‘Forge Fields’

Neutral Citation Number [2014] EWHC 1895 (Admin)

Paragraph 45 states that with regards to preserving the setting of a Listed building or preserving the character and appearance of a Conservation Area, preserving means doing no harm.

Neutral Citation Number: [2014] EWHC 1895 (Admin)

Case Nos: CO/735/2013
CO/16932/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 June 2014

Before :

Mr Justice Lindblom

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Between :

The Queen (on the application of **(1) The Forge Field Society** **(2) Martin Barraud** **(3) Robert Rees)**	**Claimants**
- and -	
Sevenoaks District Council	**Defendant**
- and -	
(1) West Kent Housing Association **(2) The Right Honourable Philip John Algernon Viscount De L'Isle**	**Interested Parties**

Mr James Strachan Q.C. (instructed by **Winckworth Sherwood**) for the **Claimants**
Mr Alexander Booth (instructed by **the Council Solicitor of Sevenoaks District Council**) for the **Defendant**

Hearing dates: 24 and 25 March 2014

Judgment Approved by the court for handing down

Garage, thus retaining views of the flank wall to this property. I also consider that the impact on the setting of the conservation area would be limited as the development would represent a small extension to the village, it would be seen in the context of existing built form within the conservation area, and has been well designed to respect this built form. The interruption of views would be limited and would not affect viewpoints as identified in the conservation area appraisal. Such limited harm would result in some conflict with policies EN23 of the local plan and SP1 of the Core Strategy. However, whilst having special regard to the desirability of preserving listed buildings and the character or appearance of the conservation area, I consider that the harm arising from the development would represent less than substantial harm to the significance of the heritage asset under paragraph 134 of the NPPF. This states that less than substantial harm should be weighed against the public benefits of the proposal. This balancing exercise is considered later in the report in addition to the test under SP4 as to whether such harm is overriding."

42. In paragraphs 163 to 166 of the report the officer came to his conclusions on the impacts of the proposed development "using Policy SP4(c), applying the statutory test set out in Sections 66 and 72 of [the Listed Buildings Act] and advice in the NPPF". In paragraph 166 he said:

> "Paragraph 134 of the NPPF states that 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. Whilst I acknowledge the legislative duty placed on a local planning authority to have special regard to the preservation of conservation areas and listed buildings, in this instance and following the advice in paragraph 134 of the NPPF, the proposal would bring substantial public benefits through the provision of affordable local housing to meet an identified need. I consider that this benefit is capable of carrying greater weight than the limited harm identified to heritage assets, and that the impact on heritage assets would not be overriding under Policy SP4(c)."

43. In paragraph 182, in his "Conclusion", the officer said that he did not consider that the "limited harm" outweighed the benefits of providing local needs affordable housing, and that on this basis he concluded that the proposal "would accord with Policy SP4 of the Core Strategy and with the advice contained on heritage assets within the NPPF".

44. At the meeting, according to the minutes, the members were told that the officer's report had found "some limited harm" to the conservation area and to the setting of Forge Garage, that the "[the] statutory test required that special regard be had to the to the desirability of preserving or enhancing these", but that the Chief Planning Officer did not consider that this "limited harm", taken together with the "limited harm" to the AONB, "outweighed the benefits of providing local needs affordable housing".

45. Mr Strachan submitted that in determining the second application the Council failed – as it had in determining the first – to comply with its duties under sections 66 and 72 of the Listed Buildings Act. Its error was similar to the one made by the inspector in *Barnwell.* Having "special regard" to the desirability of preserving the setting of a listed building under section 66, and paying "special attention" to the desirability of preserving or enhancing the character and appearance of a conservation area under section 72, involves more than merely giving weight to those matters in the planning balance. "Preserving" in both contexts means doing no harm (see the speech of Lord Bridge of Harwich in *South Lakeland District Council v*

Secretary of State for the Environment [1992] 2 A.C. 141, at p.150 A-G). There is a statutory presumption, and a strong one, against granting planning permission for any development which would fail to preserve the setting of a listed building or the character or appearance of a conservation area. The officer acknowledged in his report, and the members clearly accepted, that the proposed development would harm both the setting of Forge Garage as a listed building and the Penshurst Conservation Area. Even if this was only "limited" or "less than substantial harm" – harm of the kind referred to in paragraph 134 of the NPPF – the Council should have given it considerable importance and weight. It did not do that. It applied the presumption in favour of granting planning permission in Policy SP4(c) of the core strategy, balancing the harm to the heritage assets against the benefit of providing affordable housing and concluding that the harm was not "overriding". This was a false approach. Its effect was to reverse the statutory presumption against approval.

46. Mr Booth submitted that the Court of Appeal's decision in *Barnwell* did not change the law, but reflected the familiar jurisprudence applied in a number of previous cases – for example, in *The Bath Society v Secretary of State* [1991] 1 W.L.R. 1303. The Council complied fully with the requirements of sections 66 and 72. The officer's conclusion that the harm to the setting of the listed building and to the character and appearance of the conservation area was only "limited" and thus "less than substantial" is not criticized as unreasonable, nor could it be. Following the policy in paragraph 134 of the NPPF, the officers weighed that less than substantial harm against the substantial public benefit of providing affordable housing to meet an identified need. There is no suggestion that they struck this balance unreasonably. They also found that the harm was not such as to be "overriding" under Policy SP4(c). This too was a reasonable planning judgment.

47. In my view Mr Strachan's submissions on this issue are right.

48. As the Court of Appeal has made absolutely clear in its recent decision in *Barnwell*, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in *Barnwell* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.

49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell*, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.

50. In paragraph 22 of his judgment in *Barnwell* Sullivan L.J. said this: