Neutral Citation Number: [2013] EWHC 4052 (Admin)

Case No: CO/9251/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2013

Before :

Mr Justice Lindblom

- -

Between :

Forest of Dean District Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**Defendant**
- and -	
Ricky Jones	**Interested Party**

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- -

Mr Anthony Crean Q.C. (instructed by **the Legal Team Manager of Forest of Dean District Council**) for the **Claimant**
Ms Lisa Busch (instructed by **the Treasury Solicitor**) for the **Defendant**
Mr Michael Rudd (instructed under the **Bar Council Direct Public Access Provisions**) for the **Interested Party**

Hearing date: 11 November 2013

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Judgment

Mr Justice Lindblom:

Introduction

1. In this case the claimant, the Forest of Dean District Council ("the Council"), challenges the decision of an inspector appointed by the defendant, the Secretary of State, to allow an appeal by the interested party, Mr Ricky Jones, and to grant planning permission for the siting of gypsy caravans on land at Newent in Gloucestershire. The Council says the decision is unlawful because the inspector failed to deal properly with the effects of the development on the setting of three listed buildings. Its challenge is made in an application under section 288 of the Town and Country Planning Act 1990 ("the 1990 Act").

2. Mr Jones is a gypsy. He sought permission for the stationing of 13 caravans for gypsy families on a site of about 1.3 hectares, at Southend Lane in Newent. He appealed both against the Council's refusal of planning permission and against an enforcement notice served by the Council. The alleged breach of planning control against which the Council had enforced was the unauthorized change of use of a smaller piece of land, about 1.2 hectares within the larger site, for the stationing of residential caravans. The inspector held an inquiry into the appeals in November 2012 and January and February 2013. His decision letter is dated 13 June 2013. He referred to the enforcement appeal as "Appeal A" and the appeal against the refusal of planning permission as "Appeal B". He refused Appeal A, and allowed Appeal B and granted planning permission subject to nine conditions.

3. The sites are in the countryside to the south-east of Newent, on the north-eastern side of Southend Lane. Near them, to the south of Southend Lane, are the three listed buildings: a house called Southerns and two barns – Southerns Barn and Southcote Barn, both of which have been converted to residential use. All three are listed at grade II. One of the main issues in the appeals was the effect that the development in either appeal would have on their setting.

4. The Council lodged its application with the court on 15 July 2013. On 24 September 2013 it sought a declaration that the planning permission granted by the inspector had lapsed because of Mr Jones' alleged failure to comply with one of the conditions the inspector had imposed. That application was withdrawn at the hearing. I need say no more about it.

The issue for the court

5. In the end the Council pursued only ground 2 of its application. It abandoned grounds 1 and 3. In ground 2 it contends that the inspector misdirected himself on the statutory requirement – in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") – to have special regard to the desirability of preserving the settings of listed buildings. That was how the ground was originally pleaded. In his oral submissions on behalf of the Council Mr Anthony Crean Q.C. also argued that the inspector misconstrued or misapplied government policy for "designated heritage assets" in the National Planning Policy Framework ("the NPPF").

Background

6. An earlier enforcement appeal had been allowed on 6 January 2010, on ground (a). The inspector in that appeal granted planning permission for the stationing of caravans on part of the land – the part that was to become the site in Appeal A – until 31 January 2012. In his decision letter (in paragraph 28) he recorded the fact that the Council's planning witness had said in his evidence that the effect of the development on the setting of the listed buildings was not a ground to dismiss the appeal. He accepted (in paragraph 32) that it would be possible "to mitigate the most obvious effect by additional planting, as is proposed", but he said that "the effect is not just a visual one that could be avoided by screening and the use of the land as a caravan site is detrimental to the character of the setting of the buildings, contrary to [Gloucestershire Structure Plan] policies S6 and NHE6".

7. On 13 February 2012 Mr Jones applied for planning permission for the development that was to become the subject of Appeal B. The proposed development was described in the application as the "stationing of caravans for 13 … family gypsy pitches with utility/day room buildings, propane gas tanks and hard-standing ancillary to that use".

8. On 20 February 2012 the Council issued the enforcement notice that became the subject of Appeal A. Its reasons for issuing the notice included allegations of harm to the local landscape and to the living conditions of local residents. A further reason was "Impact on listed buildings", because, it was said, "the use is considered to be detrimental to the character and setting of nearby listed buildings resulting in conflict with advice in PPS5 and … practice guide, English Heritage Guidance 'The Setting of Heritage Assets' and … contrary to Regional Planning Guidance policy EN3 and Gloucestershire Structure Plan policies S6 and NHE6".

9. On 11 April 2010 the Council refused Mr Jones' application for planning permission.

10. Mr Jones' appeal against the enforcement notice (Appeal A) was made under section 174(2)(a) and (g) of the 1990 Act, his appeal against the refusal of planning permission (Appeal B) under section 78.

11. At the inquiry into the appeals one of Mr Jones' witnesses was Professor Ruth Reed. She is Professor of Architectural Practice at the Birmingham School of Architecture, and a past President of the Royal Institute of British Architects. In her proof of evidence she said (in paragraph 21) that the proposed development "will not lead to substantial harm to the setting of the listed buildings and therefore in the new policy environment, paragraph [134] of the NPPF is pertinent to this case …".

