Neutral Citation Number: [2015] EWHC 292 (Admin)
Case No: CO/4211/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
PLANNING COURT
LEEDS DISTRICT REGISTRY

The Court House
Oxford Row
Leeds LS1 3BG

20 February 2015

B e f o r e :

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

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Between:

NORTH COTE FARMS LTD **Claimant**

- and -

(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) EAST RIDING OF YORKSHIRE COUNCIL **Defendants**

David Hardy, Solicitor Advocate (instructed by Eversheds) for the Claimant
Richard Honey (instructed by Treasury Solicitor) for the First Defendant
Hearing date: 9/2/2014

HTML VERSION OF JUDGMENT

Judge Behrens :

1. Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 in which Northcote Farms seeks to quash the decision of the Secretary of State's Inspector, Louise Crosby, contained in a decision letter dated 1 August 2014.

2. The Inspector refused planning permission for the erection of a 75m high wind turbine because of the proposal's effect on the setting of Carnaby Temple, a listed folly built around 1770, which was some 500m away from the site of the proposed turbine.

3. There are 2 grounds of appeal which are helpfully set out in paragraph 1.3 of Mr Hardy's skeleton argument:

> Ground (1): Having identified Carnaby Temple as a Grade II designated heritage asset which would be affected by the proposed development, the Inspector found as a matter of fact that:
>
> (a) the windows of the building had been bricked up
>
> (b) the Temple was currently unable to fulfil one of its original purposes, that being a place from which to look out onto the landscape and coast
>
> (c) there are no views out of the Temple anywhere
>
> Notwithstanding these findings of fact, the Inspector concluded that there would be harm to the heritage significance of the building on a hypothetical assumption that narrow views from the windows would be harmed if the buildings were not bricked up. No views are obtainable and there was no evidence before the Inspector that listed building works to the Temple are likely to happen. In so doing, the Inspector took into account an immaterial consideration and/or failed to provide adequate reasons for her conclusion of harm and/or acted perversely
>
> Ground (2): Inspector Crosby failed to determine the appeal in accordance with section 38(6) of the Planning and Compulsory Purchase Act 2004. In so doing, the Inspector misunderstood and/or misapplied the statutory test and failed to provide adequate or any adequate reasoning for her approach

4. The Secretary of State resists the application. Essentially he contends that the challenge to the decision of the Inspector is a challenge to the merits of the decision and this court should not interfere. However he also contends that the Inspector was entitled as a matter of law to take into account the views from Carnaby Temple and that the Inspector's approach was in accordance with the submissions made to her and was correct. Alternatively, it would have made no difference to the result of the appeal if she had considered s38(6) expressly.

2. The Law

2.1 General Principles

5. There is no dispute as to the relevant general principles of law which are set out in each of the skeleton arguments and may be summarised as follows.

The Planning Merits

6. An application to the Court is not an opportunity for a review of the merits of an Inspector's decision, and the Court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the merits.

7. The assessment of facts and weighing of considerations is in the hands of the Inspector alone and the Court has no power to intervene; matters of planning judgement are entirely for the Inspector

Decision Letters

8. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. An Inspector is obliged only to "deal with the substantial points that have been raised" and "the principal important controversial issues".

9. An inspector is not writing an examination paper and decision letters must be read in good faith. Decision letters should be read fairly and as a whole and without excessively legalistic textual criticism.

10. A decision letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed; it is not necessary to rehearse every argument relating to each matter.

Irrationality

11. For a conclusion to be irrational or perverse it must be one that that no reasonable person in the position of the Inspector, properly directing herself on the relevant material, could have reached. The Court will require "something overwhelming" from the Claimant before allowing a challenge of this. A claimant alleging that an inspector has reached a *Wednesbury* unreasonable conclusion on a matter of judgement faces a particularly daunting task.

Relevance

12. If a matter would not have caused the Inspector to reach a different conclusion then it is irrelevant whether it was taken into account.

2.2 Statute

13. I was referred to 2 statutory provisions in the course of the application.

14. Section 66 (1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the 1990 Act") which 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 its setting or any features of special architectural or historic interest which it possesses.

