



Neutral Citation Number: [2016] EWHC 2898 (Admin)

Case No: CO/2122/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2016

Before:

THE HON. MR JUSTICE CRANSTON

Between:

GORING-ON-THAMES PARISH COUNCIL	<u>Claimant</u>
- and -	
(1) SOUTH OXFORDSHIRE DISTRICT COUNCIL	<u>Defendants</u>
(2) THE ENVIRONMENT AGENCY	
- and -	
GORING AND STREATLEY COMMUNITY ENERGY LIMITED	<u>Interested Party</u>

Mr. Charles Streeten (instructed by **Richard Buxton**) for the **Claimant**
Mr. Jeremy Pike (instructed by **South Oxfordshire District Council**) for the **1st Defendant**

Hearing dates: 9 November 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE CRANSTON

Mr Justice Cranston:

Introduction

1. This is a claim for judicial review brought by Goring-on-Thames Parish Council (“Goring Parish Council”) against a decision of the development control (planning) committee of South Oxfordshire District Council (“the Council”) dated 9 March 2016. The Council decided to grant planning permission for a scheme to generate hydropower at Goring Weir for local usage, at full capacity some 107KW. Lang J gave permission to bring the claim on 25 July 2016.
2. The proposed scheme is to be located within the Goring-on-Thames Conservation Area and the Streatley Conservation Area. It is also located in the Chilterns and the North Wessex Downs Areas of Outstanding Natural Beauty (“AONB”). The former covers 324 square miles, the latter 668 square miles.
3. Goring Parish Council objected to the hydropower scheme for a number of reasons when the matter was before the Council’s planning committee. The challenge in this judicial review focuses on harm from the scheme to the Chiltern and North Wessex Downs AONBs and the impact of noise from it upon tranquillity in the AONBs; the scheme’s impact on listed buildings, their settings and the conservation areas; and the Council’s failure to adopt a reasoned environment screening opinion in relation to it.
4. Shortly before the hearing Goring Parish Council confirmed its intention to file a notice of discontinuance as regards its claim against the Environment Agency. The consent order between the parties concerned the flood risk assessment and its adequacy. Thus the only claims which needed to be considered at the hearing were those against the Council.

Background

5. The villages of Goring and Streatley, as well as the River Thames which lies between them, have a rich, cultural history. The location of the two villages has marked a crossing of the River Thames since Celtic times. The first bridge was built in 1837 and replaced in 1923. The nearby Grade I listed church of St Thomas of Canterbury is a visible reminder of Goring’s long parish history, dating as it does to Norman times. There are about a dozen Grade II listed buildings in the two villages. Throughout its history, the site has been connected with both art and literature. A Turner painting entitled ‘Goring Mill and Church’ hangs in the National Gallery. Books such as Jerome K Jerome’s *Three Men in a Boat* and Kenneth Grahame’s *Wind in the Willows* have descriptions of the villages or drew inspiration from the site of Goring Weir.
6. Goring Weir is located within a section of the River Thames where it divides into separate channels comprising the lock cut, a main channel split by an island with two separate weirs, Goring Weir and Streatley Weir, and an old mill channel. The lock, with associated buildings, is on the eastern bank. Goring Weir is located to the west of these. The eastern bank, in Goring, comprises residential properties with gardens leading down to the river. The western bank, in Streatley, is characterised by meadow land and marshy grassland, and includes the buildings forming the Swan Hotel. It is

Grade II listed. The B4009 road bridge over the River Thames is located 100 metres south of the weir, linking Goring and Streatley. The Thames footpath runs alongside the river on the western bank, and south of the Lock House on the eastern bank.

7. The weir itself has a sharp crest of approximately 59.5 metres in length with a series of steps to discharge the water downstream. There are three sluice gates and a fish pass is located in the centre of the weir. The large sluice gates in the middle of the weir are controlled by the Environment Agency to maintain the upper water level for navigation and flood control.

The planning application

8. The scheme involves demolishing part of the existing weir at Goring lock for a distance of approximately 18 metres and replacing it with three Archimedes screws. The screw turbines, each of 3.5 metres diameter, will then be installed directly on the site of the existing weir. These will be arranged side by side, directly on the section of the weir closest to the lock house. Water will flow into the screws across the site of the existing weir crest, and discharge close to the bottom of the existing weir. The screws will be fully visible, but the gearboxes, generators and control systems will be situated in a separate power house. The top of this building will be lower than the existing walkway. The concrete works are to be left exposed, and metalwork, including the Archimedes screws and the acoustic covers to the generators, will be painted 'Environment Agency' grey. A 2.1 metre wide fish pass, an eel pass and a three metre wide flood control gate for use by the Environment Agency are part of the scheme.
9. Goring and Streatley Community Energy, the Interested Party, and their consultants held pre-application discussions with the Environment Agency regarding an application for a hydropower scheme in 2010. They had had an Environment Report prepared by a consultant in 2009, which had some sections on landscape and visual amenity. As to landscape, the report said that the existing weir structure was functional in appearance. The addition of the hydropower plant to the weir would not significantly increase its size nor have an adverse effect on its visual character: "The hydropower plant will therefore have no significant adverse effect on the local landscape character." As to visual amenity, the report concluded that the view from the road bridge over the river and weir had a high sensitivity to change. So did the view from the river going upstream:

"[A]dverse effects of high significance on visual amenity would be experienced mainly by river users travelling upstream and pedestrians viewing the river from the B4009 road bridge. In order to mitigate for the adverse impacts on these visual receptors, the colour of the hydropower plant and the control building would be sympathetic with the local landscape and the existing weir structure."

