Kirklees Local Plan Examination

Stage 4 – Various Matters

Note to clarify the council's position in relation to public benefit versus harm to heritage assets (including reference to relevant appeal cases)

1.1 During the course of the Stage 4 hearings a number of site allocation discussions focussed on the issue of the way in which the council has interpreted policy in the National Planning Policy Framework and guidance contained in the National Planning Practice Guidance. It was agreed that the council should provide a statement of their position and provide copies of relevant appeal decisions.

Kirklees Council Statement

1.2 The Council followed national historic environment guidance with respect to the allocations proposed in the Local Plan. Specifically NPPG paragraph 18a-019-20140306. This states that a clear understanding of the significance of a heritage asset and its setting is necessary to develop proposals which avoid or minimise harm. The Heritage Impact Assessments (HIAs) that the Council has prepared provide a clear understanding of any potential impact (upon the significance of heritage assets) of developing land that is currently undeveloped.

1.3 In accordance with Paragraph 129 of the NPPF, the HIAs also identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise, in order to avoid or minimise conflict between any heritage asset's conservation and any aspect of the proposed allocation.

1.4 The NPPG refers to such studies like HIAs as being able to reveal alternative development options, for example more sensitive designs or different orientations, that will deliver public benefits in a more sustainable and appropriate way. The HIAs identify alternative development options to minimise harm in the form of the mitigation measures they outline. The council welcomes incorporating mitigation measures as modifications to the other site specific considerations where deemed necessary in order to ensure that development can occur upon all areas within the allocations proposed. Such modifications would ensure that the public benefits flowing from providing a supply of housing are delivered in a more sustainable way.

1.5 The sequential approach to conserving and enhancing the historic environment that the Council has followed (i.e. identifying and minimising harm before weighing up public benefits) is an approach that was advocated by Historic England in their Regulation 19 response to the Local Plan.

1.6 Historic England stated at Publication Draft consultation stage that before allocating sites for development an assessment needs to be undertaken of the contribution which sites make to those elements which contribute towards the significance of heritage assets and what impact the loss of undeveloped sites and their subsequent development might have upon significance; if it is considered that the development of a site would harm elements which contribute to the significance an asset, then the Plan needs to set out the measures by which that harm might be removed or reduced; and if, at the end of the assessment process, it is concluded that the development would still be likely to harm elements which contribute to the significance of assets, then sites should not be allocated unless there are clear public benefits that outweigh the harm (as is required by NPPF, Paragraph 133 or 134).

1.7 In preparing the HIAs and accepting the incorporation of mitigation measures within the Plan, the Council has adhered to this process, and thereby considers, in light of having taken into account all reasonable alternative sites (based on proportionate evidence), that the public benefits of providing a supply of housing to meet the needs of present and future generations outweighs any less than substantial harm to the significance of designated heritage assets that may arise.

1.8 Throughout the NPPF, there is a presumption in favour of sustainable development, and therefore in favour of granting permission. That is the default setting. However, certain specific policies within the NPPF indicate situations where this presumption does not apply and where, instead, development should be restricted. Paragraph 134 is, one such policy. That said, paragraph 134 provides for a balancing exercise to be undertaken, between the 'less than substantial harm' to the designated heritage asset, on the one hand, and the public benefits of the proposal, on the other. Consequently it is the council's view that paragraph 134 should not be considered restrictive until public benefits are deemed, after undertaking a balancing exercise, to not outweigh harm to the significance of a designated heritage asset.

1.9 In terms of the scope of public benefits and whether they must address all dimensions/roles of sustainable development, or include heritage benefits as well, a recent appeal decision issued by the Planning Inspectorate supports the Councils contention that they do not (Appeal Decision APP/E2530/W/17/3181823).

1.10 This appeal decision serves to illustrate that providing a supply of housing to meet the needs of present and future generations is a public benefit that delivers social and economic progress, and is capable, in its self, of outweighing harm to the significance of designated heritage assets (as outlined under the terms of NPPG 18a-020-20140306 and NPPF paragraphs 7 and 134).

1.11 Attached are a number of planning appeal and Court of Appeal decisions which the council considers relevant to its position.

Appendix 1 – Court of Appeal Decision: Forest of Dean District Council and Secretary of State for Communities and Local Government and Gladman Developments Ltd

England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2016] EWHC 421 (Admin)
Case No: CO/4852/2015

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

Bristol Civil and Family Justice Centre,
Redcliff Street, Bristol, BS1 6GR.
4 March 2016

B e f o r e :

THE HON MR JUSTICE COULSON

Between:

Forest of Dean District Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**First Defendant**
- and -	
Gladman Developments Ltd	**Second Defendant**

Mr Peter Wadsley and Mr Philip Robson (instructed by Legal Services, FDDC) for the Claimant
Mr Gwion Lewis (instructed by Treasury Solicitor) for the First Defendant
Mr David Elvin QC and Mr Peter Goatley
(instructed by Irwin Mitchell LLP) for the Second Defendant
Hearing date: 23 February 2016

HTML VERSION OF JUDGMENT

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. On 12 June 2014, the second defendant developer (whom I shall call "Gladman") applied for planning permission to build up to 85 dwellings and associated works on land north of Ross Road in Newent, GL18 1BE. In February 2015, the claimant (whom I shall call "FDDC"), refused that application. Gladman appealed and there was an Inquiry in late June/early July 2015. In a written decision dated 25 August 2015, the inspector allowed Gladman's appeal and granted outline planning permission.

2. By an application made pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act"), lodged on 5 October 2015, FDDC challenges the decision of the planning inspector. There are four grounds of appeal as follows:

> (1) Failing to consider and give reasons as to whether the site was a 'valued landscape';
>
> (2) Incorrectly applying the National Planning Policy Framework ("NPPF") at paragraph 134 and the test on harm to heritage assets;
>
> (3) Failing to consider the interaction between paragraph 134 and paragraph 14 of the NPPF and therefore applying the wrong test;
>
> (4) Inadequate reasoning.

3. Unusually perhaps, the first defendant (whom I shall call "SSCLG") expressly accepts that Ground 3, the failure to consider and apply the test created by the interaction between paragraphs 134 and 14 of the NPPF, has been made out. In consequence, SSCLG joins with the claimant, FDDC, in asking me to quash the appeal decision. Gladman do not accept Ground 3. In those circumstances, in order to save both time and costs, at the hearing I invited the parties to deal with Ground 3 only, although it was of course also necessary to deal with the issue of discretion and whether, if Ground 3 was made out, the inspector's decision would still have been the same.

4. The argument on these two points alone took almost all of the time allocated for the hearing on 23 February 2016. At the end of that hearing, I gave a short ruling in which I indicated that: a) FDDC's application on Ground 3 had been successful, together with brief reasons; and that b) it could not be said that, if the inspector had applied the right test, he would necessarily have reached the same answer. In those circumstances, I allowed the application to quash. I said that, in view of the importance of the point, not only for the parties, but for what I was told was the planning process generally, I would provide a fuller written judgment explaining the reasons for my decision. This is that Judgment.

2. THE RELEVANT LEGAL PRINCIPLES

1. **Section 288**

5. Section 288 of the 1990 Act provides as follows:

"288 Proceedings for questioning the validity of other orders, decisions and directions

(1) If any person—

(a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—

(i) that the order is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that order; or

(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—

(i) that the action is not within the powers of this Act, or

(ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

(2) Without prejudice to subsection (1), if the authority directly concerned with any order to which this section applies, or with any action on the part of the Secretary of State to which this section applies, wish to question the validity of that order or action on any of the grounds mentioned in subsection (1), the authority may make an application to the High Court under this section.

(3) An application under this section must be made within six weeks from the date on which the order is confirmed (or, in the case of an order under section 97 which takes effect under section 99 without confirmation, the date on which it takes effect) or, as the case may be, the date on which the action is taken.

(4) This section applies to any such order as is mentioned in subsection (2) of section 284 and to any such action on the part of the Secretary of State as is mentioned in subsection (3) of that section.

(5) On any application under this section the High Court—

(a) may, subject to subsection (6), by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

I note that this claim was brought under the unamended provisions of the 1990 Act, pursuant to which permission to make the application is not required. Thus the case

proceeded directly to a substantive hearing. The amended s.288 only applies to decisions taken on or after 26 October 2015.

2. **The Correct Approach to Section 288**

6. The correct approach to be adopted to a s.288 claim was set out in paragraph 19 of the judgment of Lindblom J (as he then was) in ***Bloor Homes East Midland Ltd v SSCLG*** [2014] EWHC 754 (Admin) as follows:

> "19. The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in ***Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26*** , at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in ***South Bucks District Council and another v Porter (No. 2)*** ***[2004] 1 WLR 1953*** , at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into *Wednesbury* irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann **in** ***Tesco Stores Limited v Secretary of State for the Environment*** ***[1995] 1 WLR 759*** , at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in ***Newsmith v Secretary of State for*** ***[2001] EWHC Admin 74*** , at paragraph 6).
>
> (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in ***Tesco Stores v Dundee City Council*** ***[2012] PTSR 983***, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, ***South Somerset District Council v The Secretary of State for the Environment*** (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in ***Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government*** [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. ***Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government [2013] 1 P. & C.R. 6*** , at paragraphs 12 to 14, citing the judgment of Mann L.J. in ***North Wiltshire District Council v Secretary of State for the Environment [1992] 65 P. & C.R. 137***, at p.145)."

3. **The NPPF**

7. During the hearing, numerous paragraphs within the NPPF were referred to. It would make this Judgment unnecessarily prolix if I set out all those paragraphs. In my judgment, the important paragraphs were as follows:

(a) Paragraph 14:

"At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.

For **plan-making** this means that:

- local planning authorities should positively seek opportunities to meet the development needs of their area;
- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
  - specific policies in this Framework indicate development should be restricted.[1]

For **decision-taking** this means:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or[2]
  - specific policies in this Framework indicate development should be restricted.9"

It is this second bullet point under 'decision-taking' that matters for the purposes of this case. Of the two alternatives applicable where the development plan is absent, silent or relevant policies are out-of-date, the first ("any adverse impacts…") was referred to at the hearing as Limb 1. The second, ("Specific policies…") was referred to as Limb 2.

(b) Paragraph 49:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

(c) Paragraphs dealing with conserving and enhancing the historic environment, including:

> "126. Local planning authorities should set out in their Local Plan a positive strategy for the conservation and enjoyment of the historic environment, including heritage assets most at risk through neglect, decay or other threats. In doing so, they should recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance. In developing this strategy, local planning authorities should take into account:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
> - the wider social, cultural, economic and environmental benefits that conservation of the historic environment can bring;
> - the desirability of new development making a positive contribution to local character and distinctiveness; and
> - opportunities to draw on the contribution made by the historic environment to the character of a place.
>
> …
>
> 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, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
>
> 133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
>
> - the nature of the heritage asset prevents all reasonable uses of the site; and
> - no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
> - conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
> - the harm or loss is outweighed by the benefit of bringing the site back into use.
>
> 134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use."