15. Section 38(6) of the Planning and Compulsory Purchase Act 2004 which provides:

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

16. I was referred to a number of authorities on each of these provisions and will refer to them when considering the grounds of appeal later in this judgment.

3. The Planning Application

History

17. As already noted the planning application related to the erection and operation of a 49m high wind turbine (75m wind to tip), erection of a meter house and transformer compound and construction of crane pad and access track on land at Temple Farm, Temple Lane, Carnaby, East Yorkshire.

18. The original application was made on 12th March 2012. It was refused on 24th January 2014 on 3 grounds. The second ground was:

> The proposed development will result in harm to Carnaby Temple and the Burton Agnes Hall complex of designated heritage assets …The harm identified to these designated heritage assets is not considered to be outweighed by the benefits associated with renewable energy development and as such the application is contrary to policy EC5 of

> the Proposed Submission Strategy Document and paragraph 132 of the National Planning Policy Framework ("NPPF").

19. An appeal to the Secretary of State was dismissed by the Inspector on 1st August 2014

4. The Decision Letter

20. The Decision Letter is divided into sections.

The site and landscape

21. The site is described in paragraphs 4 - 15 of the Decision Letter. The Inspector found that the appeal site is located in an agricultural field to the west of Temple Farm. It falls within the Open High Rolling Farmland of the Yorkshire Wolds. The relevant key characteristics of this area are the elevated rolling landform; the large scale open landscape with long distance views dominated by sky; its sparsely populated area with scattered villages and farmsteads; large and very large rectilinear regular arable fields; fragmented hedgerows; and very few public rights of way.

22. The landscape is gently undulating, with the appeal site located on one of the more elevated sections of this landscape. The turbine would be sited around 200m south-west of the existing large farm buildings. To the west of the site is a shelterbelt of mature and semi-mature deciduous woodland. The proposal would introduce a tall vertical structure into this landscape.

23. Given the location of the proposed turbine, its elevated position and its overall height it would be seen from some distance away. However, in most views it would be seen in the context of large farm buildings, the electricity poles and the nearby woodland. In the Inspector's view these would help to ameliorate its effect as it would not be the only structure with a vertical emphasis. Nonetheless she pointed out that it would be appreciably taller and contain rotating blades.

24. Overall the inspector found that the landscape has the capacity to absorb this single turbine which would be seen in the context of other large buildings, numerous electricity poles and a shelterbelt of mature woodland. In the light of ground 2 it is necessary to set the final sentence of paragraph 15:

> As such, it would not harm its character or appearance and would accord with BWLP policy EN3 which seeks to protect the Wolds Area of Landscape Protection; policy EN2 which seeks to protect the open countryside from harmful development; and policy EN25 which permits renewable energy proposals where they would not unduly harm the character and appearance of the landscape.

The setting

25. In paragraph 16 of the Decision Letter the Inspector summarises the effect of s66(1) of the 1990 Act. In paragraphs 17 – 20 she deals with the setting of Burton Agnes Hall and concludes in paragraph 20 that the proposal would not harm the setting and would preserve the special architectural and historic interest in that building.

26. She deals with the setting of Carnaby Temple in paragraphs 21 to 28 of the Decision Letter. As these paragraphs are central to the first ground of appeal I shall set them out in full.

> 21. Carnaby Temple is located around 500 m from where the wind turbine would be sited. It is a chinoiserie style folly built around 1770, with later additions for William Strickland of Boynton Hall. It is constructed from pinkish-brown brick with an asphalt and Welsh slate roof. It is octagonal in plan with a 19th century extension to the rear and is 2 storeys high with a single storey lantern. It has a pagoda roof with ball finial. The building is disused and the windows and doors have been bricked up. It is surrounded by arable fields adjacent to it is a large manure heap, associated with Temple Farm.
>
> 22. The Temple was constructed in an elevated position to provide views across the landscape and towards the coast. The setting of the building is integral to its aesthetic and historic significance in two ways, firstly because of its appearance within the surrounding

area and secondly for the views it affords/provides. Consequently it is highly sensitive to change.