10. An initial planning application was made in 2012. There was a Noise Impact Assessment accompanying it dated September 2012. Paragraph 7 stated:

"[I]t is appreciated that mechanical noise is substantially different from that of rushing water noise and transmits at

higher frequencies. Therefore individual acoustic covers will be place[d] over all three drive trains to reduce the noise within 1m by at least 20dBA. This would result in a sound pressure level at the lock-house of no more than 47dBA and at the nearest residence on the Goring bank of just 30dBA, both of which are inaudible above the existing ambient sound levels at each location”.

11. The 2012 planning application was withdrawn following objection from the Environment Agency on the basis, inter alia, that the flood risk assessment was inadequate.
12. The current application was dated late August 2015. As a result of the application, the Council prepared a publicity checklist. “Affecting Conservation Area” was ticked, but not “Affecting setting of a Listed Building”. There was also an *Environmental impact assessments* (“EIA”) checklist, which indicated that the application fell under Schedule 2, was in a sensitive area but not over the threshold. The Council officer added a note that the Swan Hotel at Streatley should be consulted.
13. The Council’s conservation officer was consulted. In her response of 16 October 2015, she listed as relevant legislation and policy section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990, section 12 of the National Policy and Planning Framework (“NPPF”) and Local Plan Policy CON7. She then stated that she had no objection to the principle of the application. Throughout history, the river has been used to generate power and she considered that the installation of the Archimedean screw generator was a modern progression of an historic tradition.
14. However, she said, the location at Goring Weir did not lend itself so well to discreet housing of the generators since this part of the river was open in character and was prominent in views from the river crossing. As such, it was important that the built structures be as small as possible in order to reduce their visual impact on views with the conservation area. The solid brick wall appearance of the power house in the proposal would dominate views. The conservation officer’s recommendation was as follows:

“Ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area. If there is harm, it is certainly less than substantial as the special character and appearance of Goring that warrants its designation will not be completely lost. As such, where there is harm, the Local Authority should be satisfied that it is outweighed by the public benefits of this scheme as per paragraph 134 of the NPPF. I therefore suggest that either a redesign of the building or evidence that the most sympathetic design has been proposed should be obtained to inform the decision.”

15. In October 2015 the conservation officer for West Berkshire Council also responded to the application. She agreed with what the Council’s conservation officer had said. However, she was concerned that the proposal in its then form would harm the setting

of Streatley Conservation Area, contrary to the NPPF and Policies CS14 and CS19 of West Berkshire's Core Strategy 2006-2026. These concern protecting the historic environment from harmful development. She agreed that every effort should be made either through the use of different materials or a total redesign to help assist with reducing its visual impact.

16. There were a number of objections to the scheme. For example, the freeholder of Cleeve Court, further upstream, commented that whichever way one looked at the proposed development – from the bridge, the moorings and even from the Thames path – it would have a dreadful visual impact. The former chairman of Streatley Parish Council wrote in October 2016, mentioning the proximity of the Swan Hotel, a listed building, to the development.
17. A revised Design and Access Statement from the applicant was submitted in January 2016. It conceded that that 2015 application misjudged the concern with visual impact. Accordingly, there had been some redesign. The generators had been relocated and the control equipment was to be placed in a hut on the riverside by the lock-keeper's house. The statement addressed the main view of the scheme from the B4009 as follows:

“It is recognised that the project is within the Goring conservation area and the view from the road bridge has played a significant part in determining details of the final design.

The form of this scheme is dictated by its function, and as with the lock at Goring, there is little that can be done in some areas to hide the concrete structure. The troughs in which the Archimedes screws rotate, and the screws themselves are of steel construction and could be painted almost any colour that may be required. The proposed colour scheme is neutral, adopting the natural colour of concrete and the grey paint of the existing hardware associated with the lock and the weir.”

The revised Design and Access Statement also contained some paragraphs on the implications for the Goring conservation area.

18. There was a further response from the Council's conservation officer on 19 January 2016 after the revised plans. She commented that the hut with the relocated control equipment would not look out of place as an ancillary garden structure to the lock-keeper's house. She added:

“Recommendation:

My recommendation remains unchanged. I support this application and consider the amendments further mitigate the visual impact of the proposal. The harm is less than substantial and subject to other planning considerations, should be outweighed as per paragraph 134 of the NPPF.”