8. The NPPF itself has to be approached in accordance with the guidance referred to by Lord Reed in ***Tesco Stores v Dundee City Council*** (as set out in paragraph 19(4) of ***Bloor Homes***, above). The NPPF has also been recently considered by the Court of Appeal in ***Europa Oil and Gas Ltd v SSCLG*** [2014] EWCA Civ 825 in these terms:

> "13. Paragraph 90 of the NPPF is a policy statement which, in accordance with basic principle, "should be interpreted objectively in accordance with the language used, read as always in its proper context" (per Lord Reed JSC in ***Tesco Stores Ltd***.
>
> …
>
> 15. On the face of it, the NPPF is a stand-alone document which should be interpreted within its own terms. It even contains a glossary (Annex 2) which explains familiar planning terms such as "local plan" and "planning condition", cross-referring as appropriate to legislation…"

9. More particularly, paragraphs 132-134 of the NPPF were dealt with by Gilbart J in ***Pugh v SSCLG*** [2015] EWHC 3 (Admin). He noted at paragraph 49 of his judgment that paragraph 134 "can be a trap for the unwary if taken out of context" and he went on to say in paragraph 50:

> "There is a sequential approach in paragraphs 132-4 which addresses the significance in planning terms of the effects of proposals on designated heritage assets. If, having addressed all the relevant considerations about value, significance and the nature of the harm, and one has then reached the point of concluding that the level of harm is less than substantial, then one must use the test in paragraph 134. It is an integral part of the NPPF sequential approach. Following it does not deprive the considerations of the value and significance of the heritage asset of weight: indeed it requires consideration of them at the appropriate stage. But what one is not required to do is to apply some different test at the final stage than that of the balance set out in paragraph 134. How one strikes the balance, or what weight one gives the benefits on the one side and the harm on the other, is a matter for the decision maker. Unless one gives reasons for departing from the policy, one cannot set it aside and prefer using some different test."

4. **Heritage Assets**

10. Heritage assets and the correct approach to them was recently dealt with by the Court of Appeal in ***Barnwell Manor Wind Energy Ltd v East Northants DC*** [2014] EWCA Civ 137, and by Lindblom J in ***R (Forge Field Society) v Sevenoaks DC*** [2014] EWHC 1895 (Admin). At paragraphs 48-51 of his judgment in ***Forge Field***, Lindblom J said:

> "48. As the Court of Appeal has made absolutely clear in its recent decision in ***Barnwell***, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in ***Barnwell*** it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.
>
> 49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in ***Barnwell***, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.
>
> 50. In paragraph 22 of his judgment in ***Barnwell*** Sullivan L.J. said this:
>
> > "… I accept that … the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept

> that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in ***The Bath Society***] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"".

> 51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in ***South Lakeland*** (at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area "there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest". Sullivan L.J. said "[there] is a "strong presumption" against granting planning permission for development which would harm the character of appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight"" (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings "should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise" (paragraph 24). Even if the harm would be "less than substantial", the balancing exercise must not ignore "the overarching statutory duty imposed by section 66(1), which properly understood … requires considerable weight to be given … to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings" (paragraph 28). The error made by the inspector in ***Barnwell*** was that he had not given "considerable importance and weight" to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29)."

5. **Discretion**

11. Of course, even if the court concludes that the inspector may have made an error of law, the decision to quash is not automatic; it is a matter of discretion. In the ordinary case, the decision to quash will only be made if the court cannot say that, even allowing for the error, the decision would inevitably have remained the same. This approach was recently followed in ***Europa***. In that case, Ouseley J was not satisfied that, without the error made by the inspector as to the interpretation of 'mineral extraction', the decision would inevitably have been the same. The Court of Appeal agreed. They held that the judge was entitled to find that the decision might have been different but for the inspector's error and thus to exercise his discretion to quash the decision.

3. THE APPEAL DECISION

12. The inspector's appeal decision in the present case was dated 25 August 2015. For present purposes, it is necessary only to set out some of the paragraphs under two of the inspector's own headings: 'The setting of heritage assets' and 'The overall planning balance'.

13. As to the setting of heritage assets, the following paragraphs are relevant:

> "31. In my view the two fields that make up the appeal site contribute to the significance of the listed Mantley House Farm complex. In their current undeveloped state these fields provide an appropriate rural and tranquil setting for the farm house and the associated former farm buildings. In previous times there may well also have been a functional and historical link between the two as it is likely the fields would have been farmed as part of the extensive Mantley Farm estate. Consequently the appeal proposal would damage the rural setting of the Mantley Farm complex and erode the likely functional and historical relationship that existed between the farm and nearby fields. The effect would be particularly evident from Horsefair Lane as the views of the Mantley Farm complex sitting within a rural landscape would be lost.
>
> 32. It is clear from the Illustrative Masterplan for the appeal site that a real effort has been made to reduce the impact of built development and disturbance on the farm complex's immediate setting. To this end the south-western part of the site next to the Mantley House Farm complex would remain undeveloped and be given over to public open space, whilst the main access road off Ross Road would be located away from the western boundary. Furthermore extensive areas of planting are planned along the edge of the proposed private drives nearest to the farm buildings to provide a green edge to the open space and soften the impact of the new dwellings. I consider that the provision of such a sizeable open area on that part of the site next to the Mantley House Farm complex, together with the associated landscaping, would lessen the impact of the development on the immediate setting of this group of listed buildings. However it would not produce a setting of the same quality and characteristics as currently exists.
>
> 33. Having regard to the effects of the appeal scheme, the proposed mitigation and the high threshold required for 'substantial harm' I consider that the proposed development would cause 'less than substantial harm' to the Mantley House Farm complex in terms of *the Framework*."

14. As to the overall planning balance, the relevant paragraphs are set out below. I have put the critical parts in bold:

> "42. The Council cannot demonstrate a 5-year supply of deliverable housing sites and it would appear that the shortfall may be significant. Consequently all relevant policies for the supply of housing have to be regarded as out of date and accorded very limited weight. ***Paragraph 14*** **of the** ***Framework*** **makes it clear that in such cases planning permission should be granted, where relevant policies in the development plan are out-of-date, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in** ***the Framework*** **taken as a whole.**
>
> 43. I have identified adverse impacts of the appeal scheme. In particular I have concluded that the proposal would detract from the rural character and appearance of Horsefair Lane. I have also found that by causing 'less than substantial harm' the development would fail to preserve the special architectural and historic interest of the Grade II listed Mantley Farm complex and would harm the significance of Picklenash Court, a non-designated heritage

asset. These findings bring the scheme into conflict with elements of local and national planning policy.

44. I now turn to the weight that should be attached to these adverse impacts in the overall planning balance. As regards the adverse impact on the character and appearance of Horsefair Lane I believe that the visual harm would be fairly localised and confined to a particular part of Horsefair Lane. Consequently I attach only moderate weight to this consideration.

45. Given the statutory duty as regards listed buildings I am obliged to give considerable weight to the desirability of preserving the setting of the Mantley House farm complex in carrying out the balancing exercise, even though I have found that the harm would be 'less than substantial.' In my view, however, it is also necessary to take account of the fact that the appeal scheme provides for a substantial area of open space on the part of the appeal site next to the Mantley House farm complex. Although this would not replicate the current rural setting of this former farm it would ensure that the listed buildings continue to sit within an undeveloped area and away from other built development. Consequently whilst attaching considerable weight to the failure of the scheme to preserve the special architectural and historic interest of the Grade II listed Mantley House farm I believe that this needs to be tempered with my finding that the new setting created would allow the continued appreciation of these heritage assets within an undeveloped area.

46. Similarly the public open space to be created north of Ross Road would ensure that the non-designated heritage asset, Picklenash Court, retains an open setting to the front albeit of a different nature and extent than currently exists. As a result, taking account of the scale of this harm and the nature of the asset and its surroundings, only limited weight should be attached to the harm to the significance of Picklenash Court.

47. There are considerable public benefits associated with the appeal scheme and these need to be given substantial weight. *Paragraph 14* of the *Framework* makes it clear that sustainable development has three dimensions: economic, social and environmental. In my judgement the proposal would fulfil the economic role of sustainable development and would contribute to building a strong, responsive and competitive economy, by helping to ensure that sufficient land is available to support growth. There would also be associated economic benefits in terms of construction jobs, increased spending in the area, additional Council tax revenues, and the New Homes bonus. With reference to the social dimension the scheme would contribute to boosting housing supply, by providing a range of sizes and types of housing for the community, including a sizeable number of acutely-needed affordable housing units.

48. As regards environmental considerations Newent is recognised as a sustainable settlement and considered to be an acceptable location for accommodating new development. The appeal site is well located in terms of accessibility to the various facilities and services in the town and the development would help to support them. For longer trips alternatives to the private car are available with bus services available in the town. The proposed land to be given over to public open space would be of recreational benefit and footpath/cycleway links would be created across the site. There would be increased opportunities for ecological enhancement and habitat creation that

> would not arise if the land were to continue in its existing use. In due course a softer edge to the town would be created than currently exists. The site is available and it is likely that it could be developed within the next five years.
>
> 49. It is evident that I have identified adverse environmental impacts of the appeal scheme. **The essential test in cases such as this is not confined to the assessment of harm in isolation but rather whether the adverse impacts identified would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.** In this regard I have also identified a considerable number of economic, social and environmental benefits that would arise as a result of the appeal that need to be given substantial weight. In my judgement the limited number of adverse impacts identified in this case, and their localised nature, even when added together, would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. I therefore find that there are insufficient grounds for finding against the development and that when taken as a whole the appeal scheme would constitute sustainable development. Consequently the *Framework's* presumption in favour of sustainable development applies."

4. GROUND 3: DID THE INSPECTOR APPLY THE WRONG TEST?

1. The Principal Issues

15. The principal issues between the parties must be considered against the background of the matters that are not in dispute. It is agreed that the last bullet point in paragraph 14 of the NPPF (paragraph 7a) above) applies to this case, because the inspector found that FDDC's policy was out of date due to their inability to show a 5 year housing supply. Paragraph 49 of the NPPF was therefore engaged. It is also agreed that the inspector's findings in respect of the Mantley House Farm complex, a Grade II listed group of buildings, related to a designated heritage asset. Finally, it is agreed that the inspector found that the development proposal would lead to "less than substantial harm" to the significance of the Mantley House Farm complex. Accordingly, paragraph 134 of the NPPF, set out at paragraph 7c) above, is, on any view, directly applicable to this application.

16. Ground 3 of the s.288 application is in these terms:

> "Failure to consider the interaction between NPPF 134 and NPPF 14, Footnote 9, and applying the wrong test when balancing the harm and benefits of the development."

Essentially, Mr Wadsley (strongly supported by Mr Lewis for SSCLG) contends that, because the development plan is out-of-date, the presumption in favour of granting planning permission is disapplied in either of the two separate circumstances identified in the last bullet point of paragraph 14 of the NPPF (Limb 1 or Limb 2, set out at paragraph 7(a) above). FDDC and SSCLG submit that Limbs 1 and 2 cover different possibilities. They argue that, in circumstances where there is a finding of less than substantial harm to the significance of a designated heritage asset, the harm has to be weighed against the public benefits of the proposal. Crucially, they say that this balancing exercise must be carried out in the ordinary (or unweighted) way. They say that this is the test required by paragraph 134, and that it is the same test required by Limb 2 of paragraph 14, because paragraph 134 is a policy indicating that development should be restricted.

17. Mr Elvin, on the other hand, maintains that paragraph 134 is not a policy indicating that planning should be restricted, so that Limb 2 does not apply in this case. Further or in the alternative, he argues that the weighted balancing exercise required by Limb 1 of paragraph 14 should be 'read across' to the exercise set out in paragraph 134. He says that is what the inspector did, and therefore no criticism can attach to his decision.

2. **Limb 2 and Footnote 9**

18. Limb 2 of the last bullet point of paragraph 14 of the NPPF disapplies the presumption in favour of granting planning permission in circumstances where "specific policies in this Framework indicate development should be restricted." Footnote 9 gives examples of those policies. One of those policies is identified as relating to "designated heritage assets".

19. As I have said, the parties disagreed about whether Limb 1 or Limb 2 applied in this case. In consequence, there was a good deal of argument about whether footnote 9 was intended to be an exclusive list of the policies relevant to the test in Limb 2. There was also a debate about whether or not each of the paragraphs within the NPPF which set out the various policies referred to in footnote 9 had to be regarded as a policy indicating that development "should be restricted". Mr Elvin went so far as to say that, unless FDDC/SSCLG could show that each paragraph in the NPPF setting out every one of the policies noted in footnote 9 amounted to a planning restriction of some sort, they were bound to lose.