23. Because of the topography of the land around the Temple it is mostly only visible at short range. From Church Lane, the turbine would be highly visible because of its scale and proximity. From parts of this road the Temple would be seen also, but it would be very small and indistinguishable on the horizon to the casual passer by because of its distance from the road. Moreover, it would be viewed from Church Lane in conjunction with the large modern farm buildings of the host property and the numerous, electricity poles and the wires criss-crossing the landscape.

24. Views from the north, just beyond the Temple, would be affected most by the proposal. One of the submitted photomontages shows the Temple to the left of the illustration as the most prominent element; beyond it, and in the centre, the large farm buildings of Temple Farm and the electricity poles and wires are shown as smaller elements in comparison with the Temple; and to the right would be the tall modern wind turbine.

25. From this angle, the unsympathetic extension to the Temple is visible and therefore it is not seen in its best light, but the attractiveness and architectural and historical importance of the building is still evident. As such, the listed structure would retain pre-eminence in the foreground with the proposed turbine most distant, diminished in scale and seen partly against the sky.

26. The wind turbine would nevertheless affect the setting of the Temple. In particular, the rotating blades would be a distraction that would reduce the ability to appreciate the heritage asset. Despite the presence of the other large modern structures nearby, the degree of harm to views of the Temple in the landscape would be significant.

27. Since the windows of the Temple have been bricked up it is currently unable to fulfil one of its original purposes, that being a place from which to look out onto the landscape and coast. As it currently stands there are no views out of the Temple anywhere. If the windows had not been blocked up then the planned views out of the building towards the coast would be unaffected by this proposal.

28. However, views from a number of the windows in the opposite side of the building would include the uncharacteristically tall modern turbine. Within this field of view there would also be the modern farm buildings and close to the turbine, modern electricity poles. The turbine would be much taller than those buildings and the electricity poles, and contain moving blades. As such, the proposal would introduce another tall modern structure into these planned views of the landscape. The narrow views from some of the windows would be dominated by sizeable modern structures. This would be very much at odds with the original planned views of open rural landscape. Consequently the proposal would result in harm to the significance of the building in this regard also.

27. No complaint is made about the description and conclusions in paragraphs 21 to 26 of the Decision Letter. However Mr Hardy criticises paragraphs 27 and 28. In particular he complains that the Inspector should not have had regard to the views from the Temple given that the windows were blocked up.

28. In paragraph 29 of the Decision Letter the Inspector concluded that the harm to the Temple was "less than substantial" and she referred to paragraph 134 of the NPPF which required a balancing exercise between the harm and the public benefits of the proposal.

29. In paragraphs 30 and 31 the Inspector referred again to the need to give considerable importance and weight under s 66(1) of the 1990 Act to the harm to a listed building and to paragraph 132 of the NPPF which requires harm to a heritage asset to be weighed in the planning balance.

Visitor Economy

30. In paragraphs 32 and 33 the Inspector concluded that the proposal would not cause harm to the visitor

or rural economy.

Benefits

31. In paragraph 34 the Inspector set out the benefits of the proposal. She said:

> 34. The wind turbine would produce electricity for use at the farm and therefore reduce its reliance on electricity from the National Grid corresponding to an estimated maximum annual reduction of 2,640 tonnes in carbon dioxide emissions. The proposal would contribute to Government renewable energy targets, reduce the emission of greenhouse gases and address climate change. These matters attract significant weight.

Other Matters

32. In paragraphs 35 to 39 the Inspector dealt with a number of other matters including noise, shadow flicker, local wildlife and highways. She concludes that none of these would be adversely affected by the proposal.

Conclusions

33. The inspector expresses her conclusions in paragraphs 40 – 43. In the light of the criticisms in ground 2 it is convenient to set out the whole of her conclusions.

> 40. A balance must be drawn between the competing considerations of the proposal. On the one hand the turbine would provide important local and national environmental benefits in terms of the provision of renewable energy, which carry significant weight. I have also found that the proposal would not harm the character or appearance of the landscape or the visitor economy and that it would preserve the setting of Burton Agnes Hall. On the other hand it would have a significant impact on the significance and setting of a grade II listed building and result in less than substantial harm to it.
>
> 41. The turbine is proposed to be in place for a temporary period of 25 years and this could be controlled by a planning condition. Consequently it would be temporary and reversible. Government advice in paragraph 2.7.17 of EN-3 says that the time-limited nature of wind farms, where permission is sought for a temporary period, is likely to be an important consideration for the decision maker when assessing, among other things, the potential effects on the settings of heritage assets.
>
> 42. Nevertheless, I am not satisfied that the benefits associated with this proposal outweigh the harm when assessed against the local planning policies, Government advice in relation to renewable energy and the Framework, as a whole. In carrying out this balance I have I attached considerable importance and weight to the duty set out in section 66(1) of the Act.
>
> 43. As such, the proposal would conflict with policy EC5 of the Draft East Riding Local Plan which to supports wind turbines, but only where any significant adverse impacts are satisfactorily minimised and the residual harm is outweighed by the public benefits of the proposal. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed.

34. It is apparent from these paragraphs that the Inspector has carried out a balancing exercise between the harm she identified to the setting of Carnaby Temple and the benefits of the proposal. She has attached considerable weight and importance to the duty in s 66(1) of the 1990 Act but has concluded as a matter of planning judgment that the benefits do not outweigh the harm. She considers that the proposal conflicts with policy EC5 of the Draft East Riding Local Plan.

35. It is equally apparent that apart from the references in paragraph 15 to policies EN2, EN3 and EN25 the Inspector has not expressly dealt with the question of whether the proposal complies with the existing development plan. This failure is said by Mr Hardy to constitute a fatal mistake in that the Inspector has failed to take s 38(6) of the 2004 Act into consideration. Accordingly on this ground the decision should

be quashed.

5. Ground 1

36. As already noted Mr Hardy does not complain of the Inspector's finding in paragraph 26 that the degree of harm to views of Carnaby Temple in the landscape would be significant.

37. His complaint relates to the Inspector's analysis of "the planned views" from the Temple in paragraphs 27 and 28. As the windows are blocked up and the Temple is inaccessible there are no views from the Temple itself. It follows that the consideration of the hypothetical views from the Temple was an error of law and the Inspector should not have considered that there was any additional harm as a result of the views from the Temple. As it is impossible to determine from the decision the amount of harm that was attributed to the views from the Temple the decision is flawed and the Claimant is prejudiced.

38. Mr Honey sought to answer this complaint in a number of ways. First, he pointed out that it was plain that the Inspector was well aware that the windows were blocked up and there were no present views from the Temple itself. She recorded that fact in a number of places not least in paragraph 27.

39. He referred me to the guidance from the government on the setting of a heritage asset and how it should be taken into account which includes:

> The contribution that setting makes to the significance of the heritage asset does not depend on there being public rights or an ability to access or experience that setting. This will vary over time and according to circumstance.

40. It is apparent from footnote 1 to paragraph 18 of the Decision Letter that the Inspector was aware that access by the public was not material. Mr Honey submitted that the impact on the heritage site had to be looked at in principle.

41. Mr Honey next referred me to a number of passages from the Landscape and Visual Assessment submitted by the Claimant in support of the planning application. Thus the Executive Summary contains the following passages:

> A substantial adverse impact is expected for the immediate landscape setting of **Carnaby Temple.** The proposed turbine would be a major new feature in the landscape and would detract from the prominence of the Temple in its localised setting and would be a major new feature in the views afforded *from this location*, although it would not impede the main views to the south and the east. The proposed turbine would therefore affect the aesthetic value of the Grade II listed building; this value is, however, already diminished by the derelict, inaccessible state of the building and has been degraded by the proximity of modern agricultural buildings and overhead power lines. [My italics]
>
> The views from the Temple are as significant as views of the building. The presence of the proposed turbine …would form a dominant element within the wider panorama from the site. The presence of a turbine would therefore have substantial impact on this aspect of the setting of the asset.