19. West Berkshire's conservation officer also responded following the redesign in January 2016:

“The proposal has been amended such that the visual impact of the proposal on the character of the Streatley Conservation Area has been much reduced. I therefore have no objections.”

In her witness statement of 14 June 2016 the Council’s planning officer has said that West Berkshire’s conservation officer had considered the potential for impact on the setting of listed buildings, in particular the Swan Hotel, and had not considered the scheme to be harmful or significant.

20. In its second response of February 2016, Goring Parish Council expressed its continued concern about the potential flooding risks associated with the scheme, especially since the villages of Goring and Streatley had suffered a number of serious flooding events in the recent past. Goring Parish Council was concerned, it said, about how the installation would be operated and maintained, the potential risk of debris affecting it and mechanical breakdown. Noise was also raised. After quoting paragraph 7 of the Noise Impact Assessment of 2012, its response added:

“However it had been stated previously that noise levels would not truly be known until the installation was running, which raised further concerns so [Councillors] were still not reassured by this assessment.”

As well as the possible detrimental impact on fish and the weir pools, Goring Parish Council reiterated that still no formal visual impact assessment had been prepared.

The officer’s report and the decision

21. The application was referred to the Council’s planning committee because of the objections from Goring Parish Council. The officer’s report for its meeting on 9 March 2016 recommended approval of the scheme. At the outset it noted the objections of Goring Parish Council, before describing the application area (including the Swan Hotel) and the proposal. The report then summarised the representations from both the so-called “specialist” advisers (such as other councils) and the public as regards both the original and revised plans. With respect to the original plans, one supporter had said that the visual impact on the wider setting was less than substantial, whereas one objector referred to the visual impact on the landscape character of the AONBs and conservation areas.
22. Goring Parish Council was one of the specialist advisers and maintained its objections to the revised plans in summary, flood risk, noise impact, impact on biodiversity, visual impact on the AONB and conservation area, the lack of a visual impact assessment and financial viability of the scheme. Previously objecting to the original proposals, Streatley Parish Council now had no strong views: the visual impact of the amended proposal had a much reduced impact on the Streatley conservation area, and there were no objections in that regard. West Berkshire Council supported approving the revised scheme, taking the same view of visual impact as Streatley Parish Council.

“The visual impact of amended proposal has a much reduced impact on the Streatley Conservation Area – no objections”.

The Council’s own conservation officer supported the revised application:

“[T]he amendments further mitigate the visual impact of the proposal.”

Its environmental protection team also supported approval: any potential noise issues could be addressed satisfactorily by imposing conditions prior to installation, with a detailed acoustic report, including mitigation measures.

23. As to the general public, there were four representations of support for the revised proposals. The reasons given were that the amended design was preferable to that originally submitted; that the Thames is a wonderful and historical source of clean energy; that the scheme looks like many other weirs already on the river; AONB and conservation area regulations do not prohibit development, but seek mitigation, and this is demonstrably feasible as shown by the photomontages; and that local communities should support green energy schemes of this kind.
24. There were 58 representations objecting to the scheme, even as revised. The reasons as summarised in the officer’s report were that the revised plans did not address the concerns raised in the original consultation; the proposal conflicted with the Countryside and Rights of Way Act; the relocated control hut was highly visible from upstream and the lock viewing area; the proposed access was unsafe and inadequate over private land; other locations were more appropriate and far less destructive; and the acoustic enclosures would increase the height of the scheme, impacting on visual amenity.
25. The officer’s report recorded that both the Chilterns and North Wessex Downs AONB boards were consulted but did not comment.
26. After referring to the planning history, the officer’s report set out relevant planning policy and guidance. This included South Oxfordshire’s strategy policies such as CSEN1, landscape (AONB) and CSEN3, Historic Environment, and local plan policies C3, The River Thames and its valley, C4, Landscape setting, CON7, Conservation areas and EP2, Noise and vibrations. There was a general reference to the NPPF and to specific paragraphs in the NPPF guidance. The officer’s report then dealt with six main issues: renewable energy considerations, visual impact on the landscape character of the AONB, flood implications, the impact on the character and appearance of the conservation area, biodiversity and ecological considerations and noise impact.
27. As regards visual impact, the report referred to paragraph 116 of the NPPF, the AONBs, the visual impact assessment undertaken in 2009, the 2016 Design and Access Statement, and photographs of the site and stated:

“6.3vi Notwithstanding the landscape importance of the AONB and the special landscape character of the river corridor, the proposed development should be viewed in the context of the existing weir structure and is not considered to have an adverse effect on its visual appearance, over and above that of the existing weir.

The report, which considers the original proposal rather than the revised proposal, recommends that in order to mitigate the

impact on highly sensitive areas, the colour of the hydropower plant and the control building would be sympathetic to the local landscape and the existing weir structure. The revised scheme minimises the impact on visual amenity further, by virtue of the control systems being removed from over the weir, and reducing the height of the proposed structure over the weir. Further to this point, a schedule of materials, finishes and detailing would be required by condition to ensure the finishes harmonise with the local landscape and the existing weir structure.”