20. I am not sure that I derived very much assistance from either of these arguments. On the face of it, footnote 9 cannot be regarded as exhaustive, since it is plain that the policies which it set out were merely provided by way of example. But that does not affect the outcome of this case in any event, since "designated heritage assets" is one of those examples. And as to the second issue, it does not seem to me that either side's arguments necessarily stand or fall on showing, either that every paragraph of the NPPF dealing with the policies in footnote 9 could be said to restrict planning in one way or another, or that only certain paragraphs within the relevant sections of the NPPF needed to be restrictive in order for Limb 2 to apply. The first substantive issue for me is whether paragraph 134, dealing as it does with what happens if there is finding of a less than significant harm to a designated heritage asset, is a "specific policy [which] indicates development should be restricted", an issue I address in **Section 4.3** below.

21. However, before coming to that, I think it is worth giving one example of a policy which is expressly referred to in footnote 9, and which may therefore be regarded as a policy restricting development within the definition of Limb 2. That concerns the Heritage Coast. Although this is a policy referred to in footnote 9, the only express reference to the Heritage Coast in the body of the NPPF comes in the second bullet point of paragraph 114. This provides that:

> "Local planning authority should…maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes, particularly in areas defined as Heritage Coast, and improve public access to an enjoyment of the coast."

22. I accept Mr Wadsley's submission that this is a very general statement of policy. But its inclusion in footnote 9 indicates that the policy is considered to be, even in those general terms, restrictive. In my view, it can be regarded as a policy indicating that "development should be restricted" only because the general presumption in favour of development may not apply in areas defined as Heritage Coast, in consequence of the operation of paragraph 114. I note, as Mr Wadsley did, that Mr Elvin did not address this point, although it was expressly raised in Mr Wadsley's opening submissions.

3. **Is Section 134 A Policy Indicating That Development Should Be Restricted?**

23. Mr Elvin argued that paragraph 134 was not a restriction on development. Instead, he said, a restriction within the NPPF was something like paragraph 87, dealing with the Green Belt, which stipulates that "inappropriate development is…harmful to the Green Belt and should not be approved except in very special circumstances." His argument was that, because there was not such a clear prohibition in paragraph 134, paragraph 134 should not be regarded as a restriction on development.

24. I do not accept that submission for four reasons.

25. First, based on the words used in paragraph 134 in the context of the NFFP as a whole, I consider that paragraph 134 is a policy indicating that development should be restricted. Throughout the NPPF, there is a presumption in favour of sustainable development, and therefore in favour of granting permission. That is the default setting. However, certain specific policies within the NPPF indicate situations where this presumption does not apply and where, instead, development should be restricted. Paragraph 134 is, I think, one such policy.

26. Paragraph 134 provides for a balancing exercise to be undertaken, between the "less than substantial harm" to the designated heritage asset, on the one hand, and the public benefits of the proposal, on the other. The presumption in favour of development is not referred to and does not apply. Paragraph 134 is thus a particular policy restricting development. Limb 2 of paragraph 14 applies.

27. I should add that, although Mr Lewis submitted that it was always SSCLG's intention to create this route by which the presumption in favour of development will not apply, I have had no regard to that submission. It is irrelevant to the true meaning of paragraph 134 and Limb 2 of the last bullet point of paragraph 14. The policy is a function of the NPPF itself; not what counsel tell me that the SSCLG intended it to say. But in my view, the words used in paragraph 134 plainly constitute a restriction of development within the normal meaning of the words used.

28. Secondly, I think that it is appropriate to give the word "restricted" in Limb 2 of paragraph 14 a relatively wide meaning, to cover any situation where the NPPF indicates a policy that cuts across the underlying presumption in favour of development. The alternative is impractical. It is not a sensible approach to the NPPF for everyone involved in a planning application to comb through each of the policies referred to in footnote 9, to try and work out which paragraphs under each policy heading could be said to be unarguably restrictive of development, as opposed to those which, as a function of their wording, might be regarded as more nuanced. That is the sort of exercise which Mr Elvin attempts at paragraph 33 of his written submissions. In my view, it is an approach which runs the risk of construing the NPPF in an overly-prescriptive way, contrary to the principles set out in ***Tesco Stores*** and ***Bloor***.

29. At times, such as his submissions on paragraph 133 of the NPPF, Mr Elvin came close to urging that 'restricted' in paragraph 14 should be given the same meaning as the word 'refused'. I consider that this would be an incorrect interpretation of Limb 2; I agree with Mr Wadsley that it is significant that the policy could have said 'refused', but instead deliberately used the much wider word 'restricted'.

30. Thirdly, I consider that Mr Elvin's approach is not in accordance with the footnote itself. I have, at paragraphs 21 and 22 above, given the example of the Heritage Coast within the NFFP. The only reference to that policy in the whole of the NPPF is at paragraph 114, so

the footnote must therefore assume that paragraph 114 is restrictive of development. In my view it is, but only in the same way as paragraph 134 is restrictive, in that it is identifying a situation in which the presumption in favour of development does not apply. To that extent, the wording in paragraph 114 is even more general than in paragraph 134. But since the NPPF assumes that paragraph 114 is restrictive; *a fortiori*, so too is paragraph 134.

31. Fourthly, I have set out at paragraph 7c) above paragraphs 132 – 134 of the NPPF. They contain different tests: for example, paragraph 133 states that planning permission for a development which creates significant harm to a designated heritage asset should be refused, whereas paragraph 134 says that, if the harm is less than significant, it has to be balanced against the benefits. Yet there is nothing in footnote 9 which seeks to differentiate between those paragraphs or those tests. The footnote encompasses the entirety of the policy in relation to designated heritage assets, and therefore includes both paragraphs. Furthermore, as Gilbart J noted in ***Pugh*** (paragraph 9 above), those paragraphs have to be read together. This approach again supports the proposition that, albeit in their different ways, both paragraph 133 and paragraph 134 'indicate that development should be restricted'.

32. Accordingly, on a proper interpretation of the NPPF, I consider that the exercise at paragraph 134/Limb 2 needs to be undertaken when there is less than substantial harm to the significance to a designated heritage asset. I consider that this conclusion is in accordance with the principles noted in **Sections 2.2 and 2.3** above. Furthermore, on the face of it, this exercise would seem to involve an ordinary (or unweighted) balancing of harm and benefits. However, that point too is disputed by Gladman, and is therefore the second substantive issue which I have to decide.

4. **Does Paragraph 134 Import Limb 1?**

33. Further or in the alternative to his submission that paragraph 134 was not a policy indicating that development should be restricted, Mr Elvin argued that the balancing exercise in paragraph 134 was not an ordinary one. Instead, he said, the weighted balancing exercise envisaged in Limb 1 (that is to say, that the adverse effects of permission would "significantly and demonstrably outweigh the benefits") should be imported - or as he put it, 'read across' - into paragraph 134. He submitted that there was no difficulty with interpreting paragraph 134 as importing that weighted test: indeed, he said, that was in accordance with the NPPF and the presumption in favour of development and the granting of planning permission.

34. I do not accept that submission. It seems to me that it is wholly inconsistent with the words of paragraph 134 itself, which make plain that the balancing exercise is of a standard type, without any weighting. There is no reason to import the weighted test from Limb 1 of the last bullet point of paragraph 14 into paragraph 134, when the words of paragraph 134 can be read entirely satisfactorily without them. Reading across in this way would be unnecessary and over-complicated. Moreover, without any signpost of any sort, it would be unwarranted. It would be contrary to the natural meaning of the words used.

35. Accordingly, I do not accept that the balancing exercise envisaged in paragraph 134 is anything other than the ordinary (unweighted) test described by its wording. I do not consider that the test in Limb 1 can or should be read across in the way submitted.

36. There is a further point. I accept Mr Lewis' submissions that, in respect of Limb 1, the weighted balancing exercise is of broader scope because it involves an assessment "against the policies in this framework taken as a whole". Accordingly, the exercise in Limb 1 is designed to take into account everything, not just the specific policies of restriction referred

to in Limb 2. Again that suggests that Limbs 1 and 2 are different and separate exercises and there would be no need to read across the test in Limb 1 to any of the specific policies which restrict planning, referred to in footnote 9.

37. The two alternative Limbs also make sense as a matter of policy. It means that Limb 2 encompasses the standard balancing exercise in circumstances where there is a policy of restriction on development. But if the result of that standard balancing exercise comes down in favour of development, notwithstanding the restriction, then it is rational that the broader review under Limb 1, where the whole of the NPPF is considered, should be a weighted exercise, so as to give impetus to the presumption in favour of development.

5. **The Presumption in Favour of Preserving Listed Buildings**

38. I have set out in **Section 2.4** above the law relating to heritage assets, including the extract from the judgment in ***Forge Field***. This makes plain, amongst other things, that, when a development will harm a listed building or its setting, the decision-maker must give that harm considerable importance and weight. That harm alone gives rise to a strong presumption against the grant of planning permission. This is of course linked to the SSCLG's duty under s.66 of the *Planning (Listed Buildings and Conservation Areas) Act* 1990 identifying the requirement on the part of the local planning authority or the SSCLG "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

39. It is plain that the inspector in this case was aware of the considerable weight and importance to be given to the desirability of preserving the setting of the Mantley House Farm complex: see paragraph 45 of his decision. But I consider that the appropriate place for that considerable weight to be applied was as part of the ordinary balancing exercise under paragraph 134 of the NPPF. Because the inspector did not undertake the ordinary balancing exercise required by paragraph 134, it follows that the considerable weight to be given to the preservation of listed buildings, let alone the presumption against granting permission in such situations, has been at best diluted, and at worst, lost altogether.

40. I note that the inspector himself says that considerable weight has to be given to this issue "in carrying out the balancing exercise". But since the balancing exercise that he undertook was only the weighted balancing exercise under Limb 1, and not the ordinary balancing exercise under Limb 2/paragraph 134, there is a very real risk that the important guidance in ***Forge Field*** was not fully followed.

41. For these reasons, I can see why (albeit very late) Mr Lewis prayed in aid the submission that the SSCLG's obligation in respect of listed buildings could only properly be discharged if paragraph 134 and the Limb 2 exercise was undertaken in the way I have indicated. Whilst Mr Elwin was entitled to complain that this point had not been in Mr Lewis' skeleton argument, it did seem to me to be a matter which was of some importance and therefore fell to be considered by the court. In any event, I consider that it was foreshadowed at paragraphs 54-57 of Mr Wadsley's skeleton argument. Having considered the issue, I agree with Mr Lewis and Mr Wadsley that it does provide further support for FDDC/SSCLG's case on Ground 3.

6. **Other Decisions**

42. Both sides endeavoured to support their respective positions by reference to other appeal decisions, whether they were decisions by planning inspectors or decisions by the SSCLG expressly agreeing or confirming the approach of the planning inspector. We looked principally at three of these, concerning proposed developments at:

(a) Highfield Farm, Tetbury, Gloucestershire (APP/F1610/A/11/2165778);

(b) New Haine Road, Ramsgate, Kent (APP/Z2260/A/14/2213265);

(c) The Hawthorns and Keele University Campus, Keele, Newcastle-Under-Lyme (APP/P3420/A/14/2219380; APP/P3420/E/14/2219712).

In each of these cases, the SSCLG had written agreeing with the conclusions of the relevant inspector.

43. I was not persuaded that the decision in relation to Highfield Farm was of any particular relevance because there the restriction on development applied under Limb 2 of paragraph 14 was in respect of Areas of Outstanding Natural Beauty. I accept that the restrictions on development set out in the NPPF relating to such Areas are, on any view, clear-cut.

44. As to the decision in relation to Ramsgate, it seems to me that that is of some assistance because, at paragraph 118 of his decision, the inspector concluded that the harm was outweighed by the significant benefit of the development. That was undertaken as an ordinary Limb 2 balancing exercise, even if it is not recorded in those terms. Having found that the presumption in favour of development was not switched off as a result of the Limb 2 exercise, the inspector properly applied the weighted test in Limb 1, and concluded that there were no adverse impacts that significantly and demonstrably outweighed of the benefits of the development.

45. However, by far the clearest application of Limbs 1 and 2 of paragraph 14 of the NPPF can be found in the decision relating to the University of Keele. In that case the SSCLG expressly agreed with the inspector's conclusions at paragraphs 265-276. At paragraphs 266-268, the inspector said as follows:

> "266. The Framework establishes that sustainable development should be seen as a golden thread running through both plan-making and decision-taking. Paragraph 49 advises that housing applications should be considered in the context of the presumption in favour or sustainable development. However it goes on to say that relevant policies for the supply of housing should not be considered up-to-date if the Council cannot demonstrate a 5 year supply of deliverable housing sites. That is the case here and in such circumstances the housing supply policies in the LP are not up-to-date, including those relating to the location of housing. The weight to be given to the policy conflict is therefore reduced. In such circumstances the relevant policy comes from Paragraph 14 of the Framework. Paragraph 14 contains two limbs and it is clear from the word "or" that they are alternatives.
>
> 267. The first limb requires a balance to be undertaken whereby permission should be granted unless the adverse impacts significantly and demonstrably outweigh the benefits, when assessed against policies in the Framework as a whole. The second limb indicates that the presumption should not be applied if specific policies indicate development should be restricted. If the Secretary of State does not agree with my GB conclusion, the second limb would apply. Footnote 9 however gives other examples, including those policies relating to designated heritage assets. I have concluded under Consideration Three that the proposal would be harmful in these terms. There was some debate about whether the restriction applies only to cases of substantial harm under Paragraph 133.

> 268. However the Council makes a persuasive point that Footnote 9 refers to policies in the plural, which would mean the inclusion of circumstances where there is less that substantial harm as well. It seems to me that if the second limb was only expected to apply to heritage assets where there was substantial harm it would have said so. Whilst Paragraph 133, albeit that this is more stringent as one would expect. In the circumstances the presumption doe not apply in this case and it is necessary to balance benefits and harms in accordance with Paragraph 134 of the Framework..."

46. In my judgment, this decision applies Limbs 1 and 2 in the last bullet point of paragraph 14 in precisely the way I would have expected. I accept that the SSCLG's endorsement of this decision is consistent with the approach that he now takes in agreeing with FDDC that, in this case, in respect of Ground 3, the inspector erred in law. Beyond that, it does not seem necessary for me to go.

7. Conclusions

47. For these reasons, I am satisfied that the inspector erred in law in not adopting the same approach as the inspector in the Keele University case. The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law.

5. DISCRETION

48. Of course, I would not quash the inspector's decision, despite the fact that both FDDC and the SSCLG wish me to do just that, if I considered that, allowing for the correction of the error, the inspector would have come to the same conclusion (**Section 2.5** above). However, I cannot be satisfied that the inspector would have reached the same conclusion. There are three reasons for that: one general and two particular.

49. In general, it is always difficult to say that a decision-maker who applied the wrong test in law would inevitably have reached the same conclusion even if he had applied the right test. That is particularly so where, as here, the test in Limb 1 is weighted very firmly in favour of the benefits of development, whilst the ordinary test in paragraph 134 is not. It is a bit like comparing the test to be applied in a criminal case and the test to be applied in a civil case. The results may be the same; but it is difficult to be sure that they would inevitably be the same.

50. The first particular reason why I cannot be sure that the same result would eventuate is set out in paragraphs 38-41 above, in connection with listed buildings. The considerable weight to be given to the harm done to the Mantley House Farm complex in an ordinary planning balancing exercise may make a critical difference.

51. The second arises from paragraphs 41-49 of the decision, where the inspector makes a number of findings of harm to which he attaches weight of various kinds. Thus he attaches *moderate* weight to the adverse impact on character and appearance of Horsefair Lane (paragraph 44 of the decision); *considerable* weight to the desirability of preserving the setting of the Mantley House Farm complex (paragraph 45); and *limited* weight to the harm to the non-designated heritage asset, Picklenash Court (paragraph 46). Against those matters, the inspector identifies a number of considerable public benefits in paragraphs 47

and 48. It is not difficult to see why he concluded that the adverse impacts would not significantly and demonstrably outweigh the benefits. But it is impossible to be sure that, as part of an ordinary balancing exercise, the harm he identified would not outweigh the benefits.

52. Accordingly, like the court in ***Europa***, I cannot be sure that this error of law made no difference to the outcome. It may have made no difference; equally, it may have made a significant difference. For those reasons therefore, in the exercise of my discretion, it is proper to quash the decision on Ground 3. I reiterate that, for the reasons noted above, I have not considered Grounds 1, 2 and 4 of the application to quash the appeal decision.

Note 1 For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion. [Back]

Note 2 Unless material considerations indicate otherwise. [Back]

Appendix 2 – Planning Appeal Decision: APP/E2530/W/17/3181823 – Land off south side of Kettering Road, Stamford, Lincs PE9 2JS

The Planning Inspectorate

Appeal Decision

Site visit made on 7 February 2018

by Zoe Raygen Dip URP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9th March 2018

Appeal Ref: APP/E2530/W/17/3181823
Land off south side of Kettering Road, Stamford, Lincs PE9 2JS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Kier Homes against the decision of South Kesteven District Council.
- The application Ref S14/3078, dated 31 October 2014, was refused by notice dated 9 February 2017.
- The development proposed is described as residential development comprising 39 houses and associated parking spaces and garages together with access road and turning areas, open space and landscaping, foul water pumping station, surface water balancing pond and open space.

Decision

1. The appeal is allowed and planning permission is granted for residential development comprising 29 houses and associated parking spaces and garages together with access road and turning areas, open space and landscaping, foul water pumping station, surface water balancing pond and open space at land off south side of Kettering Road, Stamford, Lincs PE9 2JS in accordance with the terms of the application, Ref S14/3078, dated 31 October 2014 subject to the conditions set out in the schedule to this decision notice.

Procedural Matter

2. A planning obligation under section 106 of the Town and Country Planning Act 1990 (as amended), in the form of a Unilateral Undertaking (UU) has been submitted as part of the appeal. The UU is a material consideration and I return later to consider its specific provisions in more detail. At my request the Council submitted a Planning Obligations and Community Infrastructure Levy (CIL) Compliance Statement. I have had regard to this document in my consideration of the appeal.

3. During the course of the planning application the subject of this appeal the number of houses was reduced from 39 to 29. I have therefore dealt with the appeal on that basis.

Background and Main Issue

4. A proposal for the erection of 48 houses at the appeal site was dismissed at appeal in 2015 (APP/E2530/A/14/2229265 – referred to as the previous appeal decision). The Inspector considered that the benefits of the proposal did not outweigh the harm that she found to designated and non-designated heritage

assets caused by the proposal. The appeal decision is a material consideration in the determination of this appeal.

5. Within that context, the main issue is the effect of the proposal on the character and appearance of the area, having particular regard to the setting of designated and non-designated heritage assets.

Reasons

6. The National Planning Policy Framework (the Framework) clearly defines the setting of a heritage asset as the surroundings in which such an asset is experienced. 'Significance' has a particular meaning in heritage policy terms and is defined as the value of a heritage asset because of its heritage interest which may be archaeological, architectural, artistic or historic. The glossary confirms that significance can be derived from a setting as well as the asset's physical presence.

7. Both parties refer to case law regarding the setting of heritage assets[1]. I have had regard to these, advice in the Framework, advice from Historic England, the previous appeal decision, the evidence before me and observations from my site visit in my assessment of the setting of the various designated and non-designated heritage assets in this case.

8. The appeal site lies to the south of the main built up area of Stamford. Stamford Conservation Area (CA) covers a large part of the town, with the appeal site being close to the defined St Martin's area within the Stamford Conservation Appraisal (the SCA). From the evidence before me and my observations on site, the significance of the CA is largely derived from the number of high quality listed buildings, together with the use of traditional materials, and the siting of the buildings and their relationship to each other. The SCA lists the key characteristics of the St Martins area of the CA as its medieval street pattern; the high concentration of listed buildings; the building materials; and the use of features such as chimneys, dormer windows and boundary walls.

9. The setting of this part of Stamford plays a part in the significance of the CA. The almost instant change from the rural approach of the Old Great North Road to the townscape of Stamford, with historic buildings set on the back edge of the pavement, provides a dramatic point of entry to the CA. Here a sense of enclosure takes over from the open, rural character of the approach to the town.

10. The mainly developed northern side of Kettering Road provides a stark contrast to the mostly open, undeveloped nature of the southern side where the appeal site is located. There are some houses on Pinfold Lane on the south side of Kettering Road. However, these are few in number, and are large detached houses set in significant plots which are well landscaped. As a consequence, they are not particularly obtrusive within the open countryside. Furthermore, the presence of playing fields and a small pavilion on the south side of Kettering Road do not substantially detract from its overall rural appearance.

11. In views from the south across to Stamford, including from First Drift and Wothorpe Park, the abrupt change from open countryside to the elevated built up area of Stamford with its closely packed roofscape punctuated by church steeples, can be clearly seen.

[1] Regina (Williams) v Powys County Council [2017] EWCA Civ 427
Steer v Secretary of State for Communities and Local Government and Others: Admn 22 Jun 20

12. From the evidence before me, the significance of the key listed buildings[2] near to the appeal site is largely derived from their historic form and particular architectural features. Fryers' Callis is a terrace of almshouses with gardens to the front enclosed by a brick wall sited on the corner of Kettering Road and Wothorpe Road. Its setting has been improved by the redevelopment of the adjacent football ground, which has allowed the removal of unsightly structures near to the buildings. These will be replaced by an area of open space, which will allow the almshouses to be separated from surrounding development by gardens and open space.

13. As a result, appreciation of the architectural importance of Fryers' Callis would be apparent from views along both directions of Kettering Road. I saw at my site visit that the open land on the opposite side of the road to Fryers' Callis allows views from the south towards the almshouses. I do not doubt that such views are enjoyed by local residents and walkers in the area. Nevertheless, I observed that in distant views the architectural importance and function of the building is barely discernible. Although the building marks the edge of the urban development on the north side of Kettering Road, I have seen no substantive evidence to suggest that the houses were meant to be appreciated in such extensive views from the surrounding countryside, to an extent that would contribute substantially to their heritage significance. As a result, the long distance views, in my opinion, add little to the significance of the terrace itself.

14. However, the rural approach to Stamford in this area does emphasise the significance of Burghley House, a grade I listed building, and its Bottle Lodges set within a grade II* registered park and garden, and its relationship to Stamford, reinforcing its status as an important country house. While the presence of the Old Great North Road and the traffic and consequent noise does have some impact on the rural setting of the buildings, I found at my site visit that such intrusion is largely subservient to the predominant rural open countryside setting. Furthermore, although there are hedges and trees along Old Great North Road, there are clear views of the southern part of the site from the road, including from the Bottle Lodges.

15. To the south of the site is Wothorpe, and my attention has been drawn both to its designation as a Special Character Area, and the presence of a listed building grade II known as The Elms. Wothorpe forms a small grouping of buildings of a variety of ages and designs. They are set in an elevated position with respect to Stamford, mostly in large plots with a high level of planting giving an open verdant character to the area. As a consequence, I regard Wothorpe Special Character Area (WSCA) as a non-designated heritage asset. The Elms is sited close to Wothorpe Park and has a main outlook over the countryside towards Stamford. Its significance is mainly derived from its architectural importance. Nonetheless, the open rural setting contributes to the significance of the Elms as well as to that of the WSCA.

[2] Fryers' Callis almshouses– Grade II,
Burghley Park Bottle Lodges, gateway arches, gates and flanking walls – Grade II (referred to collectively as the Bottle Lodges)

16. Bearing all the above in mind, the open countryside setting of some of the heritage assets contributes to their significance. Pursuant to section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, special regard is to be had to the desirability of preserving, among other things, the setting of listed buildings. No statutory protection is afforded to the setting of Conservation Areas. However, paragraph 132 of the Framework sets out that the significance of a heritage asset can be harmed or lost through development within its setting. Paragraph 135 of the Framework confirms that the effect of a proposal on the significance of a non-designated heritage asset should also be taken into account in determining any application.

17. The appeal site is located to the south of Kettering Road. It is open and undeveloped with hedgerows and some trees. Although set back from the Old Great North Road behind hedgerows, it is visible from the road as Stamford is approached from the south. Furthermore, the appeal site is visible from views from Old Drift and Wothorpe. Public footpaths extend from Wothorpe through the appeal site into Stamford and the surrounding countryside. Hence the appeal site is particularly visible in views towards Stamford from the south and in views from within the site to surrounding heritage assets. Although itself it has no special designation, the open, undeveloped nature of the appeal site, together with its location close to the urban area of Stamford means it makes a significant, positive contribution to the rural character of the area, and the setting of the nearby heritage assets and the town.

18. The appeal site is allocated for an indicative number of 50 dwellings within Policy STM1 of the Local Plan for South Kesteven Site Allocation and Policies Development Plan Document 2014 (DPD) (Site reference STMa1). I note that the Council is in the early stages of preparing a new Local Plan, within which, I am advised by various parties, the site is under consideration to be de-allocated. However, the plan is at a very early stage of preparation, and has not yet been the subject of examination. Therefore, I give its contents very limited weight.

19. Accordingly, although it is now some time since the adoption of the DPD, I have seen no substantive evidence to suggest that the principal of housing is not acceptable on this site. However, given the nature of the site, it is inevitable that development would result in a change to the character of the area. As I have found that the appeal site is within the setting of a number of heritage assets, then both local and national policy require that any change is carried out in a sensitive manner. An explanatory note within Policy STM1 states that the development of this site should preserve and enhance the setting of Stamford and nearby heritage assets. The quantum of houses built on the site must be supported by a heritage impact assessment which demonstrates the layout and design of a proposal will not adversely affect the approach to the town and nearby heritage assets and preserves local distinctiveness.

20. In the previous appeal decision the Inspector highlighted a number of areas where the proposed scheme did not accord with the submitted Heritage Impact Assessment, or the Landscape and Visual Appraisal. These were that the development would not be set back from the southern boundary of the site and the design of the proposal would not result in a landscape dominated street scene or take account of its impact from London Road (Old Great North Road) on the Burghley Lodges and west gate, where new development on the site should appear as rooftops within groups of trees.

21. A new Heritage Statement 2017 (HS) and updated Landscape and Visual Assessment 2016 (LVA) have been submitted with this appeal. The LVA outlines a landscape strategy for development of the site which it considers would allow the development to appear as roof tops within groups of trees to protect the surrounding cultural and historic assets. If this were to be achieved, the HS concludes that the proposal would not be materially harmful to the setting and significance of the heritage assets.

22. The number of houses has been significantly reduced from that considered under the previous appeal proposal. There is dispute between the parties as to whether the reduction in houses numbers has led to a substantial reduction in a commensurate amount of floorspace and therefore built development on the site. The Council consider that due to a limited reduction in actual floorspace, together with the presence of parking areas, the layout has the appearance of a suburban estate with little reference to Stamford. Irrespective of the amount of floorspace proposed, the houses have been laid out in a form which according to Historic England represents the character of a back lane sometimes historically found on the approach roads into Stamford. As a result the layout has some historical integrity.

23. Nevertheless, the layout consists of houses sited with minimal gaps between them, creating almost solid lines of development within the site. Furthermore, although I note that it is agreed that the amount of surface parking is reduced, within the appeal proposal from that proposed in the previous appeal scheme, it still exists. This, together with the proximity of the buildings to each other and the amount of built development, would leave only limited space for planting within the site itself as recommended within the LVA. Furthermore, the development as a whole would still need to satisfactorily integrate into the rural character of the southern side of the road.

24. Most of the planting along Kettering Road would be retained, and I saw that even in winter, due to the amount of planting and its density, this provides an effective screen. As a result, the proposed houses along the part of the site fronting the road would be set back creating an open frontage. I note that this follows the approach suggested in the LVA. Consequently, the open setting of Fryers' Callis would be maintained. Furthermore, the rural setting of the CA on the south side of the approach into Stamford along Kettering Road would be preserved. While the Council points to the loss of the views of Fryers' Callis from First Drift, I am not convinced that the heritage significance of these relative small domestic structures would be materially harmed through the loss of that view.

25. The houses would extend no further back in the site than those on Pinfold Lane to the east. As a result a large area between the back of the houses and the southern boundary of the site would be retained and would be extensively landscaped and planted. This would introduce an area of planting which would supplement the existing trees and hedgerows on the southern edge of the appeal site. Furthermore, the dwellings located along much of the southern extent of the built development would be arranged with rear gardens to the south. The layout would, therefore, be fairly loose and responsive to the site's location at the edge of the settlement. As a result, I would concur with Historic England that the open area would have much of the character of the existing rural setting of the designated heritage assets affected, and of key approaches to them.

26. The LVA indicates that planting would be in the form of native species. It is likely therefore that there would be a high proportion of deciduous species which would lose their leaf during the autumn and winter months. Nevertheless, I saw at my site visit that even in winter, established planting, if in the correct location and of an appropriate density, is still capable of not only giving a rural appearance to an area, but also softening views of buildings.

27. Tree planting within the developed area of the site would be largely confined to narrow landscaping strips, often close to houses and car park spaces, and it would be unlikely to achieve the green corridors as envisaged within the LVA. Nevertheless, combined with the significant landscaping to reinforce the existing planting around the site, together with the set back of the dwellings from the southern boundary, the planting within the site would allow the development to achieve a softer, more gradual transition between the built up area and the rural landscape. The deeper planting would also reinforce the visual screening of the development in views from the south and go some way to ensuring that the buildings, although presenting a solid form of development, particularly between plots 10-16, would be effectively blended into the countryside in views from the south as envisaged by the Inspector at the time of the examination of the DPD.

28. The Council raises concerns about the extent of the tree planting itself obscuring views towards Stamford. However, given the topography of the area I am satisfied that this would be an unlikely occurrence, and certainly not evident from the mature trees in the landscape as exists.

29. Turning to the houses themselves, the Council refers to the height of a number of the proposed houses particularly in the north eastern corner of the site, and the consequent impact this may have on views across to the CA, Fryers' Callis and the churches of St Marys and St Martins, both listed buildings. I note that paragraph 4.3 of the South Kesteven Landscape Character Assessment states that the views of the town centre and church towers and spires should be protected. However, I have seen no substantive evidence that the proposed two, and two and a half storey houses would be of a height that would significantly interfere with the view of the CA and listed buildings to such an extent to harm their significance.

30. At my site visit I saw that the church spires rise above the main roofscape of Stamford which, due to its elevated nature, was also very apparent. Indeed this is evident in photographs supplied by the Council in its statement. The dip in land levels where the appeal site is located should ensure that views across to Stamford and its roofscape, including the churches are maintained. While the appeal site has undulating levels, I am also mindful that the Inspector at the time of the DPD examination considered that because it is on lower ground, the views towards historic Stamford would not be obscured in any way.

31. The design of the houses proposed includes many of the typical architectural features found within Stamford as identified within the SCA including chimneys and dormer windows. As a result, while a number of different "house types" would be used within the development I do not find the individual appearance of the houses to be offensive or unacceptable. The SCA identifies that the predominant building material within the St Martins part of the CA is stone with either coursed rubble masonry or ashlar for the higher status buildings. Given the proximity of the appeal site to the CA then careful consideration needs to be given to the materials to be used in the development, and I share

the concerns raised by various parties regarding the quality of the materials proposed by the appellant. Nevertheless, I also concur with the view of the Inspector on the previous appeal that this is a matter that could adequately be dealt with by the imposition of a condition seeking the submission and agreement of samples of materials to be used, if the appeal were to be allowed.

32. The footpaths within the site would be diverted for a short distance within the appeal site, and therefore would be protected in accordance with paragraph 75 of the Framework, inasmuch as they would not be extinguished. While the experience of users of the footpath would be altered, particularly within the built up area of the site, this would only be for a short distance at the north of the site, where long distance views of Stamford are not as readily appreciated as from the southern part of the appeal site.

33. Bringing all of the above together, I find that the contribution the site currently makes to the rural setting of the CA, the Bottle Lodges, Burghley Park, The Elms and the WSCA would be diminished to some degree. Furthermore, the layout and siting of the houses, although having some historical integrity, would nevertheless present a mass of built suburban development which would result in some harm to the character and appearance of the area. However, in the context of this being an allocated site at the present time, the combination of the location of the housing away from the southern boundary, their design and appearance, together with the proposed and existing planting means the effect would be visually contained and would limit the harm both to the character and appearance of the area generally and to the significance of the designated and non-designated heritage assets.

34. I have considered the computer generated images (CGI) supplied. These show the appeal site from a point likely to be to the south of the site and from Kettering Road. I viewed the appeal site from these locations and from First Drift, and a number of other locations as suggested by the Council and other interested parties during my visit. The CGI shows the development within the summer months when the trees are in full leaf. The Council suggest that the CGI has not been updated from the previous proposals, and this has not been disputed by the appellant. However, even if this is the case, the CGI from a southern viewpoint still demonstrate that the development would be viewed as a roofscape within clusters of trees. While the CGI images have not therefore been definitive in themselves, they reinforce my view that the harm to the significance of the heritage assets would be limited, but not absent.

35. I am aware that the Council granted planning permission for the comprehensive redevelopment of the former football club for housing (S11/2300/MJRO) and construction of the dwellings was underway at the time of my site visit. In approving this application the Council considered that the development would not adversely affect the setting of the adjacent listed buildings or the conservation area. However, this site is on the northern side of Kettering Road within the established built up area of Stamford. Furthermore, it was a brownfield site. Consequently, its characteristics and relationship to surrounding heritage assets is different from the site before me now. In any case, I have determined the appeal based on its own merits.

36. For the reasons above therefore, notwithstanding the conclusions of the HS, I conclude that the proposal would cause some harm to the character and appearance of the area having particular regard to the setting of designated and

non-designated heritage assets. It would therefore be contrary to Policy STM1 of the DPD and Policy EN1 of the Local Development Framework for South Kesteven Core Strategy 2010 and paragraph 17 of the Framework which require that development must be appropriate to the character and significant natural, historic and cultural attributes and features of the landscape within which it is situated, and contribute to its conservation, enhancement or restoration and take account of the different roles and character of different areas.

Unilateral Undertaking

37. Policy H3 of the Core Strategy 2010 requires a target provision of 35% affordable housing on all developments comprising 5 or more dwellings. For a scheme of 29 dwellings, this would equate to a provision of up to 10 affordable units. However, the UU provides for a total of 13 affordable units, four of which would be on site and nine within an existing development in Bourne which already has planning permission.

38. While the majority of the affordable homes would be located off-site, the Council raises no objections to this provision which it states has been supported to help with the viability of the appeal scheme. I have seen no substantive evidence which would lead me to a different conclusion. While objectors refer to a draft neighbourhood plan, prepared by Stamford First, which states that affordable housing should be provided on-site, I understand the plan is at a very early stage of preparation having only gone through a first round of public consultation, and therefore carries very limited weight.