42. Mr Honey accordingly submitted that the Claimant's own expert had regarded the views from the Temple as being significantly affected.

43. In his reply Mr Hardy suggested that Mr Honey's submissions involved a misreading of both the government guidance and the impact assessment. He submitted that the government guidance was dealing with a situation where there was, at the time of the application, no public access and where the position might change. He submitted that Mr Honey was mixing up accessibility and availability. He submitted that references in the Claimant's assessment to views from the Temple were in fact views from the site of the Temple.

44. I prefer the submissions of Mr Honey. I do not accept that the government guidance is to be read in the way Mr Hardy suggests. More importantly it seems to me to be perfectly clear that the Inspector was entitled to take into account views from the Temple. The fact that the windows of the Temple are

currently bricked up and the Temple is currently inaccessible is no doubt relevant to the amount of harm but circumstances may change. It seems to me that this was recognised in the passages from the landscape and impact assessment referred to above. I also note that policy EN20 refers to the setting not only of the listed building but also of its curtilege.

45. Nor do I accept the submission that the Inspector was bound to specify in the Decision Letter the amount of harm caused by the views from the Temple. In my view the Inspector cannot be criticised for taking into account the "planned views" from the Temple as she does in paragraphs 27 and 28 of the Decision Letter.

46. It follows that I reject ground 1 of the application.

6. Ground 2

47. In order to assess Ground 2 it is necessary to consider the provisions of the development plan, the provisions of the Draft East Riding Local Plan, the NPPF, the authorities on section 38(6) of the 2004 Act, and section 66(1) of the 1990 Act, and the representations that were made to the Inspector.

The Development Plan

The East Yorkshire Borough Wide Local Plan was adopted in June 1997. The relevant policies are policies EN2, EN3, EN20 and EN25 which provide:

> (EN2) Proposals acceptable in the open countryside under other plan policies will be permitted where in terms of siting, layout, design and landscaping they:
>
> 1. avoid the loss of the best and most versatile agricultural land; and
>
> 2. will not harm the character of the surrounding area; and
>
> 3. safeguard sites and features considered important for their landscape, amenity or historical value; and
>
> 4. safeguard nature conservation interests; and
>
> 5. will not harm the landscape setting of settlements
>
> (EN3) Within the Wolds area of landscape protection, proposals which are otherwise acceptable in the open countryside and, in particular, small scale tourism and recreation proposals associated with the area's cultural and natural heritage will only be permitted where:
>
> 1. They will not be prominent or harm the quality of the landscape; and
>
> 2. In terms of design, materials colour and landscape treatment they are of a high standard in scale and character with their surroundings; and
>
> 3. Individually and cumulatively with other development, they will not give rise to levels of traffic noise or visitor pressure likely to harm the quiet character or nature conservation interest in the area.
>
> (EN20) Proposals affecting listed buildings will only be permitted where the character, appearance and setting of the building and its curtilege will be retained
>
> Sufficient details will be required to enable such an assessment to be made …
>
> (EN25) Proposals for renewable energy generators and ancillary infrastructure will be permitted providing that they will not unduly harm the appearance of the landscape, nature conservation interests, residential amenity or sites of archaeological interest
>
> To enable such an assessment to be made and to consider appropriate siting … wind

energy projects should provide sufficient details of …

48. It is to be noted that the only consideration of these policies in the Decision Letter is contained in paragraph 15. Mr Hardy submitted that on its true construction the Inspector must be taken to have found that the proposal was in accordance with the development plan. I do not accept that submission. I have set out the well established guidance on the reading of decision letters and shall not repeat it.

49. Paragraph 15 of the Decision Letter is contained in a section dealing with the character and appearance with the landscape. In my view the Inspector is saying no more than the proposal complies with EN2, EN3 and EN25 in relation to the character and appearance of the landscape. She is saying nothing, for example, about EN20. Nor is she saying that the proposal complies with conditions 2 and 3 of EN2.

The Draft East Riding Local Plan

50. The Draft East Riding Local Plan has not been adopted although there are no unresolved objections to it. It reached the final round of public consultation on 10th March 2014.