28. Turning to the character and appearance of the conservation area, the report noted that throughout its history the Thames had been used to generate power and the scheme was considered to be a modern progression of an historic tradition. The site was clearly visible from the bridge, from on the river and from the riverside areas to the north in neighbouring Streatley. Given the sensitivity of the area, revisions had been sought in the design. The report continued:

“6.5iii Ultimately there will be some alteration to the character of this part of the river and the contribution it makes to the Conservation Area. The revised plans have reduced the visual impact of the weir construction on the river and the proposed Control Hut is of a design and scale that it would not look out of place as an ancillary garden structure to the Lock House. The Conservation Officer at West Berkshire Council has also assessed the impact of the revised proposal on the Streatley Conservation Area and has raised no objections. In order to mitigate visual impact further, a schedule of materials, finishes and detailing is recommended, which would be secured by condition.”

29. In addressing the noise impact of the scheme, the report referred to planning policy and the 2012 noise impact assessment submitted. It noted that the Council’s environmental health officer had advised that potential noise impact could be addressed by imposing a planning condition, requiring a detailed acoustic report prior to installation of the proposed development. The report explained:

“6.7iii The condition would require the applicant to carry out a Noise Impact Assessment in accordance with BS 4142:2014 ‘Methods for rating and assessing industrial and commercial sound’, by a suitably qualified acoustic consultant and testing in a variety of water flows. In the event that noise levels exceed standards levels, the applicant would be required to submit appropriate mitigation before the first use of the scheme. Noise attenuating features (principally the acoustic covers, insulation of building) are bespoke to the equipment installed, but noise reducing measures can be designed to achieve any reasonable level of attenuation that is required and the measures are of a small enough scale that they would not introduce further planning considerations.

Subject to a detailed condition, the noise impact associated with the development can be satisfactorily managed to the extent that the residential amenity of neighbouring dwellings would be safeguarded.”

30. The Council’s planning committee considered the matter on 9 March 2016. A representative of Goring Parish Council spoke in opposition to the application, as did a local resident and Cllr Kevin Bulmer, the local ward councillor, who had been active in the cause. The application was put to vote and approved.

31. Formal planning permission was granted, subject to eleven conditions. Condition 5 requires that prior to the installation of any equipment associated with the development, a schedule of materials, finishes and detailing must be approved in writing by the Council. The reason is to

“integrat[e] the visual appearance of the development with the existing weir structure, and to minimise impact on visual amenity of the sensitive landscape character of the area in accordance with Policy CSEN1 of the South Oxfordshire Core Strategy 2027 and Policies C3, C4 and D1 of the South Oxfordshire Local Plan 2011.”

32. For the same reason there must be a full specification of the Archimedes screw hydroelectric power installation (condition 6).

33. Condition 10 deals with noise and reads as follows:

“No development shall take place until a detailed scheme for protecting the surrounding area from noise arising from the development hereby permitted has been submitted to and approved in writing by the local planning authority. The scheme shall include an acoustic report produced broadly in accordance with BS 4142:2014 ‘Methods for rating and assessing industrial and commercial sound’. Thereafter, the development shall not be carried out other than in accordance with the approved details.

The acoustic report shall be prepared by a competent person with a detailed knowledge of acoustics. It is recommended that an acoustic consultant qualified (as a minimum) to be an associate member of the Institute of Acoustics carry out this work. A list of accredited consultants can be found on the Institute of Acoustics’ website www.ioa.org.uk or by telephoning 01727 848195.

Reason: To protect the occupants of nearby residential properties from loss of amenity due to noise disturbance and in accordance with Policy EP2 of the South Oxfordshire Local Plan 2011.”

34. The planning permission then sets out the reasons for the decision. These mirror the conclusions in the officer's report, which had been before the planning committee:

“By virtue of the scale, layout and design of the development, the hydropower scheme is not considered to be harmful to the special landscape character of the Area of Outstanding Natural Beauty or the river corridor, as amplified by the Visual Impact Assessment.

The impact on the historic merits of the Conservation Area and effect on visual amenity constitutes less than substantial harm, which is outweighed by the public benefit of the renewable energy generation and through the use of the existing water source. Subject to detailed information to be submitted for approval by condition, the scheme does not present planning issues with respect to ecological and environmental protection, flood risk and noise emission.

Subject to conditions, the proposal accords with the [National Policy and Planning Framework] (2012) and National Planning Practice Guidance (2014), South Oxfordshire Core Strategy (2012), South Oxfordshire Local Plan (Saved policies, 2011) and the South Oxfordshire Design Guide (2008).”