39. Policy SAP10 of the DPD provides standards for the provision of open space within new developments. The Council confirms that in order to comply with this Policy as well as the open space that would be provided on the appeal site a contribution of £22,292.10 would be required towards an equipped area of open space. The UU secures such a contribution towards the provision or upgrading of open space and/or a play area at The Meadows in Stamford.

40. I am therefore satisfied that the proposed contributions and requirements contained within the UU would be necessary to make the development acceptable, are directly related to the development and fairly and reasonably related in scale and kind to the development. Furthermore, the Council has confirmed in its CIL Compliance Statement that there are no more than five completed obligations which would contribute to the play area at The Meadows or other play areas if required. Therefore the UU would comply with both the contents of Regulation 122(2) and 123 of the Community Infrastructure Levy Regulations 2010 and paragraph 204 of the Framework.

Other matters

41. I have been referred to two appeal decisions regarding the erection of housing close to The Elms within the WSCA (APP/J0540/W/17/3181276 and APP/J0540/A/12/2186590). However, these proposals were for only two and one dwellings respectively, sited close to the Elms. I am of the opinion that the appeal before me now, for significantly more houses located on a site a much further distance from the Elms raises different issues, and the cases are not directly comparable.

42. The closest existing residential properties to the proposed housing would be those on Pinfold Lane. I saw on site though that there would be a generous

distance between the proposed and existing dwellings, which would ensure that levels of privacy would be maintained, and residents' outlook would not be materially harmed.

43. Considerable objection has been raised to the level of traffic that would be generated by the proposed houses. The appellant has submitted a Transport Statement and a Green Travel Plan which demonstrates that the proposed site access and the junction of Kettering Road and High Street St Martin's would have capacity at peak times if the development were to take place. I note that the Highway Authority has not raised any objection to the proposal. Furthermore, I saw that the appeal site is in walking distance of a number of local facilities and services, and therefore would be in an accessible location by means other than the private car. In the absence of any substantive evidence to the contrary therefore I am satisfied that the proposal would not be materially harmful to highway safety.

44. Concerns have also been raised regarding drainage and the potential for flood risk. However, I note that the appeal site is within Flood Zone 1 and the Environment Agency, Lead Flood Authority, Anglian Water and the Internal Drainage Board have all raised no objections to the proposals, subject to relevant conditions. I have seen nothing which would lead me to take a contradictory view to these acknowledged experts.

45. I was unable to access Wolthorpe Park and the Elms at the time of my site visit. Nevertheless, I am satisfied that from the many vantage points from which I viewed the proposals, I was able to have a good appreciation of the two heritage assets, their open countryside setting and the contribution that makes to their significance, along with the impact the appeal proposals would have on that setting and significance.

Conclusion

46. In as much as there would not be any loss of a listed building or direct impact on the character or appearance of the CA, and given that the setting of the CA as seen from the south is but one component of its overall significance, I am satisfied that the harm I have identified to the significance of the heritage assets can, in the language of paragraph 134 of the Framework be considered as less than substantial.

47. The Inspector on the previous appeal also found that the proposals caused less than substantial harm, but she did not seek to assess the level of harm within that categorisation. I note that the adjacent planning authority did not object to the current appeal proposal as it considered that it would have a low impact on the WSCA and it would not result in harm to the heritage significance of the Elms. Furthermore, Historic England describes the "reduced impact" of the scheme in its letter to the Council regarding the proposal dated 29 November 2016. After careful consideration, having found that the harm to the character and appearance of the area and hence the setting and significance of the heritage assets would be limited, then I am satisfied that the level of harm would be towards the lower end of less than substantial harm.

48. However, as raised by the Stamford! Protect Our Green Space group, the courts have confirmed that less than substantial harm does not equate to a less than substantial planning objection and that any such harm is to be given considerable

weight[3]. Paragraph 134 of the Framework requires that less than substantial harm be weighed against the public benefits of the respective proposals.

49. The proposal would deliver social and economic benefits by providing 29 new homes in an accessible location on the edge of Stamford. In this respect, the development would make a modest contribution to meeting housing requirements and choice in the district on an allocated site whilst supporting local services and businesses. There would also be temporary economic benefits arising from the construction activity required to deliver the development.

50. The appellants identify that the Council is able to demonstrate a 5.3 year housing land supply. Many of the objectors have stated that the site is not required for housing as enough has both been allocated to the north of the town and is currently under construction. Nevertheless, the allocation within the DPD weighs in favour of the proposal, as it forms an integral part of the Council's housing supply. Although the indicative allocation was for 50 dwellings, the previous appeal decision was clear that the proposal for 48 dwellings made a significant unacceptable impact on the significance of heritage assets. It is unlikely therefore, that notwithstanding the comments of the Inspector at the time of the examination of the DPD, that the indicative number of dwellings could be achieved on site in such a way as to provide sufficient protection to the significance of the various heritage assets. While I have seen no substantive evidence to suggest that the inability to achieve 50 dwellings on the site would lead to the Council being unable to demonstrate a five year housing land supply, the reduction to 29 dwellings only would clearly have some impact on the supply figure.

51. In addition, Policy H1 of the Local Development Framework for South Kesteven Core Strategy 2010 states that housing figures are minimum levels of growth rather than maximum. Moreover, even if this site were not to be developed and the Council still had a five year housing land supply there is nothing in the Framework to suggest that the existence of a five year supply should be regarded as a restraint on further development. In this context, I attach considerable weight to the social and economic benefits identified based on the scale of development proposed.

52. Furthermore, the provision of much needed affordable housing would help to meet the needs arising in the south of the district and therefore I attach substantial weight to the benefit of the scheme in this particular regard. The scheme would also provide a large area of open space, over and above the amount required by policy within the development plan providing a modest benefit inasmuch as it could be used by nearby residents as well as future residents of the appeal scheme.

[3] *R. (on the application of The Forge Field Society) and others v Sevenoaks District Council and others* [2014] EWHC 1895 (Admin)
Barnwell Manor Wind Energy Ltd v East Northants DC and others [2014] EWCA Civ 137
R (on the application of Gillian Hughes) v South Lakeland DC & Interested Parties [2014] EWHC 3979 (Admin)
Jane Mordue v Secretary of State for Communities and Local Government and others [2015] EWHC 539 (Admin)
Irving v Mid Sussex District Council : [2016] EWHC 1529 (Admin)
Steer v Secretary of State for Communities and Local Government and Others: Admn 22 Jun 20

53. In terms of the balance required by paragraph 134 of the Framework, I am satisfied that the public benefits of the proposal outweigh the less than substantial harm to the significance of the heritage assets referred to. With regard to the balance required within paragraph 135 of the Framework, I am firmly of the view that the benefits I have outline above outweigh the limited harm I have found to the setting and significance of WSCA, a non-designated heritage asset.

54. Moving on to the overall planning balance, I have identified that there would be conflict with the development plan, inasmuch as there would be some limited harm to the character and appearance of the area, related mainly to the less than substantial harm to the significance of the heritage assets. In such circumstances permission should be refused unless material considerations indicate otherwise. In this case the benefits that I have outlined above combined with the fact that this is an allocated housing site which Policy STM1 of the DPD anticipates as delivering up to 50 dwellings on the site are material considerations, the totality of which lead me to the view that they are sufficient, in this instance, to outweigh the limited harm that I have identified.

55. Therefore, for the reasons above and having regard to all other matters raised, I conclude on balance, that the appeal should be allowed.

Conditions

56. I have had regard to the various planning conditions that have been suggested by the Council and considered them against the tests in the Framework and the advice in the Planning Practice Guidance and have made such amendments as necessary to comply with those documents. In the interests of certainty it is appropriate that there is a condition requiring that the development is carried out in accordance with the approved plans.

57. Conditions 3-7, 15, 17 and 18 are necessary to protect the character and appearance of the area and the ecology of the area. Condition 3 requires details to be approved prior to the commencement of the development to ensure that existing trees and hedgerows on the appeal site are adequately protected prior to any development occurring.

58. Conditions 8-11 are necessary to protect highway safety. Condition 12 is required to ensure safe access to the site and that it is adequately linked to the surrounding area.

59. Conditions 13 and 14 have been imposed to ensure that the site is adequately drained and does not pose a flood risk to surrounding areas. Condition 16 is required to protect residents' living conditions. Condition 19 is required to reduce the reliance of future occupiers on the private car.

Zoe Raygen

INSPECTOR

SCHEDULE OF CONDITIONS

1) The development hereby permitted shall begin not later than three years from the date of this decision.

Plans

2) The development hereby permitted shall be carried out in accordance with the following approved plans: 1255-03 Rev K, 1255-31 Rev E, 1255-46 Rev B, 1255-47 Rev B, 1255-48 Rev A, 1255-49 Rev B, 1225-33 Rev A, 1225-35, 1225-36, 225-37, 1255-38 Rev A, 1225-50 Rev B, 1255-51 Rev A, 1255-42, 1255-41, 17117/2002 Rev A, 17117/2003 Rev C, 17117/05 202, 17117/05 201 Rev J, JBA 13/147-TS02 Rev D, JBA 13/147-01 Rev B.

Ecology/trees

3) Before the development hereby permitted is commenced, details of a site specific tree protection method statement and plan shall be submitted to and agreed in writing by the local planning authority. The details to be submitted shall ensure that all existing trees or hedgerows shown on the approved plan as being retained are fenced off to the limit of their root protection area or branch spread, whichever is the greater, in accordance with BS 5837. No works including:

i. removal of earth,
ii. storage of materials,
iii. vehicular movements or
iv. siting of temporary buildings

shall be permitted within these protected areas. Once agreed in writing the development shall be implemented in strict accordance with the tree protection method statement and plan. .

4) Before any construction work above ground is commenced, details of any soft landscaping works shall have been submitted to and approved in writing by the Local Planning Authority. Details shall include:

i) planting plans;
ii) written specifications (including cultivation and other operations associated with plant and grass establishment);
iii) schedules of plants, noting species, plant sizes and proposed numbers/densities where appropriate;

5) All planting, seeding or turfing comprised in the approved details of landscaping shall be carried out in the first planting and seeding seasons following the occupation of the buildings or the completion of the development, whichever is the sooner; and any trees or plants which within a period of 5 years from the completion of the development die, are removed or become seriously damaged or diseased shall be replaced in the next planting season with others of similar size and species.

6) Before any part of the development hereby permitted is occupied, a landscape management plan shall have been submitted to and approved in writing by the Local Planning Authority. The plan shall include:

i) long term design objectives,

ii) management responsibilities and

iii) maintenance schedules for all landscape areas, other than privately owned, domestic gardens.

For a period of not less than 5 years following the first occupation of the final dwelling/unit hereby permitted, the approved Landscape Management Plan shall be adhered to in full.

7) The development shall be carried out in strict accordance with the recommendations and conclusions of the Phase 1 Habitat Survey dated November 2013 and the Updated Ecological Assessment undertaken by James Blake Associates Ltd dated 26th July 2016.

Highways

8) Other than site clearance and preparation works no works shall commence on the construction of the hereby permitted dwellings until full engineering, drainage, street lighting and constructional details of the streets proposed for adoption have been submitted to and approved in writing by the Local Planning Authority. The development shall, thereafter, be constructed in accordance with the approved details.

9) Other than site clearance and preparation works no works shall commence on the construction of the hereby permitted dwellings before the first 50m metres of estate road from its junction with the public highway, including visibility splays, as shown on drawing number 1255-03 Rev K has been completed.

10) Notwithstanding the road surface details shown on drawing 1255-03 Rev K, details of an alternative means of surfacing the area of road in front of plots 9 and 10 shall be submitted to and agreed in writing by the Local Planning Authority prior to the commencement of the houses on the plots. The road shall then be surfaced in accordance with the agreed details prior to the occupation of the houses.