51. Policy EC5 is relevant:

> A Proposals for the development of the energy sector … will be supported where any significant adverse impacts are satisfactorily minimised and the residual harm is outweighed by the public benefits of the proposal. Developments and their associated infrastructure should be acceptable in terms of:
>
> 1. The cumulative impact of the proposal with other existing and proposed energy sector developments.
>
> 2. The character and sensitivity of landscapes to accommodate energy development …
>
> 3. The effects of development on:
>
> i. Local amenity, including noise …
>
> ii. Biodiversity …
>
> iii. The historic environment, including individual and groups of heritage assets above and below ground
>
> iv. Telecommunications …
>
> v. Transport …
>
> vi. Increasing the risk of flooding; and
>
> vii. The land including land stability …
>
> B …

52. It will be seen that policy EC5 is more favourable to a developer than policy EN20. In particular whilst policy EN20 requires the character, appearance and setting of the listed building and its curtilege to be "retained", policy EC5 requires a balancing exercise to be undertaken between the residual harm and the public benefits of the proposal.

The NPPF

53. I shall not lengthen this judgment by setting out the terms of the NPPF in full. I was, however referred to a number of paragraphs of the NPPF. In summary:

> 1. Paragraphs 11 and 12 expressly refer to s 38(6) of the 2004 Act and make it clear that applications must be made in accordance with the development plan unless material

considerations indicate otherwise.

2. Paragraph 14 sets out "the presumption in favour of sustainable development" and makes it clear that where relevant policies in the development plan are out of date permission should be granted unless adverse impacts of doing so would significantly and demonstrably outweigh the benefits.

3. Section 12 deals with heritage assets. Within section 12 paragraph 134 deals with a situation where a development proposal leads to "less than substantial harm to the significance of a designated heritage asset". It requires a balancing exercise to be undertaken between the harm and the public benefits of the proposal.

4. Annex 1 deals with transitional provisions. Under paragraph 215 decision makers are now required to give due weight to the policies in existing plans according to their degree of consistency with the NPPF. Under paragraph 216 decision makers are entitled to give weight to emerging plans according to the extent to which there are unresolved objections and the degree of consistency between the emerging plan and the policies in the NPPF.

54. It seems to me that policy EN20 and conditions 2 and 3 of EN2 are inconsistent with Section 12 of the NPPF in that they require the setting of historic asset to be retained or safeguarded whereas paragraph 134 of the NPPF requires a balancing exercise between the harm and the benefit. On the other hand policy EC5 in the draft plan is wholly consistent with paragraph 134 of the NPPF.

Representations made to the Inspector

55. As the appeal was by written representations, each party submitted a detailed statement of case.

56. In paragraph 2.4 of its statement of case the Claimant referred to draft policy EC5 and stated that it was being afforded significant weight. It described the 1997 plan as "out of date".

57. In the table in paragraph 7.1 of the statement of case the Claimant commented on the 1997 plan in the following way:

> This plan technically remains part of the development plan for the area. The level of weight that can be afforded to it is minimal due to its venerability and its lack of conformity with the NPPF. In any event we feel that the propose development complies with its requirements.

58. The comment on policy EC5 was:

> Considerable weight is being afforded to the Draft local plan due to the age of the adopted plan and its lack of conformity with the NPPF. It is our view that the proposed development complies with this policy. The minimal harm caused by the proposed development is outweighed by the benefits it brings by the production of renewable energy.

59. Paragraph 6.3.2 of the Council's statement of case also invited the inspector to attach great weight to policy EC5.

60. Thus it can be seen that both sides invited the Inspector to apply policy EC5 and to carry out the balancing exercise that was in fact carried out in the concluding part of her decision. Furthermore the Claimant expressly invited the Inspector to give minimal weight to the development plan because it was out of date and not in conformity with the NPPF. Neither side referred to s38(6) of the 2004 Act or invited the Inspector to make any determination as to whether the proposal was or was not in accordance with the development plan.