Legal and policy framework

35. The *NPPF* in paragraph 115 requires that great weight be given to conserving landscape and scenic beauty in AONBs, which have the highest status of protection in relation to landscape and scenic beauty. It adds that the conservation of wildlife and cultural heritage are important considerations in all these areas. Paragraph 116 states that the conservation of cultural heritage is an important consideration in AONBs. Part 12 of the *NPPF* is entitled “Conserving and enhancing the historic environment”. Paragraph 132 reads, in part:

“132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building... should be exceptional...”

Section 134 of the *NPPF* states that where a proposal will lead to less than substantial harm to the significance of a designated heritage asset, the harm should be weighed against the public benefits of the proposal.

36. The Council has a number of relevant *planning policies*. Core Policy CSEN1, Landscape, provides that the district's distinct landscape character and key features will be protected against inappropriate development and, where possible, enhanced.

Where development is acceptable in principle, measures will be sought to integrate it into the landscape character of the area. High priority will be given to conservation and enhancement of the Chilterns and North Wessex Downs AONBs and planning decisions will have regard to their setting. In particular, the landscapes and waterscapes of the River Thames corridor will be maintained and where possible enhanced, as will the setting and heritage of the river for its overall amenity and recreation use.

37. Core Policy CSEN3, Historic Environment, states that the district's historic heritage assets will be conserved and enhanced for their historic significance and important contribution to local distinctiveness, character and sense of place. This will be carried out through, inter alia, conservation area appraisals/reviews and the determination of planning applications. The text to the policy notes the South Oxfordshire district has some 72 conservation areas.
38. Policy EP2 on noise states that proposals which would by reason of noise have an adverse effect on existing or proposed occupiers will not be permitted, unless effective mitigation measures are implemented.
39. AONBs now fall under the Countryside and Rights of Way Act 2000. They can be designated for the purposes of conserving and enhancing their natural beauty, and conservation boards established to pursue this purpose, in particular to draw up management plans to that end: ss.82, 86-87, 89. Section 85(1) imposes a duty on public bodies such as the Council to have regard to this purpose in exercising or performing any functions in relation to, or so as to affect, land in an AONB.
40. Section 1 of the Chilterns AONB management plan 2014-2019, reads:

“The primary purpose of designating an area of countryside as an AONB is to conserve and enhance the natural beauty of its landscape. In this sense, the term ‘natural beauty’ refers not only to the scenic qualities of the landscape but to all those other elements which together produce the special character of the AONB. These elements include wildlife and man-made features such as its archaeological and built heritage.”

A chapter of the management plan is devoted to the historic environment. The text to policy HE3 provides that the historic environment is irreplaceable and damage must be avoided, especially where the site's importance has been identified and protection conferred by some form of designation. Additionally, it is the setting of many sites which adds to their importance and the way they are appreciated. Policy HE9 provides:

“The Chilterns has an extraordinary cultural heritage covering the historic environment and all that makes it special: a wealth of literary and military figures; the aristocracy; poets; religious leaders; politicians; innovators and notable business people all of whom have left their mark on the Chilterns. It is an essential ingredient of what makes a place different and is crucial to develop a sense of identity and local pride. It also provides a

plethora of opportunities to promote the area to attract visitors and tourists.”

41. *Conservation areas* fall under Part 2 of the Planning (Listed Buildings and Conservation Areas) Act 1990. Section 71 places on local planning authorities the duty to draw up and publish proposals for the preservation and enhancement of conservation areas in their areas. Section 72(1) imposes a duty in exercising planning functions to give

“special attention... to the desirability of preserving or enhancing the character or appearance of [a conservation] area”.
42. West Berkshire Council published its Conservation Area Appraisal for Streatley in 2010. There is a reference in this to the Swan Hotel in the 1870s. Among the conclusions from the appraisal are that the Streatley conservation area makes an important contribution to the cultural and historic aspects of the natural beauty of the AONB.
43. Although the Goring conservation area has been in existence for decades, there is no comparable conservation area appraisal as that for Streatley.
44. With regard to *listed buildings*, section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 imposes the duty in granting planning permission to have special regard to the desirability of preserving them or their setting or any features of special architectural or historic interest which they possess. A challenger must demonstrate substantial doubt as to whether a decision maker has complied with the duty: where the decision-maker has referred to the statutory duty, the relevant parts of the NPPF and any relevant policies in the development plan, there is an inference that the duty has been complied with, absent some positive indication to the contrary: *Jones v. Mordue* [2015] EWCA Civ 1243; *R (on the application of Palmer) v. Herefordshire Council* [2016] EWCA Civ 1061.
45. EIAs are provided for in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, 2011 SI No. 1824, as amended (“the EIA Regulations”). Part 2 of the EIA Regulations provides for screening opinions as to whether an EIA is required. In effect, Regulation 7(a) requires a planning authority to adopt a screening opinion if an application before them for determination is a Schedule 2 application. Included in the descriptions in column 1 of Schedule 2 are installations for hydroelectric energy production. Column 2 adds a threshold: “The installation is designed to produce more than 0.5megawatts”. However, a column 1 development falls within the definition of a Schedule 2 development, whatever the threshold, if any part is to be carried out in a sensitive area, and a sensitive area by definition includes an AONB: regulation 2(1).

Issue 1: Impact on the AONB

46. For Goring Parish Council, Mr Streeten contended that the Council’s finding that the development would cause no harm to the Chilterns or North Wessex Downs AONBs was *Wednesbury* unreasonable.

47. The first string to Mr Streeten's bow was that the finding that there would be some harm to the character of the river and the contribution it makes to the conservation area was inherently incompatible with the conclusion in paragraph 6.3vi in relation to the AONBs, that the development "is not considered to have an adverse effect on its visual appearance, over and above that of the existing weir". In his submission, the finding of no harm in this regard derived from what was flimsy analysis on the part of the 2009 consultants' report. There was little, if any, objective analysis in what was, after all, an environment report by an environmental scientist, not someone expert in analysing visual impacts or landscape. (This is a point strongly made by Catherine Hall, a chartered architect and member of Goring Parish Council.) Moreover, the report concluded that the hydropower plant would have no *significant* adverse effect on local landscape character, not that there were *no effects*.
48. I accept Mr Streeten's submission that there can be a substantial overlap between the factors relevant to assessing the impact of a proposed development upon an AONB and a conservation area. AONBs might be primarily concerned with potential landscape visual impact, and conservation areas with impact upon heritage, but as paragraph 116 of the NPPF indicates the conservation of cultural heritage is an important consideration in an AONB. Human occupation and patterns of habitation and cultivation have shaped the face of the English countryside. Cultural heritage is very much part of what Dame Fiona Reynolds describes as "the fight for beauty". Its importance is brought out clearly in the Chilterns AONB management plan. The acknowledged sensitivity of the area around Goring Weir, reflected in the various heritage and landscape designations, derives not only from the aesthetic beauty of the location but also from its cultural heritage.
49. The difficulty Mr Streeten faces is that his legal challenge on this score is a rationality challenge. I accept that the intensity of review varies with the subject matter, a point made in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223 itself. But as Sullivan J said in *R (on the application of Newsmith Stainless Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, an applicant alleging *Wednesbury* unreasonableness as regards decisions based on planning judgment faces a particularly daunting task. That was said of a decision by a planning inspector, but in my view there is no difference with the decisions of local planning authorities, when properly advised by their officers. On my reading, nothing in *R (on the application of Campaign to Protect Rural England) v. Dover DC* [2016] EWCA Civ 936 suggests otherwise.
50. In my judgment the Council's assessment in paragraph 6.5iii of the officer's report that there might be a degree of impact upon the Goring conservation area is not inherently incompatible with the assessment in paragraph 6.3vi that there might be no impact upon the AONB. That is despite Mr Streeten's submission, which I have said I accept, that heritage enters a planning assessment with an AONB.
51. In *R (on the application of Campaign to Protect Rural England) v. Dover DC* [2016] EWCA Civ 936, the court effectively struck down the grant of planning permission for an extensive housing development in an AONB. But that does not lead to a different conclusion in this case, since that was a reasons, not a rationality, challenge to the local planning authority's decision. "A local planning authority which is going to authorise a development which will inflict substantial harm on an AONB must

surely give substantial reasons for doing so”: [21], per Laws LJ, with whom Simon LJ agreed.

52. Nor do I consider that *R (on the application of Lensbury Ltd) v. Richmond upon Thames LBC* [2016] EWCA Civ 814 is to the point. That again was not a rationality challenge, but was advanced as the failure to assess whether a planning application in an area designated as metropolitan open land for, as in this case a hydroelectric generating facility on a weir, was what under local planning policy was “inappropriate development”. Because it did not address that issue, the Council did not then go on to ask itself the critical question whether under the policy very special circumstances existed to justify the grant of planning permission.
53. In his judgment in *Lensbury*, with which Beatson LJ agreed, Sales LJ recalled the danger of “death by a thousand cuts” identified by Sullivan J in *R (Heath and Hampstead Society) v. Camden LBC* [2007] EWHC 977 (Admin); [2007] 2 P&CR 19, [37], as he put it in that case, “a series of planning permissions being granted for developments each apparently reasonable in itself but having a serious cumulative detrimental effect on the important public interest in the continuing openness of MOL [metropolitan open land] and the Green Belt...” That applies to cultural heritage as well, even though in the context of these very large AONBs this was a very small development and any harm localised.
54. The important point is that there is no suggestion that the Council wrongly applied planning policies. The boards of the AONBs made no submissions on the proposal when invited to do so. The line of attack by those opposing the development was on the visual, not the heritage, impacts of the proposal. This was a classic matter of planning judgment, and the Council’s assessment that there was no harm to the AONB cannot be said to be *Wednesbury* unreasonable.
55. The second string to Mr Streeten’s AONB bow was acoustic harm. He submitted that the Council’s consideration of noise impacts resulted in a lacuna in the decision-making process in that the harm which the noise would cause to the AONB was ignored. Among the special qualities of AONBs included their tranquillity, as recognised in the Chilterns AONB management plan. Mr Streeten underlined his submission in this regard with a telling passage from *Wind in the Willows*, where Mole is mucking about in a boat on the river listening to the pleasant sound of water lapping over a weir.
56. Mr Streeten continued that paragraph 6.3vi of the officer’s report related to visual impact on the landscape character of the AONB, but said nothing about noise. While paragraph 6.7 dealt with noise impact, there was no reference there to the AONB or to landscape generally. The officer’s report simply considered that development from the perspective of Policy EP2 of the South Oxfordshire Local Plan, which deals with the effect of noise on occupiers of residential properties. Those like Goring Parish Council were not confining their concern about noise to residential users.
57. I fully accept that amongst the special qualities of AONBs is their tranquillity. The Chilterns AONB management plan has a heading “Loss of tranquillity”, underlining that it is a much valued quality but is constantly being lost with the noise from motorways, trunk roads and low flying aircraft. I also accept that tranquillity will be high on the list of priorities of many of those walk along the Thames Path or “muck about