11) No dwelling shall be occupied until the estate streets affording access to those dwellings has been completed in accordance with the Estate Street Development Plan

12) Other than site clearance and preparation works no works shall commence on the construction of the hereby permitted dwellings until a scheme has been submitted to and agreed in writing by the local planning authority for the construction of a 1.5 metre wide footway, together with arrangements for the disposal of surface water run-off from the highway at the frontage of the site. The agreed works shall be fully implemented before any of the dwellings are occupied, or in accordance with a phasing arrangement to be agreed in writing with the local planning authority.

Flooding and drainage

13) No building hereby permitted shall be occupied until surface water drainage works shall have been implemented in accordance with details that shall first have been submitted to and approved in writing by the local planning authority. Before any details are submitted to the local planning authority an assessment shall be carried out of the potential for disposing of surface

water by means of a sustainable drainage system, having regard to Defra's non-statutory technical standards for sustainable drainage systems (or any subsequent version), and the results of the assessment shall have been provided to the local planning authority. Where a sustainable drainage scheme is to be provided, the submitted details shall:

i) provide information about the design storm period and intensity, the method employed to delay and control the surface water discharged from the site and the measures taken to prevent pollution of the receiving groundwater and/or surface waters;

ii) include a timetable for its implementation; and,

iii) provide, a management and maintenance plan for the lifetime of the development which shall include the arrangements for adoption by any public authority or statutory undertaker and any other arrangements to secure the operation of the scheme throughout its lifetime.

14) No hard-standing areas shall be constructed until the works have been carried out in accordance with the surface water strategy so approved.

Hard landscaping

15) Other than site clearance and preparation works no works shall commence on the construction of the hereby permitted dwellings until details of hard landscaping works shall have been submitted to and approved in writing by the Local Planning Authority. Details shall include:

i) proposed finished levels and contours;

ii) means of enclosure (boundary treatments);

iii) car parking layouts;

iv) other vehicle and pedestrian access and circulation areas;

v) hard surfacing materials;

vi) minor artefacts and structures (e.g. furniture, play equipment, refuse or other storage units, signs, lighting etc.);

vii) .proposed and existing functional services above and below ground (e.g. drainage power, communications cables, pipelines etc. indicating lines, manholes, supports etc.);

viii) retained historic landscape features and proposals for restoration, where relevant.

The approved hard landscape works shall have been implemented prior to the occupation of all the houses.

Windows

16) All first floor bathroom and ensuite windows shall be obscure glazed.

Materials

17) Before any of the works on the external elevations for the buildings hereby permitted are begun, samples of the materials (including colour of any render, paintwork or colourwash) to be used in the construction of the external surfaces shall have been submitted to and approved in writing by the Local Planning Authority. The development shall then only be completed in accordance with the approved details

Pumping station

18) Prior to the pumping station hereby approved being installed precise details of its external appearance and means of enclosure shall be submitted to an agreed in writing by the Local Planning Authority. The pumping station shall only be installed in accordance with the approved details.

Green Travel Plan

19) The approved Green Travel Plan dated October 2016 shall be adhered to as long as any part of the development is occupied and implemented in accordance with the timetable contained therein.

----------END OF CONDITIONS SCHEDULE----------

Appendix 3 – Court of Appeal Decision: Dorothy Bohm and Secretary of State for Communities and Local Government and London Borough of Camden and Jez San

Case No: CO/1890/2017

Neutral Citation Number: [2017] EWHC 3217 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
IN THE MATTER OF AN APPLICATION UNDER s.288
OF THE TOWN & COUNTRY PLANNING ACT 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 December 2017

Before :

NATHALIE LIEVEN QC
(Sitting as a Deputy High Court Judge)

- -

Between :

DOROTHY BOHM AND OTHERS	**Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
(1) LONDON BOROUGH OF CAMDEN	**Interested Parties**
(2) JEZ SAN	

- -
- -

John Litton QC (instructed by **Foot Anstey**) for the **Claimants**
Jack Parker (instructed by **GLD**) for the **Defendant**
The First Interested Party did not attend and was not represented
Rupert Warren QC (instructed **Brechers**) for the **Second Interested Party**

Hearing date: 28 November 2017

- -

Judgment

Nathalie Lieven QC :

1. This is an application under s.288 of the Town and Country Planning Act 1990 to quash the decision of the Defendant, taken through an Inspector, dated 9 March 2017. The decision was to allow an appeal brought by Mr San, the Interested Party, against the refusal of planning permission by the London Borough of Camden ("the Council"). The planning application was for the demolition of an existing dwelling at 22 Frognal Way, Hampstead, London ("the site") and its redevelopment to provide a new dwelling house.

2. The Claimants are authorised representatives of the Church Row Association, an unincorporated association whose objects include the preservation and restoration of the 18th century character and amenities of Church Row and its immediate surroundings. At the start of the hearing I made an order substituting the Claimants for the Church Row Association.

3. 22 Frognal Way ("the site") lies just down the hill from Church Row at the bottom of a path which runs along the side of the Churchyard of St John's Church, a Grade One listed building.

4. The grounds of application raise three issues:

   i) the Inspector misdirected herself as to the national policy to be applied when considering a planning application/appeal which involves effects upon a non-designated heritage asset ("NDHA"). Incorporated within this ground was an argument that she erred in her application of s.72 Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBCAA 1990") and failed properly to discharge her duty under that section;

   ii) the Inspector's findings as to the significance of the NDHA were flawed by reason of (a) her approach to a material previous appeal decision concerning the Appeal Site and consequent application of national policy in relation to deliberate neglect or damage to a heritage asset; and/or (b) by taking into account and setting up as a test of significance an immaterial consideration, namely whether or not the NDHA performed a *"landmark"* role.

   iii) The Inspector erred by not imposing a condition linking the demolition of the existing building to the construction of the new building. Alternatively she erred by not giving reasons for not imposing such a condition.

5. The site lies in the Hampstead Conservation Area ("the CA"). The existing building was designed by Philip Pank, a modernist architect who designed a number of other houses in Camden, at least one of which is listed. The house was built for Harold Cooper, founder of the Lee Cooper clothing business.

6. The Hampstead Conservation Area Statement 2001 identifies the impact of the existing building as being neutral in the Conservation Area. The building was considered for statutory listing by English Heritage in 2007. English Heritage (as it then was) determined it did not meet the listing standards, but indicated that it was of local importance and that it made a positive contribution to the Conservation Area.

7. In 2008 an application was made for the demolition of the existing building and the erection of two new dwellings. The Inspector at that appeal said that the "building is of an interesting and distinctive design and appearance". He said that he agreed with English Heritage that the building made a positive contribution to the CA.

8. In 2009 planning permission was granted for extensive works to the existing building. Then in 2012 the flat roofs of the three wings of the house were removed, which exposed parts of the internal areas and threatened the building's integrity through water penetration. In December 2012 an Untidy Land Notice was issued under s.215 of the 1990 Act requiring the owner to remedy the poor condition of the land. A temporary roof was then fitted to the building and door and window openings closed.

9. Mr San bought the site in 2014. Therefore whatever actions took place before that date in respect of the existing building, he had no responsibility for them.

10. In May 2015 the Council issued an enforcement notice requiring the removal of the original roof and original fascia boards from the building. This Notice was appealed and the Inspector allowed the appeal on Ground (c) (of s.174 of the TCPA 1990), on the ground that the works had formed part of the 2009 planning permission, which had by the date of the works been implemented.

11. The planning application the subject of this case was made in 2015. It was refused in March 2016 by the Council on three grounds. The second and third related to the absence of a legal agreement and were subsequently withdrawn after agreement with the Interested Party. There was therefore one reason for refusal outstanding at the time of the planning appeal, namely the impact of the loss of the existing building on the CA.

The decision letter

12. The Inspector correctly stated that heritage assets can include non-designated heritage assets ("NDHA"). As the existing building makes a positive contribution to the CA, and had some architectural interest there is no issue that it is a NDHA, within the terminology of the NPPF.

13. The decision letter at paragraph 4 identified the main issue as being whether the proposal would preserve or enhance the CA, taking into account the loss of the existing building. At paragraphs 6 and 7 the Inspector considered the architectural merit of the building and its significance.

14. At paragraph 8 she referred to the 2009 decision and said that "there is no evidence that the former owner's intention to run the building into a state of irretrievable disrepair [sic]".

15. She reached her conclusion on the significance of the building at paragraph 10;

> "I appreciate that the building is of some architectural interest. Nevertheless No 22 is a low rise building that is mainly glimpsed within the street scene. As such it cannot reasonably be described as a 'landmark' building or having a significant impact in the immediate area. Overall, based on the evidence

> in this case, the significance of the building, whilst of some limited local heritage interest, does not weigh significantly in favour of retention."

16. At paragraph 11 she referred to the test in the NPPF for non-designated heritage assets;

> "Paragraph 135 of the Framework requires a balanced judgement which seeks in weighing applications that affect directly non designated heritage assets assessing the scale of any harm or loss and having regard to the significance of the heritage asset. The proposal result in the total loss of the building. The design of the replacement building would be acceptable and promote and reinforce local distinctiveness. Therefore, considering the reasons given above, there would not be an adverse impact from the total loss of the NDHA. I have taken this in account and with this in mind I consider the issue of the site location within the HCA."

17. The Inspector then turned to the statutory duty under s.72 LBCAA;

> "12. The statutory duty under section 72(1) of the Planning (Listed Building and Conservation Areas) Act 1990 sets out that special attention shall be paid to the desirability of preserving or enhancing the character and appearance of the conservation area."

18. At paragraph 13 she considered the role of Frognal Way in the context of the Conservation Area. At paragraph 14 she referred to local residents' concern about the loss of local views of the building.

19. Paragraphs 15 to 17 state;

> "15. The new dwelling proposed would also be a single detached property. It would be a low profile, accessible home. The design approach would respond to the site constraints. It would create a building that would read as single storey from ground level and be a high quality one off house. The appellant submits that it would be constructed to a high standard and have high sustainability credentials. The scale, massing and detailed design of the new dwelling would be appropriate within the context of its conservation area setting.
>
> 16. The existing building would be lost entirely. Whilst it is a large dwelling in the HCA in its own right I have identified in consideration of it as a NDHA that its positive contribution is limited. In this regard the net effect of the provision of the new dwelling and thereby its removal would at worst be neutral as what is special about the HCA would not be harmed. In this regard should it be constructed the appeal scheme would reflect

> the character of the HCA and preserve the part of the HCA it would be located in.
>
> 17. Therefore the scheme would not be in conflict with policy CS14 of the London Borough of Camden Local Development Framework and policy DP25 of the London Borough of Camden Local Development Framework Development Policies which amongst other things seek to preserve and enhance Camden's rich and diverse heritage assets, including conservation areas and paragraph 17 indicates that planning should conserve heritage assets in a manner appropriate to their significance."

20. At paragraph 18 she said there was no evidence of deliberate neglect or damage.

21. The approach the High Court should take in a challenge under s.288 has been rehearsed in many cases. In ***Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin), Lindblom J (as he then was) at paragraph 19 summarised the relevant legal principles applying to statutory challenges under the Town and Country Planning regime as follows:-

> "The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to 'rehearse every argument relating to each matter in every paragraph' (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court.

A local planning authority determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality' to give material considerations 'whatever weight [it] thinks fit or no weight at all' (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the

judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

22. As is set out above the site falls within the Hampstead Conservation Area and therefore the statutory duty in s.72 of the LBCAA applies. This provides:

> "(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
>
> (2) The provisions referred to in subsection (1) are the Planning Acts and Part I of the Historic Buildings and Ancient Monuments Act 1983 and sections 70 and 73 of the Leasehold Reform, Housing and Urban Development Act 1993."