The inspector's decision letter

12. In paragraphs 5 to 9 of his decision letter the inspector described the appeal sites and their surroundings. In paragraph 7, when describing the site in Appeal B, he referred to the difference between it and the site in Appeal A:

> "… The significant difference from the present situation is that an area of amenity space … would be created on the 'extra' land presently within the paddock. This would be enclosed by two new belts of planting on the north-western and south-eastern sides. Plot 1 would be remodelled as a consequence. Substantial planting belts of between 10-15m in depth would be

> added along the Southend Lane frontage; the hedge on the western boundary would be reinforced with additional planting and areas of landscaping would be introduced within the site. The access drive would be realigned close to Southend Lane to introduce a bend the purpose being to restrict views up the driveway. …".

13. In paragraph 9 the inspector referred to the planning permission recently granted on appeal for 120 houses on the eastern edge of the town, on a site "within about 50 [metres] of the northern apex of the … appeal sites". The planning permission, he said, was "an important material consideration and a significant change in the local circumstances from when the last Inspector reached his decision".

14. The inspector identified nine main issues on ground (a) in Appeal A and in Appeal B. The second of these was "[the] effect on the setting of the 3 listed buildings nearby" (paragraph 13).

15. The inspector's first main issue was "[the] impact on the landscape character and visual amenities of the countryside and the surrounding area". When considering that issue (in paragraph 27 of his letter) the inspector said this about the land on the southern side of Southend Lane:

> "… The land on the southern side of Southend Lane is developed with a line of buildings from the appeal land to the houses to the west which make up the settlement edge of Newent. Whilst there are some gaps the prevailing character is one of buildings in a more or less continuous strip projecting out from the edge of the town. The listed buildings to the south may at one time have had the appearance of an isolated farmstead (or farmsteads) but this is no longer the case. It was suggested that isolation is not just a matter of distance from any other development. I find it hard to understand how it can be viewed any other way. I consider that neither the listed buildings nor the appeal site itself are isolated but in close proximity to other development and only a short distance from the settlement boundary of Newent".

16. In paragraph 55 the inspector concluded that, if appropriate conditions were imposed, the development proposed in Appeal B "would not harm the landscape character or visual amenities of the area …".

17. The inspector's assessment of the likely effects of the development on the setting of the listed buildings is set out in paragraphs 56 to 73 of his letter.

18. In paragraph 56 the inspector said that the three listed buildings "form a close knit group along with another dwelling (Southcote) which is not listed". All three were listed in 1985. The two barns had been converted into dwellings after planning permissions and listed building consents had been granted in the early 1990s. The land around the buildings, once farmyards, was now used as private gardens for the dwellings, "with associated domestic features and paraphernalia". The residential curtilage of Southerns Barn had been extended and a garage for it had been built.

19. The inspector said in paragraph 57 of his letter that the Council's objection on this ground had been a "change of opinion" after the previous inspector's decision. The local group opposing the development, Residents Against Inappropriate Development ("RAID") had maintained its objection, and had provided documents to illuminate the history of the buildings. Having taken that material into account the inspector said that the buildings' "original use as one or more farmsteads with associated barns and outbuildings has long

since ceased". They were now dwellings, and the two barns had "undergone substantial alteration and adaptation to convert them into residential use".

20. In paragraph 58 the inspector referred to section 66 of the Listed Buildings Act. He said:

> "The statutory duty on the decision-maker enshrined in section 66 of the [Listed Buildings Act] is to have special regard to the desirability of preserving listed buildings or their settings or any features of special architectural or historic interest that they possess. As the development does not alter the physical form of the buildings in any way I am only concerned with the impact on setting. The need to ensure that the setting of the listed buildings is preserved is echoed in Policy NHE.6 of [the Gloucestershire County Structure Plan]. Policies S.6 of the [Gloucestershire Structure Plan] and CSP.1 of [the Forest of Dean Council Core Strategy ("the Core Strategy")] seek to safeguard and, where possible enhance, the historic environment and heritage assets."

21. The inspector then referred, in paragraph 59, to section 12 of the NPPF. This contains government policy on the conservation and enhancement of the historic environment. The NPPF had replaced PPS5 "Planning for the Historic Environment". But, as the inspector acknowledged, the Practice Guide for PPS5 was still extant, and its guidance on Policy HE10 of PPS5 set down principles to be applied when the impact of development on the setting of heritage assets was being considered. In October 2011 English Heritage had published detailed guidance on this in a document entitled "The Setting of Heritage Assets".

22. The inspector discerned in those documents five general points about the setting of listed buildings, which he set out in paragraph 60 of his letter. These were:

> "
> - The setting will generally be more extensive than the curtilage of the building or buildings;
> - The setting does not have a fixed boundary and cannot be definitively and permanently described as a spatially bounded area or as lying within a set distance of a heritage asset;
> - Views to and from a heritage asset are important but an assessment of impact goes beyond the visual and does not have to rely on public viewpoints; other environmental factors are of relevance as well as character and context;
> - The implications of cumulative changes need to be taken into consideration;
> - A proper assessment of the impact on setting will take into account, and be proportionate to, the significance of the asset and the degree to which proposed changes enhance or detract from that significance and the ability to appreciate it."

23. As the inspector said in paragraph 61 of his letter, it had been concluded in the previous appeal that the development against which the Council had enforced was "detrimental to the character and setting of the listed buildings", even though "the visual impact on setting could be significantly mitigated by additional planting". But since that decision an "Assessment of Significance Statement" had been prepared to support Mr Jones' application for planning permission. And Professor Reed had said in her evidence that this new document dealt with the concerns of the previous inspector about the impact on setting.

24. In paragraphs 62 to 71 the inspector discussed a number of considerations relevant to the impact of the development on the setting of the listed buildings.