on boats” on the river. The 2012 Noise assessment accepted that the mechanical noise which the turbines will produce will be different from the sound of running water presently heard at Goring weir. But it also went on to calculate that the sound from the scheme at the nearest residence would not be above the ambient sound.

58. Again the nature of the legal challenge, *Wednesbury* unreasonableness, is determinative. That challenge is not that the Council failed to take into account a material consideration. What the Council did was to apply its policy on noise, EP2, concerning residents, as it was obliged to do. The AONBs’ management plans are not statutory planning policies. No one pointed to tranquillity in relation to the AONBs. The Swan Hotel was to be specially notified of the planning application. Nothing said by any of the specialist consultees could be characterized as a concern with loss of tranquillity. Even if a couple of the public responses to the planning application can be interpreted as raising noise in a broader sense than its impact on residents, it was not in terms of tranquillity or “mucking about in boats” in the AONBs.
59. The Council was entitled to reach the planning judgment it did in paragraph 6.3iv that there was no harm to the AONB from the scheme. There was nothing for it to have regard to under section 85 of the Countryside and Rights of Way Act 2000 or paragraph 115 of the NPPF. It was not irrational for it to reach the conclusions it did.

Issue 2: Impact on listed buildings

60. Mr Streeten submitted that there is no evidence that the Council had any regard to the heritage implications of the development. First, Goring and Streatley are home to a number of listed buildings, notably the Grade I listed church of St Thomas of Canterbury and the Grade II listed Swan Hotel. Given the finding of harm to the conservation area it was wrong, Mr Streeten submitted, that no finding of harm was made in relation to the setting of the listed buildings which lie within it and within the settings of which the development is plainly visible. The Council was in breach of what he contended were its duties to investigate whether there is such harm as required under sections 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.
61. The Council’s case in response, that no objector had referred to listed buildings in any representation, is somewhat undermined in that the publicity checklist did not include a ‘tick’ by 3 - ‘affecting Setting of a listed building’. If a matter is not publicised, objectors may not raise it themselves when there are a range of other matters on the agenda. However, the Council is entitled to maintain its submission in this regard when knowledgeable groups like Goring Parish Council did not raise listed buildings and their settings as a concern. The duty to investigate under section 66, which I am prepared to accept, must be triggered by at least someone either in the Council or outside raising it as a potential issue. In the circumstances as I have described them that threshold cannot be regarded as having been reached.
62. It is not entirely true to say that none of the heritage assets in views of which the scheme will be visible were referred to in the officer’s report. The Swan Hotel on the other side of the river in Streatley was mentioned, albeit not that it is Grade II listed. But the Council was entitled to regard any concern about it and its setting as having been allayed. After the revised plan in January 2016, Streatley Parish Council had withdrawn its objection to the application. We are also told that West Berkshire

Council's conservation officer had considered the potential for impact upon listed buildings, primarily one suspects the Swan Hotel, and concluded that there would be no harmful effect.

63. Apart from the Swan Hotel, the setting of listed buildings was never a main issue of the application. Therefore it was not necessary for the officer's report to identify each one simply to confirm that there would be no material impact upon it. As Evans LJ put it in *MJT Securities v. Secretary of State for the Environment* (1998) 75 P & CR 188, there is no need to refer to insignificant issues, only the main issues. Since there was no harm to any listed building which the Council was required to take into account, the duty in section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 did not arise.
64. Mr Streeten's second point in this regard was that the officer's report recognised that there would be harm to the Goring and Streatley conservation areas but then went on to conclude that the harm was less than substantial and could be satisfactorily outweighed by the benefits of the scheme. No consideration was given to the statutory duty in sections 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the conservation area or its setting.
65. For the Council, Mr Pike contended that the officer's report dealt with the potential for impact upon the Goring and Streatley conservation areas, referred to paragraph 134 of the NPPF and concluded that any harm to the conservation area, which it said was small, was "satisfactorily" outweighed by the factors in favour of the proposed development. He highlighted that the officer's report would have been informed by the view of the Council's conservation officer, who in her response referred to paragraph 134 of the NPPF and section 72 of the 1990 Act, and stated that "if" there was harm – implying that there may not in fact be any harm – it was less than substantial. After the revised proposals she thought that any impact upon the conservation area was reduced. The West Berkshire District Council's responses took the same view.
66. The difficulty I have with this is that what the Council needed to do under section 72 was to give considerable importance and weight to harm to the conservation area: see Sales LJ (with whom Richards and Floyd LJJ agreed) in *Mordue v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, [2016] 1 W.L.R. 2682, [22]. I observe in passing the absence of a Conservation Area appraisal for Goring, which if it had existed may have concentrated the collective mind of the Council. Historic England gives advice on conducting appraisals for conservation areas in its document *Conservation Area Designation, Appraisal and Management*. It states that the task need not be for overly long or costly.
67. Nothing in the officer's report suggests that special priority was given to harm to the conservation area in accordance with the Council's duty. Rather, reflecting the officer's report, the planning permission simply concluded that the impact on the historic merits of the conservation area and visual effect on amenity constituted less than substantial harm, which was outweighed by the public benefit of renewable energy generation through use of the Thames.

68. If the Council did fall down in fulfilling its section 72 duty, as I conclude it did, there is the separate question of whether “it appears... to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”: Senior Courts Act 1981, s. 31(2A). This, on the authorities, is a backward-looking provision: *Bokrosova v. London Borough of Lambeth* [2015] EWHC 3386 (Admin), [90], per Elizabeth Laing J; *R (Williams) v. Powys County Council* [2016] EWHC 480 (Admin), [25], per CMG Ockelton, sitting as a deputy High Court Judge; *R (Mark Logan) v. London Borough of Havering* [2015] EWHC 3193 (Admin), [55], per Blake J. If so satisfied, the court must refuse relief.
69. In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer’s report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72.

Issue 3: EIA screening opinion

70. The Council worked on the mistaken assumption that because the scheme would generate only 170kw of power, no screening opinion was necessary. This was development in a sensitive area, an AONB, involving a hydropower installation. The Council now concedes that, under the EIA Regulations, a screening opinion was necessary.
71. For the Council, Mr Pike contended that despite the procedural defect all of the potential impacts of the proposed development were considered in detail by the Council as local planning authority, especially given in the present case that the proposed development has been subject to consultation with various statutory consultees, including the Environment Agency, and the numerous representations made to the Council by the public, including the Goring Parish Council. No significant effects of any description, let alone likely significant environmental effects, were considered to arise.
72. Moreover, Mr Pike continued, all of the matters for a screening opinion in relation to a development proposal have now been considered in a report by the relevant officer. After considering some 27 different issues, she concludes that there are no likely significant environmental effects arising from the proposal.
73. One’s confidence in this recent report is somewhat undermined by its assertion in the accompanying witness statement that it is a “second” screening opinion. The fact is that there never was a screening opinion. There is also Hickinbottom J’s point in *R (Jedwell) v. Denbighshire County Council* [2016] EWHC 458 (Admin), at [94], that the court must be wary with such ex post facto evidence, that it may be produced under pressure, conscious or unconscious, to maintain the decision to grant planning permission. However, the statement in this case is wide-ranging, covering the matters which could conceivably arise. Importantly, Goring Parish Council have not

identified any new matter which could lead to a significant environmental impact. Its case under this head is that the Council's failure properly to screen the scheme may well have contributed to its subsequent failures to have regard to important relevant material considerations, including the harm to the AONB and the setting of more than one listed building. These matters, as I have held, were adequately addressed.

74. Accordingly I see no reason to conclude that if the matter was considered again the Council would issue a positive screening opinion, concluding that the proposed development was an "EIA development" and require the production of an Environmental Statement. There is high authority indicating that it is not in the public interest for a decision to be quashed, and taken again, where there is no substantial prejudice to the claimant and no realistic prospect that the planning authority would decide that the proposal was in fact an EIA development: *Walton v. Scottish Ministers* [2012] UKSC 44 [2013] PTSR 51 [132]-[133], [139]-[140] per Lord Carnwath, [155]-[156] per Lord Hope; *R (Champion) v. North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710, [54]-[62] per Lord Carnwath. Accordingly, despite the failure to screen the development under the EIA Regulations, I refuse to quash the Council's decision.

Conclusion

75. For the reasons I have given, I refuse judicial review. However, in advancing the case for Goring Parish Council Mr Streeten has expertly exposed flaws in the Council's approach to the grant of planning permission. I will consider the Council's written submissions on the matter but against that background my view at this stage is that it is not entitled to its costs.