Authorities

61. I was referred to three authorities[1] on s 38(6) of the 2004 Act and two authorities[2] on s 66 of the 1995 Act.

62. The relevant principles on s 38(6) can be taken from paragraphs 26, 28 and 33 of the judgment of Richards LJ in the Hampton Bishop case:

> 26. The correct general approach to the application of section 38(6) was set out by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, by reference to a corresponding section of the Scottish legislation (section 18A of the Town and Country Planning (Scotland) Act 1972). Lord Clyde stated that the section "has introduced a priority to be given to the development plan in the determination of planning matters" (1458B); in a speech agreeing with him, Lord Hope referred to it as introducing a "presumption in favour of the development plan" (1449H). Lord Clyde went on to describe what this meant in practice. The passage (at 1459D-G) has been cited frequently but it bears repetition:
>
> > "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application …."
>
> 28. … It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say "as a general rule" because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule.
>
> 33. … It will be clear from what I have said above that in my view compliance with the duty under section 38(6) *does* as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on that issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Reed in *Tesco Stores v Dundee City Council* (see paragraph 29 above), they need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.

63. The Barnwell Manor case emphasises the need for the Inspector to give "considerable importance and weight" to a finding of harm to a listed building. This appears clearly in paragraphs 22, 24 and 29 of the judgment of Sullivan LJ. Thus in paragraph 29 he said

> 29 For these reasons, I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The Appellant's Skeleton Argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector's planning judgment …

Discussion

64. I agree with Mr Hardy that there is no express discussion in the Decision Letter of s 38(6) of the 2004 Act. I also consider, for reasons I have given, that there is no express finding that the proposal is or is not in accordance with the development plan. Nevertheless I agree with Mr Honey that this does not vitiate the decision and is not a reason to quash the decision. My reasons, which are largely those submitted by Mr Honey are as follows:

> 1. Both parties recognised that the development plan was historic and not in accordance with the NPPF. Both parties invited the Inspector to apply draft policy EC5 and to undertake the balancing exercise contained in that draft policy and paragraph 134 of the NPPF. The Claimant expressly invited the Inspector to attach "minimal weight" to the development plan. As Mr Honey pointed out the Inspector did precisely what she was asked to do by the parties. As set out above an Inspector is obliged only to "deal with the substantial points that have been raised" and "the principal important controversial issues". In my view this case does fall within the exception identified by Richards LJ in paragraph 28 of the Hampton Bishop case.
>
> 2. As set out above the Inspector found that there was significant harm to the setting of the Temple (paragraphs 26 to 28 of the Decision Letter) and that the benefits associated with the proposal did not outweigh the harm so that there was a conflict with draft policy EC5 (paragraphs 42 and 43 of the Decision Letter). In so doing she directed herself in accordance with s 66 of the 1990 Act. Both of those assessments are matters of planning judgment with which the Court will not interfere. The decision cannot be said to be irrational.
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> 3. If the Inspector had considered whether there was conformity with the development plan she would inevitably have concluded that there was a breach of policies EN2 and EN20. The proposal does not safeguard the site of the Temple (EN2 condition 3); nor does it "retain the setting of the building and its curtilege" (EN20). The finding of significant harm is in my view fatal to both of those policies. It follows that there would have been no statutory presumption under s 38(6) in favour of development. Rather, as the parties submitted the Inspector should attach minimal weight to the breach of the development plan she should determine the application in accordance with draft policy EC5 and the NPPF. That is precisely what she did. It follows, in my view that the absence of an express finding under s 38(6) made no difference to the position and to the outcome of the appeal.

65. It follows that Ground 2 fails and that this application falls to be dismissed.

Note 1 R(Hampton Bishop Parish Council) v Herefordshire Council [2014] EWCA Civ 878; South Northamptonshire council v Secretary of State [2013] EWHC 11 (Admin) and Lark Energy v Secretary of State [2014] EWHC 2006 (Admin) [Back]

Note 2 Barnwell Manor v East Northamptonshire D.C [2014] EWCA Civ 137 and R(The Forge Field Society) v Sevenoaks D.C [2014] EWHC 1895 [Back]