25. He referred in paragraph 62 to a plan that had been produced by the agent for RAID to show the extent of the curtilages of the buildings. He went on:

> "This was not disputed but given the guidance set out in the first bullet point above, I consider that the setting of the listed buildings goes beyond these curtilages – which are effectively now the private gardens to the dwellings – encompassing some, if not all, of the gypsy site. This was accepted by Prof. Reed and accords with the conclusion of my colleague. It is reasonable to conclude, based on the above guidance, that hard and fast boundaries of what constitutes the setting cannot be defined. Notwithstanding a finding that the gypsy site comes within the setting of the buildings the critical consideration is whether any demonstrable harm has or would be caused to the settings. In line with the last bullet point above, in carrying out this assessment a proportionate approach is required having regard to significance of the assets and the degree to which developments in question enhance or detract from that significance and the ability to appreciate it."

26. In paragraph 63 the inspector said he agreed with the suggestion, made on behalf of Mr Jones and accepted by the Council, that "the assessment needs to be based on what exists today and not some idealised past situation which no longer exists". This, he added, was "not to say that the history of the buildings is of no bearing but that the changes that have occurred to their form, use and surroundings are important material considerations which must be taken into account". In paragraph 64 he said this:

> "RAID argue that the listed buildings have remaining group value and historic associations with the surrounding fields, including the appeal land, which formed part of the former farm holdings. From the evidence before me I have no reason to dispute this assertion but the historic connection and relationship has long since ceased as the land has been sold off and the listed buildings are in domestic use with no association whatsoever with the surrounding land in terms of ownership and occupation. They also no longer function as a group, if they ever did, but are independent dwellings. Therefore to suggest that the appeal development 'robs' the listed buildings of their historical context is without foundation as separation in this respect has already occurred."

27. The inspector said in paragraph 65 that "[much] discussion and debate at the inquiry centred on the implications of the conversion of the two barns to dwellings". In paragraphs 66 and 67 he said:

> "66. … [The] facts are that the barns have been converted and this involved the demolition of some of the original fabric and considerable intervention, particularly for Southcote Barn, as is clear from various dated photographs that have been supplied. The historic use of the barns for agricultural and other purposes may have ceased a number of years ago prior to listing but the change of use to dwellings with associated operational development was only sanctioned by the Council when they granted the permissions/consents in 1990 and 1991 after the listing date. I accept the point for RAID that despite these changes the buildings have not been de-listed and no application has been made to do so as far as I am aware. However the appearance and character of the buildings has changed significantly and the use of the land around them, with the possible exception of some land attached to Southerns, has altered to domestic gardens. For these reasons, I do not accept the Council's submission that nothing has changed appreciably since the time of listing. There have in fact been significant changes which have impacted on both the appearance and the setting of the buildings.
>
> 67. I accept that these findings do not lead to a conclusion that the buildings are no longer worthy of protection or that their settings have been so devalued as to be of little or no importance. However, these are material factors which have affected the character and setting of the buildings and need to be taken into account when applying the required proportionate approach."

28. In paragraphs 68 to 71 the inspector considered the relationship between the listed buildings and the gypsy site, views from their gardens, and the effect of the nursery buildings on their setting:

> "68. Turning to the relationship between the buildings and the gypsy site, they are separated by Southend Lane and there is the existing vegetation in their gardens and along the frontage of the appeal land which provides a degree of the screening in between at present. I was able to go inside Southerns Barn to assess the visual impact. I consider due to the orientation of the main elevations and window positions and the distance from the gypsy site that there is no material impact from within. I did not go inside Southerns but this is closer and has full height windows at first floor level facing the appeal site. I would expect that views of the caravans and features on the gypsy site would be apparent from certain rooms at first floor level. The closest listed building is Southcote Barn part of which is very close to the land. The gable end elevation facing the lane contains windows and that at first floor would be close to Plots 1 and 2 and the proposed amenity area.
>
> 69. As regards views from the gardens, it is possible to see caravans through gaps in the vegetation especially at points close to Southend Lane. However, the domestication of the land around the buildings has already significantly altered the setting from what existed when they were listed. This has included the erection of a garage and the enlargement of the curtilage of Southerns Barn. It was argued for the appellant that new garden walls have been erected to subdivide the curtilages but I have no clear evidence on this. The public approach to the listed buildings along Southend Lane has also been affected by the presence of the gypsy site although when standing adjacent to their driveways facing the buildings the group can still be appreciated without any visual encroachment from the development on the appeal site.
>
> 70. Another factor to take into account is the effect of the nursery buildings on setting. The history of the construction of the associated buildings provided reveals that some of these have been permitted and built after listing occurred. In 1986 a substantial range of glasshouses was erected but this is on the western side some distance away. The tall glasshouse on the frontage was built in 1995 and due to its height I consider it has some impact on the setting of the listed buildings. Of even greater impact are the polytunnels built in 2000 which are on the eastern side of the nursery coming to within about 20m of the north-western garden boundary of Southerns Barn. I noted that a hedge has been planted close to this boundary to mitigate the visual impact. Nevertheless I consider that the close presence of these polytunnels to the listed buildings in question has had a substantial impact on their setting both in visual terms and by their very physical presence which has altered the character of the lane at this point.
>
> 71. In terms of character and context it is helpful to have regard to the aerial photograph supplied by the Council. This shows the extent of the appeal site and also the area of ground covered by the nursery buildings. Both are within close proximity to the listed buildings covering substantial amounts of land. The photo serves to illustrate how the nursery buildings impinge on the setting of the listed buildings by their sheer physical presence. The previous Inspector noted these buildings but did not comment on how they should be weighed when considering the impact on the settings of the listed buildings. In my opinion the presence of the nursery and the additional buildings added since the date of listing are important material factors which need to be given due weight."

