at DL42 the First Defendant said:

> "In reaching her conclusions on housing need and delivery, the Secretary of State has taken into the account the effect of paragraph 226 of the Framework, which means that [Tunbridge Wells Borough Council] can now demonstrate a Framework-compliant housing land supply, and the progress of the eLP since the previous decision. As a result, she considers that some elements of the Inspector's conclusions at IR801-810 in respect of housing need and delivery are now out of date. However, it is undoubtedly still the case that the ability to respond to the need for housing is heavily constrained (IR803), and on the basis of the evidence now before her, in particular the significant weight which she attaches to policy STR/CRS 1 and draft allocation AL/CRS3 of the eLP, she agrees with the Inspector at IR810 that it is reasonable to conclude that there is a compelling case for the need for development of this type and in Cranbrook. She further agrees that there are considerable benefits associated with delivering market and affordable housing (IR810). In reaching this conclusion she has taken into account paragraph 60 of the Framework which sets out the Government's objective of significantly boosting the supply of homes. The Secretary of State considers that the delivery of 165 homes (40% affordable housing) carries significant weight".

71. At DL46 and DL47, the First Defendant identified other benefits of the proposed development.

> "46. The Secretary of State agrees for the reasons given at IR774, IR720 and IR811 that the proposed reinstatement of hedgerows along historic boundaries and of the shaw in the southern fields would be beneficial to the time-depth character of the HWAONB (IR774). Furthermore, the proposed re-creation of Tanner's Lane would also be beneficial in heritage terms as it would reinstate a historic feature in the local landscape (IR774).
>
> 47. The Secretary of State agrees for the reasons given at IR720 and IR811 that the new woodland planting and management of existing woodland would be to the benefit of the environment and landscape. She further agrees for the reasons given at IR786 that the proposed highway works may result in improving highway safety. In addition, for the reasons given at IR811 the additional footpaths and substantial new publicly accessible amenity space would enhance recreational opportunities".

She concluded at DL48:

> "The Secretary of State has had regard to the Inspector's view at IR824 as to weight attaching to the benefits of the scheme. She has taken into account the changes since the previous decision, including her conclusion at paragraph 42 above that [Tunbridge Wells Borough Council] has a Framework compliant housing land supply, and overall, she considers that the combined weight of the benefits remains as substantial".

72. At DL49 to DL54, under the heading "Application of policies concerning AONB", the First Defendant explained how she had sought to discharge her duty under section 85(A1) of the 2000 Act.

73. At DL50, she found the development to be major development for the purposes of the Framework. She acknowledged that in those circumstances, planning permission should be refused unless there were exceptional circumstances justifying the development and it could be demonstrated that the development was in the public interest. The key elements of her analysis in relation to the section 85(A1) duty are in DL51 to DL54:

> "51. The Secretary of State has gone on to consider whether there are the exceptional circumstances required to justify this proposed development in the terms of paragraph 183 (formerly 177) of the Framework, and whether it can be demonstrated that the development is in the public interest. In line with that paragraph she has considered the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy; the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.
>
> 52. The Secretary of State has found that that the ability to respond to the need for housing in this Borough is heavily constrained, and that this particular development is needed (paragraph 42 above). She has found that the benefits of the scheme, which include landscape benefits and enhanced recreational opportunities, carry substantial weight (paragraphs 46-47 above). She has further found that policy STR/CRS 1 and draft allocation AL/CRS3, which allocates this site for this purpose, are unlikely to change and carries significant weight (paragraph 23 above). It is therefore

> likely that within a relatively short space of time, this allocation will form part of an adopted development plan.
>
> 53. When assessing whether exceptional circumstances exist, the Secretary of State has also considered the harm to the AONB that would arise from the proposed development, as summarised in paragraph 30, and has applied her duty under section 85 of the Countryside and Rights of Way Act 2000 to seek to further the purpose of conserving and enhancing the AONB's natural beauty. She has found limited harm to the HWAONB and has concluded that the harm to the landscape and scenic beauty of the HWAONB attracts great weight.
>
> 54. Overall, in terms of the paragraph 183 (formerly 177) test in the Framework, the Secretary of State considers that the above factors together constitute exceptional circumstances which justify major development in the HWAONB. The Secretary of State further considers that there are factors in this case which suggest that granting permission for the development is in the public interest. The AONB test is therefore favourable to the proposal".

74. In drawing the planning balance and by way of overall conclusion, in DL61 the First Defendant reiterated that for the reasons she had given:

> "… exceptional circumstances exist to justify the proposed development in the HWAONB and that the development would be in the public interest".

75. The considerations to which I have referred, particularly those that are enumerated in DL51 to DL54, provide a clear explanation not only for the First Defendant being satisfied that the policy test under the Framework had been met but also that, in granting planning permission, she was seeking to further the conservation and enhancement of the natural beauty of the AONB. The site and its proposed development for housing had been identified through a process of plan making, which had shown it to be a realistic location for the delivery of housing for which there was a compelling case to meet local needs. There was limited harm to the AONB, but there were no identified alternative sites either within or outside the AONB which would deliver that housing need with a lesser impact; or which would avoid the harmful impact at all. The proposed development would deliver significant benefits to the local community and to the AONB, including landscape enhancement and recreational elements. A condition was imposed which had the

effect of withdrawing permitted development rights, for the express purpose of giving protection to the sensitive landscape within which the proposed development was located.

76. I follow the approach that I set out in [61]-[63] of my judgment in *New Forest*, which at this stage of the analysis all parties including the Claimant (as Ms Dring confirmed in reply) accepted was appropriate. I am entirely satisfied that the Secretary of State's reasoning is both proper and adequate to explain and justify her stated conclusion that in granting planning permission subject to conditions and the required planning obligations, she had performed her duty under section 85(A1) of the 2000 Act.

Conclusion

77. If, as I have found to be the case under ground 1, section 85(A1) of the 2000 Act does not rule out the grant of planning permission for development in an AONB simply by virtue of the fact that the development would give rise to some, albeit limited, unavoidable harm to the natural landscape, then the First Defendant's decision to grant planning permission for the proposed development was a proper performance of that duty; and she gave proper and adequate reasons to explain why that was so.

78. For these reasons, ground 2 fails.

Disposal

79. This claim must be dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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