23. Applying this provision, where designated heritage assets are in issue, here the impact on the Conservation Area, then the decision maker should give considerable importance and weight to the preservation or enhancement of the heritage asset; *East Northamptonshire DC v Secretary of State for Communities and Local Government and Barnwell Manor Wind Energy Limited* 2015 1 WLR 45.

24. In *Mordue v Secretary of State for Communities and Local Government* (2016) 1 WLR 2682 Sales LJ said at paragraph 28:

> "Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the [s.66(1)] duty. When an expert planning inspector refers to a paragraph within that grouping of provisions … then – absent some positive contrary indication in other parts of the text of his reasons – the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned."

25. The importance of respecting the planning judgement of specialist planning inspectors was emphasised by Lord Carnwath in *Hopkins Homes v Secretary of State for Communities and Local Government* (2017) 1 WLR 1865.

26. The national policy approach to heritage assets is set out in Section 12 of the NPPF. In respect of designated heritage assets this puts into policy terms the statutory tests referred to above. The existing building is itself a non-designated heritage asset and therefore falls within paragraph 135 of the NPPF, which states;

> "The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that

> affect directly or indirectly non designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

27. The relevant Development Plan policy for the purposes of s.38(6) of the TCPA is the Camden Local Plan. None of the parties suggested that there were any policies in that Plan that were directly relevant to the legal issues that I have to decide.

Ground One

28. The Claimant argues that the Inspector misapplied paragraph 135 of the NPPF because she considered the overall impact of the new building against the loss of the existing building. Mr Litton QC, for the Claimant, argues that the Inspector should have considered the impact of the loss of the existing building, and in doing so she should have attached special importance to the preservation and enhancement of the Conservation Area. He says that she should have then gone on separately to identify what public benefits there were which might outweigh the harm to the Conservation Area from the demolition of the NDHA.

29. His argument was that the loss of a building which makes a positive contribution to the Conservation Area must cause harm to the CA, and that harm must be given considerable importance and weight. He argues that the Inspector therefore failed to carry out the correct legal exercise in the decision letter.

30. Mr Litton's Skeleton Argument focused on paragraph 135 of the NPPF, but his oral submissions placed more weight on s.72 LBCAA. He submitted that the Inspector had made a similar error to the Council's officer's report in *Forge Field v Sevenoaks DC* 2014 EWHC 1895, at para 45. Lindblom J in that case said:

> "43. Mr Strachan submitted that in determining the second application the Council failed—as it had in determining the first—to comply with its duties under Listed Buildings Act ss.66 and 72. Its error was similar to the one made by the inspector in East Northamptonshire DC. Having "special regard" to the desirability of preserving the setting of a listed building under s.66, and paying "special attention" to the desirability of preserving or enhancing the character and appearance of a conservation area under s.72, involves more than merely giving weight to those matters in the planning balance. "Preserving" in both contexts means doing no harm (see the speech of Lord Bridge of Harwich in South Lakeland DC v Secretary of State for the Environment [1992] 2 A.C. 141 at 150A–G). There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area. The officer acknowledged in his report, and the members clearly accepted, that the proposed development would harm both the setting of Forge Garage as a listed building and the Penshurst Conservation Area. Even if this was only "limited" or "less than substantial harm"—harm of the kind referred to in NPPF

> para.134—the Council should have given it considerable importance and weight. It did not do that. It applied the presumption in favour of granting planning permission in Policy SP4(c) of the core strategy, balancing the harm to the heritage assets against the benefit of providing affordable housing and concluding that the harm was not "overriding". This was a false approach. Its effect was to reverse the statutory presumption against approval"

31. At paragraph 45 Lindblom J accepted Mr Strachan's submission as set out in the paragraph quoted above.

32. In my view the Inspector made no error of law. In considering the application she had to consider two relevant tests. Firstly, by s.72 LBCAA she had to pay special attention to the desirability of preserving or enhancing the CA. As is set out in ***Forge Field*** there is a strong statutory presumption against granting planning permission which does not so preserve or enhance.

33. However, when considering the impact of the proposal on the CA under s.72 it is the impact of the entire proposal which is in issue. In other words the decision maker must consider not merely the removal of the building which made a positive contribution, but also the impact on the CA of the building which replaced it. She must then make a judgement on the overall impact on the CA of the entire proposal before her.

34. Secondly, the Inspector also had to apply the policy test in para 135 of the NPPF. Unsurprisingly, given that an NDHA does not itself have statutory protection, the test in para 135 is different from that in paras 132-4, which concern designated heritage assets. Paragraph 135 calls for weighing "applications" that affect an NDHA, in other words the consideration under that paragraph must be of the application as a whole, not merely the demolition but also the construction of the new building. It then requires a balanced judgement to be made by the decision maker. The NPPF does not seek to prescribe how that balance should be undertaken, or what weight should be given to any particular matter.

35. This is the analysis that the Inspector undertook in the decision letter. She considered the significance of the NDHA in its own right in paras 3-11. Her conclusion in para 10 was that the building had some limited local heritage interest, but that did not weigh significantly in favour of retention. At para 11 she weighed up the loss of the building with the construction of the new building, which she said would be acceptable and would promote and reinforce local distinctiveness. She concluded that there would not be an adverse impact from the loss. This was precisely the "balanced judgement" that she was required to do under para 135.

36. In respect of s.72, she considered this issue in paras 12-17. She said at para 16 that the existing building made a limited positive contribution to the CA, and the net effect of the new building would at worst be neutral and that the CA would not be harmed. Again in my view this was an entirely correct approach. Section 72 requires the overall effect on the CA of the proposal to be considered. There is no requirement for a two stage process by which the demolition part of an application has to be considered separately from the proposed new development.

37. The position in ***Forge Field*** was analytically different. There it was accepted that the proposal would harm both the setting of the listed building and the CA, see para 45. The Council simply put this harm into an overall planning balance, and failed to properly apply the statutory duty in s.66 and 72, and therefore did not apply the strong presumption in favour of no harm to the heritage assets. In contrast in the present case, the clear finding of the Inspector in para 16 was that the CA would not be harmed. Therefore the test in s.72 was considered and properly applied.

38. An issue arose at the hearing, largely raised by myself, as to the relationship between para 138 of the NPPF and para 134. Paragraph 138 states:

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

39. This paragraph read on its own would seem to suggest that where, as here, a building makes a positive contribution to a CA, then its loss should be treated as falling within paragraphs 133 or 134 of the NPPF. In this case there could be no doubt that the planning judgement of the Inspector was that there would be "less than substantial harm" within the meaning of para 134, because in fact she found no harm to the designated heritage asset. Therefore even if this was an additional analytical step which the NPPF requires, it could make no possible difference to the outcome in this case.

40. In any event, the NPPF and in particular the heritage section, must itself be read as a whole and in a sensible and purposive manner. It cannot have been the intention of those drafting the NPPF that the loss of an NDHA which made a positive contribution to a CA, would itself be treated in the same way as the impact on a designated heritage asset. Such a reading would undermine the distinction in the NPPF paras 132 to 135 between designated and undesignated heritage assets. The proper approach is that where an NDHA makes a positive contribution to a CA then the decision maker has to consider the development proposal, including the loss of the NDHA, and in doing so any harm to the CA should be weighed against the public benefits.

41. I should emphasise, as is set out in para 38 above, however the paragraphs are read it cannot make any difference to the outcome of this case, because the Inspector applied para 134 of the NPPF and found the impact on the CA was at worst neutral.

42. For these reasons I dismiss Ground One.

Ground Two

43. Mr Litton refers to para 130 of the NPPF, that where there is evidence of deliberate neglect or harm to a heritage asset then its deteriorated state should not be taken into account.

44. The Inspector referred at para 8 and 18 to the 2016 enforcement Inspector's view on deliberate harm.

45. Mr Litton argued that the Inspector erred in law because she should have looked at the entire period up to the present in determining whether there had been deliberate neglect and therefore he argued that para 130 applied. He said that she was wrong to simply rely on the earlier finding that the 2009 planning permission had been implemented to conclude that there had been no deliberate harm.

46. The first and principal difficulty with this argument is that the Inspector did not rely on the state of the existing building in deciding that its removal would be acceptable. Para 130 arises where a developer argues that s/he should be granted permission to remove a building, or permission for enabling development, because of the poor state of repair of that building. The point of para 130 is to prevent a developer in those circumstances relying on his/her own default. But that situation does not arise here, because the Inspector placed no reliance on the poor state of repair of the existing building.

47. Mr Litton relies on the fact that the Inspector did refer to the internal works to the building, at DL7. However these comments do not place reliance on any disrepair in her conclusions.

48. In the Grounds and Claimant's Skeleton Argument there was an additional argument under this ground, that the Inspector had applied the wrong test to significance by referring in DL8 to the building not being a "landmark building". This point was not pursued orally. It was not in any event a good argument as the Inspector in DL8 was not saying that only landmark buildings would have any significance, but merely expressing a view on the role of the building.

49. In my view this Ground fails at this first initial point.

Ground Three

50. At the appeal hearing before the Inspector Mr Hilton Nathanson, the Ninth Claimant, was represented by Richard Harwood QC who suggested to the Inspector that a condition should be attached ensuring that construction of the new building should proceed following demolition of the existing building.

51. Paragraph 136 of the NPPF states;

> "Local planning authorities should not permit loss of the whole or part of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred."

52. The Inspector in the decision letter makes no reference to this proposed condition or any reasons for not including a condition which would have this effect. Mr Litton submits that the Inspector erred in law in not including such a condition, or by failing to give reasons for not imposing such a condition.

53. Conditions (or in some cases provisions in a s.106 agreement to similar effect) are common in cases of demolition in a CA. This is made clear by Historic England Good Practice Advice, which lists the type of condition sought as being one of the common types of conditions. It is on the face of it slightly surprising that the Inspector did not in these circumstances explain why in her view such a condition was not required.

54. However, there were a number of factors in this case which where plainly relevant to the issue. Firstly, Camden as the local planning authority did not propose any such condition. They therefore must have believed it was not necessary in this case. Secondly, there was no issue that Mr San had the means to carry out the development. Therefore the viability of the development was not in issue. Thirdly, there was evidence that Mr San was very keen to go ahead with the development. He had purchased the site in 2014 and there was evidence at the hearing that he had made considerable efforts to progress the development in order to provide a family home. The fairly long standing disuse of the site was not therefore as a result of any reluctance by Mr San to carry out a redevelopment of the site. Fourthly, and related to the third, Mr San had offered to accept a personal condition on the permission. It is clear from Mr Warren's closing at the hearing that this was offered in order to show Mr San's commitment to building the proposed home. Fifthly, the s.106 agreement does provide for a Construction Management Plan to be agreed with Camden. This could provide some control over the sequencing of the demolition and the building works. I am not convinced that it would have the same efficacy as a condition but it does have some relevance to the issue.

55. It is important to keep in mind that the policy in paragraph 136 of the NPPF is only to take all reasonable steps to ensure that the development will procced. There is no suggestion of any duty to impose a condition, or take any particular steps, and the ultimate judgement is one of reasonableness for the Inspector. The factors in paragraph 54 above show why it was entirely open to the Inspector not to impose a condition as sought by Mr Nathanson and there was no error of law in not requiring such a condition. On reasons, Mr Parker argued that the proposed condition was not a principal important controversial issue, and therefore did not need to be dealt with in the reasons. The principal important controversial issues test set out by Lord Brown in *South Bucks v Porter (no2)* concerns substantive issues rather than proposed conditions and I am not sure it can simply be read across into the question of whether proposed conditions have to be expressly dealt with in the decision letter. However, on the facts of this case where the local planning authority were not proposing or supporting the condition, and on the facts it did not appear to be necessary, I do not think the Inspector erred in law by not giving reasons for rejecting the condition.

56. I therefore dismiss the third ground.

57. For these reasons I dismiss the application.