29. The inspector summarized his conclusions on the impact of the development on the setting of the listed buildings in paragraphs 72 and 73 of his letter, contrasting the two schemes as he did so:

> "72. Bringing these findings together, I consider that the gypsy site in its present form, without the landscaping and other mitigation measures that are now put forward with Appeal

B, has caused material harm to the settings of the listed buildings. I reach this conclusion having regard to the other detrimental changes that are described above and giving consideration to the additional, cumulative harm that has arisen. The development that exists, and is the subject of the deemed application on Appeal A has detracted from the setting of the buildings in terms of its visual impact when viewed from Southerns and Southcote Barn and on the approach to all 3 buildings along Southend Lane. This harm weighs against permitting the development the subject of Appeal A as it is in conflict with the requirements of Policies NHE.6 and S.6 of the [Gloucestershire Structure Plan] and Policy CSP.1 of the [Core Strategy] and the advice on safeguarding heritage assets contained in Section 12 of the [NPPF].

73. As regards Appeal B, the proposal incorporates a number of mitigation measures which go beyond what was before the previous Inspector. These, especially the additional landscaping and incorporation of additional land at the south-eastern corner would lessen the impact on the setting of the listed buildings. I do not consider that these measures would completely eradicate the harm in this respect as the presence of the gypsy site would still have an impact on the character of the immediate area even if well-screened, a point made by the previous Inspector. However, I have been provided with a much more detailed assessment with fuller documentary evidence concerning the history of the listed buildings and the adjacent nursery buildings which has enabled me to reach a more informed view of the background and context. The level of harm and conflict with the policies cited above still needs to be taken into consideration and I will do so when carrying out the overall balancing exercise below".

30. In the following sections of his letter the inspector considered the other main issues in the appeals – relating to biodiversity, the proposed access arrangements and the safety of the highway, the living conditions of local residents, the proposed arrangements for drainage, the need for and supply of gypsy sites in the area, the need of the occupants of the site and their children for accommodation, and their personal circumstances.

31. In paragraphs 190 to 204 the inspector set out his principal conclusions. Rejecting the deemed application for planning permission in ground (a) of Appeal A, he said:

"190. I have found that this development, which flows from the deemed planning application has and would continue to cause some material harm to the landscape character and visual amenity of the area and to the setting of the nearby listed buildings and that this harm would not be satisfactorily ameliorated by the imposition of planning conditions. My findings in this respect are consistent with those of the previous Inspector who dealt with the site. I have also found that although the development is unlikely to have materially harmed the habitat of any protected species, including the great crested newt, the absence of the full range of mitigation measures means that this is a less beneficial solution in terms of biodiversity. In terms of highway safety the proposal under Appeal A does not include the improvements which I consider are necessary, to render the development acceptable. Furthermore the absence of the extra buffer of land that is provided by the Appeal B proposal leads me to conclude that the living conditions of neighbouring residents could be prejudiced.

191. On the plus side, I have found that there is a general need for more gypsy and traveller sites in the Forest of Dean and that there are unlikely to be any genuine alternatives for the site residents in terms of lawful accommodation within the area should they be required to vacate the site. There are also the general advantages in terms of health and education of having a settled base close to surgeries and schools in Newent.

192. Weighing these findings, I consider that the harm is substantial and that the continuation of the use in its present form and layout, even allowing for the possibility of imposing conditions, outweighs the arguments on need and the personal circumstances which weigh in favour. Consequently, planning permission will not be granted for this deemed proposal".

32. On Appeal B, however, the inspector's conclusions were these:

> "193. I have concluded that the development that forms the subject of the s78 appeal would, subject to appropriate conditions, not cause material harm to the landscape character and visual amenity of the area. As regards the setting of the nearby listed buildings the mitigation measures put forward lessen any harm in this respect but would not completely eradicate this harm. In terms of biodiversity I have found that the mitigation measures, including the provision of a new pond by way of the unilateral undertaking, would ensure that the development complies with the relevant policies and would be unlikely to lead to any offence under Article 12 of the [Habitats] Directive or the [Habitats] Regulations. The proposal also includes the required improvements to Southend Lane and other measures which can be conditioned to satisfactorily address highway safety and the living conditions of nearby residents.
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> 194. The general need for gypsy sites in the area and the lack of realistic alternatives, along with personal circumstances and health and education requirements are significant. I am aware that the statutory test concerning listed buildings – to have special regard to the desirability of preserving their settings – is a high hurdle but in this instance I have found that the harm to the setting of the particular buildings that would occur with this proposal would be limited, taking account of the additional screening measures. Balancing this harm against the factors in favour, which are considerable, I conclude that planning permission should be granted, subject to a range of necessary conditions which I will come to below".

33. The inspector discussed the conditions he was going to impose on the planning permission in paragraphs 200 to 204. In paragraph 201 he referred to the condition that would stipulate the submission of further details, which included "details of the width and content of the planting belts" and measures "to ensure the protection of existing trees and vegetation around the perimeter of the site". Those requirements are in condition 5).

The issue – the setting of the listed buildings

Section 66 of the Listed Buildings Act

34. Section 66(1) of the Listed Buildings Act provides:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or any features of special architectural or historic interest which it possesses."

35. In *South Lakeland District Council v Secretary of State for the Environment and another* [1992] 2 A.C. 141 the House of Lords considered the meaning of the statutory concept, in section 277(8) of the 1990 Act, of "special attention" being paid "to the desirability of preserving or enhancing the character or appearance" of a conservation area in the exercise by a local planning authority of its relevant planning functions. Lord Bridge of Harwich (at p.150A-F) endorsed the observation of Mann L.J. in his judgment in the Court of Appeal ([1991] 1 W.L.R. 1322, at pp. 1326 and 1327) that the "statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved". Lord Bridge said that this construction of the statutory duty "not only [gave] effect to the ordinary meaning of the statutory language; it also [avoided] imputing to the legislature a rigidity of planning policy for which it [was] difficult to see any rational

justification." He added (at p.150H) that "[all] building development must involve change" and if the statutory objective had been to inhibit any such change apart from "positive preservation" or enhancement of the character or appearance of the conservation area, the statutory language would have been different.

36. In an earlier passage in his speech in that case (at p.146F-G) Lord Bridge said there was no dispute that the intention of section 277(8) was that planning decisions on development proposed in a conservation area "must give a high priority" to the objective of preserving or enhancing the character or appearance of the area. In *Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303 Gildewell L.J. had said (at p.1319A) that since the desirability of preserving or enhancing the character or appearance of a conservation area was a consideration to which special attention had to be paid as a matter of statutory duty, "it must be regarded as having considerable importance and weight".

37. The "high priority" is not displaced, nor is the "considerable importance and weight" reduced, by the presumption in favour of proposals complying with the development plan (see the judgment of Mr David Keene Q.C., as he then was, in *Heatherington U.K. Ltd. v Secretary of State for the Environment* 69 P. & C.R. 374, at pp. 382 and 383).

38. In her recent judgment in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2013] EWHC 473 (Admin) Lang J. said (in paragraph 39 of her judgment) that because of the "special statutory status" accorded to the desirability of preserving the setting of listed buildings, "where the [section] 66(1) duty is in play, it is necessary to qualify Lord Hoffmann's statement in *Tesco Stores v Secretary of State for the Environment and others* [1995] 1 WLR 759, at 780F-H … that the weight to be given to a material consideration was a question of planning judgment for the planning authority". She went on to say (in paragraph 45) that the use of the word "desirability" in section 66(1) "signals that 'preservation' of the setting is to be treated as a desired or sought-after objective", to which the decision-maker ought to accord "special regard"; and that this "goes beyond mere assessment of harm." The error in that case was that the inspector had not accorded "special weight" to the desirability of preserving the setting of the listed buildings, but had "treated the 'harm' to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance" (paragraph 46). The section 66(1) duty "applies to all listed buildings, whether the "harm" has been assessed as substantial or less than substantial" (ibid.).

The NPPF

39. The NPPF was published on 27 March 2012. It sets out the Government's planning policy in England for decision-making in cases in which proposed development would affect "a designated heritage asset". It superseded PPS5 "Planning for the Historic Environment", but not the guidance in the Practice Guide (see paragraph 21 above).

40. Paragraphs 131 to 134, in section 12 of the NPPF, state:

> "131. In determining planning applications, local planning authorities should take account of:
>
> - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
> - the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality;

- and the desirability of new development making a positive contribution to local character and distinctiveness.

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 … grade I and II* listed buildings … 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."

The PPS5 Practice Guide

41. Paragraphs 113 to 117 of the PPS5 Practice Guide supported Policy HE10 of PPS5, which had contained policy principles guiding the consideration of applications for development affecting the setting of a "designated heritage asset". Paragraph 113, under the heading "Understanding setting and its contribution to significance", states:

> "Setting is the surroundings in which an asset is experienced. All heritage assets have a setting, irrespective of the form in which they survive and whether they are designated or not. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance, or may be neutral."

Paragraph 114 states:

> "The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors …; by spatial associations; and … by our understanding of the historic relationship between places. …".

Paragraph 115 states:

> "Setting will, therefore, generally be more extensive than curtilage and its perceived extent may change as an asset and its surroundings evolve or as understanding of the asset improves."

Submissions

42. For the Council Mr Crean submitted:

(1) The inspector concluded that he was only concerned with the setting of the listed buildings, and there is no argument with that conclusion.

(2) The inspector seems to have come to a different conclusion about the value of the listed buildings and their setting from that reached by the inspector in the previous appeal. He found that the harm arising from the development in Appeal A was still too great. He also found that that harm was not merely visual. Having made those findings, the inspector concluded that the development in Appeal B would not cause unacceptable harm to the setting of the listed buildings, because of the additional screening proposed and the inclusion of the land in the south-eastern corner of the site. In reaching that conclusion the inspector restricted himself to a consideration of visual harm to the setting of the listed buildings, and to the mitigation of visual impact.

(3) The inspector referred to the duty in section 66(1) but did not apply it properly. He did not accord special weight or considerable importance to the desirability of preserving the setting of the listed buildings. The statutory duty applies to the settings of all listed buildings, regardless of whether harm has been assessed as substantial or less than substantial. The inspector should not have given less than special weight to the desirability of preserving the setting of these buildings because he found the harm was only "limited". To do so was inconsistent with the approach indicated by Lang J. in *East Northamptonshire District Council*. In short, the inspector did not pay special regard to the desirability of preserving the settings of the listed buildings.

(4) The inspector failed to apply the policy in paragraphs 131 to 134 of the NPPF as he should have done. He both misunderstood and misapplied the policy. When considering how much harm there would be to the setting of the listed buildings he failed to take a rational and consistent approach, in line with the policy, and in the light of his findings of fact.

43. For the Secretary of State Ms Lisa Busch submitted:

(1) It is clear from the decision letter that the inspector was familiar with the duty under section 66(1), and with the relevant policy and guidance. He referred explicitly both to the duty and to the policy and guidance. He discharged the duty and his decision accords with the policy.

(2) The inspector did not confine himself to the visual effects of the development on the setting of the listed buildings. He took a comprehensive approach. He identified a broad range of relevant considerations in paragraph 60 of his letter. These were not restricted to visual effects. The inspector consciously applied all of the relevant factors in his assessment, in the light of the facts as he found them, including the history of the buildings, their curtilage and their setting.

(3) The inspector went beyond "mere assessment of harm". He performed the "special regard" duty just as Lang J. said it should be performed in *East Northamptonshire*

District Council. He took account of the previous inspector's relevant conclusions, the changes in circumstances and evidence, and the nature and degree of harm to the setting of the listed buildings in each of the two appeals before him. He did not ignore the buildings' "character and context". He was entitled to distinguish between the two appeals in the way that he did, and for the reasons he gave.

(4) This case is clearly distinguishable from *East Northamptonshire District Council*. The inspector did not commit the error made in that case. He knew that harm to the setting of a listed building was not merely one material consideration to be weighed in the balance. He reminded himself of the "high hurdle" presented by the duty in section 66(1). Conscious of this, he found that the relevant harm in Appeal B would be "limited", and that there were benefits strong enough for planning permission to be granted in spite of that harm. He did not fail to give "special weight" to the harm he found.

(5) There is nothing in the complaint about the inspector's interpretation and application of the NPPF policy. Given the differences between the two developments he was able to find, and plainly did, that in Appeal B the relevant harm was less than substantial. In that case therefore the development came within the policy in paragraph 134 of the NPPF. But the development in Appeal A did not. The inspector's conclusions were neither irrational nor inconsistent.

44. For Mr Jones, Mr Michael Rudd made submissions to the same effect as those of Ms Busch.

Discussion

45. I deal first with the argument pleaded as ground 2 in the Council's application, and elaborated in Mr Crean's skeleton argument.

46. I do not accept that the inspector failed to discharge the duty, under section 66(1) of the Listed Buildings Act, to have "special regard" to the desirability of preserving the setting of the listed buildings.

47. As Ms Busch submitted, this case is quite different from *East Northamptonshire District Council*. Here the inspector was clearly aware of the task he faced if he was to comply with the requirements of section 66(1). He referred to it, and correctly described it, twice: first in paragraph 58 of his decision letter, when dealing with the matter as one of the main issues he had identified – the effects of the development on the setting of the listed buildings – and then again in his general conclusions in paragraph 194.

48. The inspector also recognized that the statutory requirement was reflected in relevant policy: both in the development plan – in Policies NHE6 and S6 of the Structure Plan and in Policy CSP1 of the Core Strategy – and in government policy in the NPPF. He saw no tension or conflict between the statutory duty and relevant policy. There was no such tension or conflict.

49. Can it be said that the inspector failed to do what section 66(1) required? In my view it cannot. I do not think the scope and intensity of the inspector's assessment can conceivably be said to fall below what was required of him by the "special regard" duty. On

the contrary, it was in my view exemplary. It shows he attached great importance to the desirability of preserving the setting of the listed buildings. He described the statutory test as "a high hurdle" (paragraph 194 of his decision letter). And when one reads the relevant parts of his letter one is left in no doubt that he gave the requirements of section 66(1) a "high priority" – Lord Bridge's expression in *South Lakeland* – and "considerable importance and weight" – Gildewell L.J.'s in *Bath Society*.

50. The inspector included in his analysis every consideration relevant to the issue he had to decide in each of the two appeals. His analysis was comprehensive. He did not limit himself to an assessment of visual effects alone. He used the five points he set out in paragraph 60 of his letter as the basis for his consideration of all the relevant factors, including the significance of the three listed buildings and their "character and context". He acknowledged the relationship of the buildings as a group (paragraph 56 of the decision letter); their history and the changes that they, their curtilages and their setting had undergone since they were listed (paragraphs 56, 57, 66, 67 and 69); the relevant provisions of the development plan and of national policy and guidance (paragraphs 58, 59, 60 and 62); the previous inspector's relevant conclusions (paragraph 61); the extent of the setting of the buildings (paragraph 62); the proportionate and realistic approach that he had to adopt (paragraph 63); the historical context of the buildings (paragraph 64); the relationship between them and the appeal sites (paragraph 68); views of the appeal sites from the listed buildings and their gardens (paragraphs 68 and 69); the effect of the nursery buildings and polytunnels on the setting (paragraphs 70 and 71); the "material harm" that had been caused to the setting by the Appeal A development (paragraphs 72 and 190) and the lesser impact of the development in Appeal B (paragraphs 73, 193 and 194); and the different balance between benefit and harm in either case (paragraphs 192 and 194).

51. Of course, in assessing the effects the development would have on the setting of the listed buildings the inspector could not avoid making a visual and aesthetic judgment on each of the two proposals before him, having regard to the history and changed physical state of the buildings and their surroundings. This is the kind of exercise a decision-maker will normally need to undertake when having special regard to the desirability of preserving the setting of a listed building. Where visual or aesthetic considerations are involved in a planning decision the range of reasonable judgment is wide. The court will not interfere with a reasonable planning judgment, exercised in accordance with the relevant statutory scheme (see *Tesco Stores Ltd. v Secretary of State*). That general principle is not excluded in a case where the section 66(1) duty applies. And I do not believe Lang J. was seeking to suggest otherwise in paragraph 39 of her judgment in *East Northamptonshire District Council.*

52. In this case it cannot be said that the inspector failed to give "special weight" – as Lang J. described it – to any of the considerations relevant to the duty in section 66(1). He came to a reasonable conclusion on the issue that section 66(1) required him to face, in the light of all of the factors bearing on the judgment he had to make.

53. The fact that the conclusions in the two appeals were different does not betray a lack of consistency. If anything, it goes to show how careful the inspector was in performing the "special regard" duty. After all, the two proposals were not the same. Nor was the evidence. The inspector's conclusions could properly be different from those of the inspector in the previous appeal. And as he explained in paragraphs 72 and 73 and 190 to 194 of his decision letter, they were different. In Appeal B the harm to the setting of the listed buildings was acceptable; in Appeal A it was not. There is nothing irrational or inconsistent in that.

54. Section 66(1) did not oblige the inspector to reject the Appeal B proposal because he found it would cause some harm to the setting of the listed buildings. The duty is directed to "the desirability of preserving" the setting of listed buildings. One sees there the basic purpose of the "special regard" duty. It is does not rule out acceptable change. It gives the decision-maker an extra task to perform, which is to judge whether the change proposed is acceptable. But it does not prescribe the outcome. It does not dictate the refusal of planning permission if the proposed development is found likely to alter or even to harm the setting of a listed building. Gauging the likely effects on the setting will always be part of a broader planning assessment, though a very important part. The result of that exercise will depend on the facts and circumstances of the case in hand. The change proposed in or to the setting of the listed building may not be great. The likely harm may be slight. If there are benefits in the proposal they may be powerful enough to justify the likely effects on the setting despite the desirability of its being preserved. Such questions will be for the decision-maker to judge when having "special regard" to the statutory aim. This is in no sense to diminish the duty in section 66(1), or to re-write the case law to which I have referred. It is merely to recognize that performing the duty is an aspect of planning decision-making in a relevant case, but not the only one.

55. I turn to the argument Mr Crean developed in his oral submissions.

56. I do not accept that the inspector misunderstood or misapplied government policy in paragraphs 131 to 134 of the NPPF. Nor do I accept that, when applying the policy, he came to an unlawful conclusion or expressed that conclusion unclearly.

57. As always, it is important to read the relevant findings and conclusions of the inspector fairly, in their entirety, and not in an overly legalistic way.

58. The inspector plainly had regard to the relevant policy. He introduced section 12 of the NPPF in paragraph 59 of his decision letter. He also referred, in the same paragraph, to the guidance on Policy HE10 of PPS5 in the Practice Guide, as well as English Heritage's document "The Setting of Heritage Assets".

59. In paragraphs 133 and 134 the NPPF distinguishes between cases in which the likely harm to the "significance of a designated heritage asset" is "substantial" and those in which it is considered to be "less than substantial" (see paragraph 40 above). There is, in my view, no doubt that the inspector was well aware of this distinction. It was partly for this reason that he took as much care as he did to establish the degree of likely harm to the setting of the listed buildings in each of the two cases before him.

60. As Mr Crean pointed out, the inspector found that the setting of the listed buildings extended beyond their curtilages, which were now private gardens (paragraph 62 of the decision letter). The buildings' setting, in his view, included "some, if not all" of the gypsy site (ibid.). This does not seem to have been controversial at the inquiry.

61. The inspector saw the need to establish whether any "demonstrable harm" had been or would be caused to the setting (ibid.). He recognized that he had to approach this question having regard to the significance of the listed buildings and their setting and the way in which the development proposed would either enhance or detract from that significance and one's ability to appreciate it. His reference to "demonstrable harm", as I read it, meant harm that could be objectively demonstrated – rather than merely asserted. And I do not

accept that this represents any dilution of the section 66(1) duty or of the policy in section 12 of the NPPF. The inspector was not equating "demonstrable harm" either to "substantial harm" in paragraph 133 or to "less than substantial harm" in paragraph 134. He was not overriding or eliding the distinction between those two levels of harm. He was not posing for himself the wrong test, or asking himself the wrong question. He was not lowering the threshold of acceptability for proposals affecting the setting of a listed building. He did not do any of those things either in paragraph 62 or elsewhere in his decision letter.

62. In the very detailed analysis in the following paragraphs of the letter (paragraphs 63 to 71) the inspector expressed his findings of fact and tackled the various considerations bearing on the judgment he had to make in each of the two appeals (see paragraphs 26 to 28 above). He brought his findings together in paragraphs 72 and 73 (see paragraph 29 above). In my view those findings of fact were clear and are not vulnerable to criticism in these proceedings, and the assessment he based on them is also legally sound.

63. On Appeal A he concluded, in paragraph 72, that the gypsy site as it was, without the landscaping and other mitigation measures now put forward in Appeal B, had caused what he described as "material harm" to the setting of the listed buildings. He took account of the "cumulative harm" that had occurred, including the harm caused by the existing development on the site. This weighed against granting planning permission for the retention of the existing development.

64. The inspector's conclusion for the Appeal B development, set out in paragraph 73 of his letter, was different. He took into account the mitigation measures now proposed. These, he said, went beyond what had been before the previous inspector. Additional landscaping was now proposed and more land had been included in the south-eastern corner of the site. This would lessen the impact on the setting of the listed buildings. It was this reduced impact that the inspector was considering when he said the measures now proposed would not, in his view, "completely eradicate the harm …". The reason he gave for this conclusion was perfectly clear – that the gypsy site would still affect the character of the "immediate area" even if well screened. This was consistent with the conclusion reached in the previous appeal (see paragraph 6 above). As the inspector said, however, he had the advantage of a more detailed assessment and more evidence about the history of the listed buildings and the nursery structures nearby. And he acknowledged that the "level of harm" and the conflict with the relevant policies needed to be brought into the "overall balancing exercise" he went on to undertake.

65. I see nothing at all inconsistent between what the inspector said in paragraph 62 of his letter and what he went on to say in paragraph 73. His observations about the extent of the setting of the listed buildings in paragraph 62 are not at odds with what he said in paragraph 73 about the effect of "mitigation measures" being carried out on the part of the site in Appeal B that lay within the setting. Both passages are steps in a logical and coherent analysis, which must be read as a whole. Both sit perfectly well with relevant local policy, with government policy in the NPPF, and with the guidance in paragraphs 113 to 115 of the PPS5 Practice Guide (see paragraph 41 above), none of which prevents acceptable development within the setting of a listed building.

66. The inspector's "overall balancing exercise" appears in paragraphs 190 to 192 of the decision letter for Appeal A, and in paragraphs 193 and 194 for Appeal B. Once again, the

difference between the inspector's conclusions on each of the two appeals is plain, and so are the reasons for it.

67. I reject the submission that the inspector failed to apply his mind to the question of whether, in either case, the harm would be "substantial", thus attracting the policy in paragraph 133 of the NPPF, or "less than substantial", which would attract the policy in paragraph 134. On a fair reading of his analysis that is what he did.

68. In paragraph 190 the inspector concluded, on Appeal A, that there would be "some material harm" to the landscape and visual amenity of the area and to the setting of the listed buildings, which could not be "satisfactorily ameliorated" through planning conditions. In that case he concluded (in paragraph 192) that the harm overall was "substantial". I do not accept that his use of that word in the first sentence of paragraph 192, when referring to harm in several respects, is to be read as meaning that the harm he found to the setting of the listed building was less than substantial. On a fair reading of that paragraph in its context, I think it is quite clear that he did conclude that that particular harm would be substantial.

69. In Appeal B, however, he concluded (in the first sentence of paragraph 193) that the development would avoid "material harm" to the landscape character and visual amenity of the area, and (in the second sentence) that the mitigation measures proposed would "lessen any harm" to the setting of the listed buildings, though they would "not completely eradicate" it.

70. In judging the likely effect of the development in Appeal B on the setting of the listed buildings the inspector was entitled – indeed, bound – to take into account the mitigation proposed. The fact that the mitigation was proposed within or at least partly within the setting, rather than outside it or on the edge of it, was in itself immaterial. The likely effect of that mitigation was plainly relevant to the judgment the inspector had to make. The appearance of the proposed landscaping and screen planting and the way in which they would change views of and from the listed buildings were not contentious as matters of fact. At any rate, the inspector obviously accepted that they would reduce the harm to the setting. It was this landscaping and planting, possible with the scheme in Appeal B but not in the layout in Appeal A, that was, in the inspector's view, a decisive distinguishing feature between the two developments. One can see this in the crucial reasoning in paragraphs 72 and 73 and in paragraphs 190 to 194 of the decision letter. The landscaping and planting would of course change the setting, but not unacceptably. This was a judgment the inspector made not just on the evidence and submissions he heard, but having visited the site and its surroundings and seen them for himself.

71. I do not think the inspector's conclusions in the first two sentences of paragraph 193 can be read, as Mr Crean submitted they should be, as a general proposition – that landscaping of the kind proposed, involving the planting of trees and hedges, would always and necessarily be good for the setting of a listed building. The inspector said no such thing. It was not for him to express, as Mr Crean described it, "a universally applicable judgment", or to consider what the effect of planting trees within the setting of some other listed building might be. He had to confine himself to the case before him, and he did. What he had to consider, and did consider, was the effect of this development, with the proposed landscaping and planting in place, on the setting of the three listed buildings with which he was concerned. He plainly concluded that the planting proposed within the setting would not be damaging to it but benign, reducing the harm to a level that could be accepted.

Those conclusions are in my view entirely unexceptionable, and they were clearly explained.

72. In paragraph 194 of his letter the inspector returned to the duty in section 66(1). He reminded himself how onerous that duty is. Having done so, he said that in Appeal B the harm to the setting of the buildings would be "limited, taking account of the additional screening measures". As I think Mr Crean accepted, this was to say, in effect, that the harm was not "substantial". Thus, in Appeal B, the inspector was placing his own conclusion on the question of harm squarely within the scope of paragraph 134 of the NPPF, rather than paragraph 133. The balance he had to strike, therefore, was to weigh the harm caused by the proposed development to the setting of the listed buildings "against the public benefits of the proposal …". And he did that. In the final sentence of paragraph 194 he concluded that the factors weighing in favour of the proposal were "considerable" and sufficient to outweigh the harm he had found. Conditional planning permission could therefore be granted. This seems to me an unimpeachable planning judgment. It is not tainted by any misunderstanding or misapplication of policy in the NPPF.

73. The inspector's conclusions on this issue were, in my view, conspicuously thorough and clear, and are beyond criticism in proceedings such as these. They were based on solid findings of fact and cogent assessment. The inspector did not neglect any consideration that was relevant, nor have regard to any that was not. No doubt the Council – and others too – disagree with him on the merits of Appeal B. But that is not a reason for the court to upset the decision he made.

74. It follows that this, the sole remaining ground of the Council's application to the court does not succeed.

Conclusion

75. For the reasons I have given this application must be dismissed.