PANTHER HOUSE DEVELOPMENTS LTD

Re: Objection by Historic England

O P I N I O N

Introduction

1. This case concerns a planning application by Panther House Developments (c/o Dukelease Properties Ltd ("**Dukelease**") for a mixed-use development off Gray's Inn Road ("**the Development**").

2. The application site ('**the Site**") is located in the north-western part of the Hatton Garden Conservation Area[1] of the London Borough of Camden ("**Camden**"). The Development would occupy an approximate area of 5,400 square metres: see p. 13 of the Design and Access Statement[2]. Historic England ("**HE**") has objected to the Development in its current form.

3. The Site currently comprises four distinct buildings:

   (1) Panther House – currently in B1 use;

   (2) Brain Yard – currently in B1 use;

   (3) 156 Gray's Inn Road – currently in C3 use; and,

   (4) 160-164 Gray's Inn Road – currently in A1 retail and A3 café use with B1 office.

4. None of these buildings is statutorily or locally listed and the site does not adjoin any listed or locally listed buildings. Nonetheless, 160 Gray's Inn Road is identified as a shop front of merit and Panther House is identified as an unlisted building which makes a positive contribution to the special character of the area.

5. Prior to submitting the planning application, Dukelease was involved in considerable pre-application discussions with Camden planning, conservation and design officers

[1] See the conservation area map in the Hatton Garden Conservation Area Statement in Tab 2 of my Instructions and the site location plan at Tab 1.

[2] Tab 6 of my Instructions.

between March and November 2015. It was Dukelease's understanding that, by the end of this process, most issues had been largely agreed.

6. There have also been a range of meetings with members of the public and specific interest groups. This led to creation of Dukelease's "Statement of Community Involvement" in December 2015[3]. There were positive comments, though the sample of replies was small, as well as concerns expressed – including with regard to height, design of the Gray's Inn Road frontage and character of the street scene[4].

7. The application for planning permission to deliver a mixed-use scheme was made on 10 December 2015. Camden gave acknowledgment of receipt on 18 December 2015[5]. On the same day, HE was notified of the application.

8. HE sent a response to Camden on 13 January 2016 objecting to the Development and recommending that planning permission be refused[6]. The objections were wide-ranging and included concerns about:

   (1) The demolition of 156 Gray's Inn Road;

   (2) Bulk, alignment, design and materials in relation to 160-164 Gray's Inn Road;

   (3) Loss of a Gillette sign on the side of a building;

   (4) Loss of a degree of relief on Gray's Inn Road;

   (5) Loss of the open alleyway to Brain Yard;

   (6) Loss of architectural features at Panther House; and,

   (7) Neutralising the character of the buildings at Panther House.

9. HE concluded that:

> "In our view, the proposed new buildings and extensions are of a poor design and are incongruous with the conservation area. They appear oversized and visually very dominant in the context of the remaining historic facades, making the partial retention of those facades appear as little more than a token gesture to the conservation area status of the site. As such, the proposals are considered to cause serious harm to the character and appearance of the Hatton Garden Conservation Area and again need to be justified under paragraph 133 or 134 of the [NPPF]."

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[3] Tab 9 of my Instructions.

[4] See Tab 9, pp. 17 and 19. The SCI noted that there had been design responses to the comments but it is not clear to what extent, if any, it has dealt with local concerns.

[5] Tab 3 of my Instructions.

[6] Tab 10 of my Instructions.

10. On 12 February 2016, Nick de Lotbiniere (Savills) sent a letter to Camden[7], in response to HE's letter, setting out the benefits that would result from the Development.

11. K M Heritage wrote to HE on 14 March setting out their criticisms of the HE advice which was not well-received as HE's response[10] made clear. The response included the following:

> "You are particularly critical of our advice regarding the requirements of the local authority with regard to new development in conservation areas. I should not need to remind you of Government objectives for the historic environment as set out in the National Planning Policy Framework. At the heart of government policy for the historic environment is conserving heritage assets in a manner appropriate to their significance. This is a core planning principle. Failure to conserve heritage assets, i.e. manage change so that their significance and importance is protected and enhanced, means that the aims of sustainable development, the "Golden Thread" of the NPPF is not achievable. Section 12 of the NPPF sets out how the historic environment should be conserved and enhanced and at paragraph 132 it is made clear that when considering the impact of proposed development on a heritage asset "great weight" should be given to preserving its significance. The NPPF does indeed proactively seek enhancement and the South Lakeland approach is not sufficient if you approach the NPPF correctly. This is neither an unreliable or highly questionable approach.
>
> Finally you characterise our advice as negative and unhelpful and criticise us for not properly balancing heritage benefits in the scheme. Whilst I understand you regard the advice as unhelpful because it does not agree with your analysis it is not unfair or negative. Our role is to address the significance of the site, analyse the impact and assess whether it meets the requirements of sustainable development and to do so independently. We have now outlined our concerns repeatedly and it is regrettable that the applicant has failed to acknowledge or respond to them. That is his decision but that advice has been very carefully considered, and not just by one officer in this case, so I am disappointed that you have chosen to pursue this course of action which I believe is very ill judged."

12. I note from HE's latest letter:

    (1) Despite the assertions about HE's advice and the NPPF, it still does not clarify which paragraph of the NPPF the advice considers applies; and

    (2) It refuses to withdraw the substance of the earlier advice.

13. Dukelease is proposing to make some further revisions to the Development.

Issues for advice

14. I have been asked to comment on the approach taken by HE in its representations and advice to Camden concerning the Development.

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[7] Tab 11 of my Instructions.

[10] My copy is undated.

Summary of advice

15. In summary, I consider that:

(1) Whilst HE is the national adviser on heritage issues it views are not determinative and the final decision is for the planning decision-maker, in the first instance here Camden. Officers and members are entitled to disagree with HE and form their own judgments on the heritage issues provided that they consider and take into account the views of HE;

(2) There are several important flaws in HE's advice in the present case which significantly include –

(a) A misunderstanding of the difference between statutory and policy requirements;

(b) A failure to apply the law and policy properly;

(c) A failure to provide a clear view as to the application of the heritage policies in the NPPF;

(3) As the planning decision-maker, regardless of HE's advice, Camden must apply the law and policy correctly;

(4) In my opinion Camden is entitled to reach its own favourable judgment with regard to the Development notwithstanding the advice of HE.

Legislative and policy background

16. HE was established by the National Heritage Act 1983. S. 32 states:

> "(1) There shall be a body known as the Historic Buildings and Monuments Commission for England."

17. The National Heritage Act 1983 also sets out HE's functions and duties. S. 33 states:

> "(1) It shall be the duty of the Commission (so far as practicable)—
>
> (a) to secure the preservation of ancient monuments and historic buildings situated in England.
>
> (b) to promote the preservation and enhancement of the character and appearance of conservation areas situated in England, and
>
> (c) to promote the public's enjoyment of, and advance their knowledge of, ancient monuments and historic buildings situated in England and their preservation,
>
> in exercising the functions conferred on them by virtue of subsections (2) to (4) and section 34; but in the event of a conflict between those functions and that duty those functions shall prevail.

(2) The Commission –

…

(b) may give advice to any person in relation to ancient monuments, historic buildings and conservation areas situated in England, whether or not they have been consulted."

18. Reg. 5A of the Planning (Listed Buildings and Conservation Areas) Regulations 1990 ("the 1990 Regulations") sets out the duty of local planning authorities to notify HE of certain planning applications. It states:

"(1) This regulation applies where an application for planning permission for any development of land is made to a local planning authority, or the Secretary of State under section 62A of the principal Act, and the authority think or, as the case may be, the Secretary of State thinks that the development would affect—

(a) the setting of a listed building; or

(b) the character or appearance of a conservation area.

…

(3) The local planning authority shall send to the Commission a copy of each notice under paragraph (2) in the following circumstances—

(a) where paragraph (1)(a) applies, the listed building is classified as Grade I or Grade II*; or

(b) where paragraph (1)(b) applies—

(i) the development involves the erection of a new building or the extension of an existing building; and

(ii) the area of land in respect of which the application is made is more than 1,000 square metres."

(4) …in determining any application for planning permission to which this regulation applies, the local planning authority or, as the case may be, the Secretary of State shall take into account any representations relating to the application which are received by them before each of [the stated] periods have elapsed."

19. Part 12 of the National Planning Policy Framework ("**NPPF**") is titled "*Conserving and enhancing the historic environment"*. Paras. 128-9 and 138 of the NPPF state:

"128. In determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. The level of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance. As a minimum the relevant historic environment record should have been consulted and the heritage assets assessed using appropriate expertise where necessary. Where a site on which development is proposed includes or has the potential to include heritage assets with archaeological interest, local planning authorities should require developers to submit an appropriate desk-based assessment and, where necessary, a field evaluation.

129. Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development

affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal."

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

20. Paras. 133-134 of the NPPF state:

"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."

21. Note that in ***Forest of Dean DC v. Secretary of State & Gladman Developments*** [2016] EWHC 421 (Admin), Coulson J. held that the policy in NPPF para. 134 was one that was restrictive of development, referred to in footnote 9, and thus fell within the exceptions to the presumption in para. 14.

22. There is also guidance on heritage assets in the NPPG (Section 18a *Conserving and enhancing the historic environment*) that contains guidance on how do deal with issues such as significance, setting and the assessment of harm to heritage assets. Para. 18[11] states (where relevant):

" **What about harm in relation to conservation areas?**

An unlisted building that makes a positive contribution to a conservation area is individually of lesser importance than a listed building (paragraph 132 of the National Planning Policy Framework). If the building is important or integral to the character or appearance of the conservation area then its demolition is more likely to amount to substantial harm to the conservation area, engaging the tests in paragraph 133 of the

[11] Reference ID: 18a-018-20140306

National Planning Policy Framework. However, the justification for its demolition will still be proportionate to the relative significance of the building and its contribution to the significance of the conservation area as a whole."

23. Note also the guidance on benefits in para. 20[12]:

> "**What is meant by the term public benefits?**
>
> Public benefits may follow from many developments and could be anything that delivers economic, social or environmental progress as described in the National Planning Policy Framework (Paragraph 7). Public benefits should flow from the proposed development. They should be of a nature or scale to be of benefit to the public at large and should not just be a private benefit. However, benefits do not always have to be visible or accessible to the public in order to be genuine public benefits.
>
> Public benefits may include heritage benefits, such as:
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> - sustaining or enhancing the significance of a heritage asset and the contribution of its setting
> - reducing or removing risks to a heritage asset
> - securing the optimum viable use of a heritage asset in support of its long term conservation."

24. There is no reference to the NPPG in the representations from HE nor any sign that they have considered or applied the guidance found in it.

25. The correct approach if even less than substantial harm is identified in terms of para. 134 is to attach considerable weight even to that less than substantial harm and to weigh the benefits of the proposal in that context. See Sullivan LJ in ***East Northamptonshire DC v Secretary of State & Barnwell Manor*** [2014] 1 P. & C.R. 22 and Lindblom J. in ***R. (Forge Field Society) v Sevenoaks DC*** [2015] J.P.L. 22. In ***East Northamptonshire***. Sullivan LJ held at [22]-[23] that:

> "22. … I accept that … the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."
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> 23. That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred ([20] above). It is true… that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell L.J.'s conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a

[12] Reference ID: 18a-020-20140306

conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."

26. Such an approach may be inferred from a proper consideration and application of the relevant provisions of the NPPF. See per Sales LJ in in ***Jones v Mordue*** [2016] 1 P. & C.R. 12 at [26]-[28] (emphasis added):

> "26. With respect to the deputy judge, I think he read too much into para. [29] of the judgment of Sullivan LJ in the *East Northamptonshire* case. I do not consider that, read in the context of the judgment as a whole, Sullivan LJ and the court intended to state an approach to the reasons required to be given by a decision-maker dealing with a case involving application of s. 66(1) of the Listed Buildings Act which was at variance from, and more demanding than, that stated in Save Britain's Heritage and South Bucks DC v Porter (No.2). Sullivan LJ's comments at [29] were made in the context of a decision letter which positively gave the impression that the inspector had not given the requisite considerable weight to the desirability of preserving the setting of the relevant listed buildings, where as a result it would have required a positive statement by the inspector referring to the proper test under s. 66(1) to dispel that impression. In my judgment, the relevant standard to be applied in assessing the adequacy of the reasons given in the present case is indeed the usual approach explained in *Save Britain's Heritage* and *South Bucks DC v Porter (No.2)*, which is what the deputy judge correctly thought it ought to be.
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> …
>
> 28. If one applies the correct approach in the present case, as set out in *Save Britain's Heritage* and *South Bucks DC v Porter (No.2)*, it cannot be said that the reasoning of the Inspector gives rise to any substantial doubt as to whether he erred in law. On the contrary, the express references by the Inspector to both Policy EV12 and para.134 of the NPPF are strong indications that he in fact had the relevant legal duty according to s. 66(1) of the Listed Buildings Act in mind and complied with it. … Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the s. 66(1) duty. <u>When an expert planning inspector refers to a paragraph within that grouping of provisions (as the Inspector referred to para.134 of the NPPF in the Decision Letter in this case) then—absent some positive contrary indication in other parts of the text of his reasons—the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. Working through these paragraphs, a decision-maker who had properly directed himself by reference to them would indeed have arrived at the conclusion that the case fell within para.134, as the Inspector did</u>."

Formal status of HE's views and weight to be attributed to them

27. As the Development occupies a plot of land of approximately 5,400 sqm, the LPA was required to notify HE of the application for planning permission: reg. 5A of the 1990 Regulations.

28. Assuming HE responded within the statutory time-limit, the LPA would be required to take into account its representations, as it would in respect of any representor: reg. 5A(4) of the 1990 Regulations. However, even if the advice letter was not within time it is very likely that the LPA would take it into account since it is a material consideration

within s. 70(2) of the 1990 Act and s. 38(6) of the 2004 Act.

29. HE's advice is a material consideration. Although this means the LPA and an Inspector on appeal only has to give HE's advice as much weight as they consider appropriate, and will depend on the LPA's (or Secretary of State's) own assessment of the impact of the Development. While Camden must consider and take into account HE's advice it is not required to follow all or any of it, especially if it is considered that the advice is flawed or even that the Council disagrees with the judgments expressed by HE – having regard to the information and assessment from Dukelease's experts, the Council's own assessment of the Conservation Area, the significance of the buildings on the character and appearance of the Area and the effect of the proposals together with their benefits.

30. I consider that there are good arguments for reducing the weight to be attributed to HE's advice based on the content of its advice and its incorrect understanding of the statutory duty with regard to conservation areas.

31. Para. 138 of the NPPF requires what is now a well-known distinction to be drawn between development that will cause "*substantial harm*" and development that will cause "*less than substantial harm*". The distinction is important because whereas the former gives rise to a presumption that consent will be refused, the latter does not: paras. 133-134 of the NPPF. Although noting these provisions of the NPPF, HE fails to apply the distinction with any clarity.

32. These provisions must however be read together with the statutory duties governing the impact of proposals on listed buildings and their setting and the character and appearance of conservation areas under ss. 66 and 72 of the Listed Buildings and Conservation Areas Act 1990. See e.g. see Sullivan LJ in ***East Northamptonshire DC v. Secretary of State*** [2014] 1 P. & C.R. 22 (***Barnwell Manor***) applied by Lindblom J. (as he then was) in ***R. (Forge Field Society) v. Sevenoaks DC*** [2015] J.P.L. 22. In ***Barnwell Manor***. Sullivan LJ held at [22]-[23] that:

> "22. … I accept that … the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."
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> 23. That conclusion is reinforced by the passage in the speech of Lord Bridge in *South Lakeland* to which I have referred ([20] above). It is true… that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm

> the character or appearance of a conservation area is consistent with Glidewell L.J.'s conclusion in *Bath*. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."

33. Most recently, the Court of Appeal considered the duty to give reasons where designated heritage assets were concerned in ***Jones v. Mordue*** [2016] 1 P. & C.R. 12 and held that the discharge of the duties concerning such assets did not require a different approach to the giving of reasons. There, Sales LJ held:

> "26 With respect to the deputy judge, I think he read too much into para. [29] of the judgment of Sullivan LJ in the *East Northamptonshire* case. I do not consider that, read in the context of the judgment as a whole, Sullivan LJ and the court intended to state an approach to the reasons required to be given by a decision-maker dealing with a case involving application of s. 66(1) of the Listed Buildings Act which was at variance from, and more demanding than, that stated in *Save Britain's Heritage* and *South Bucks DC v Porter (No.2).* Sullivan LJ's comments at [29] were made in the context of a decision letter which positively gave the impression that the inspector had not given the requisite considerable weight to the desirability of preserving the setting of the relevant listed buildings, where as a result it would have required a positive statement by the inspector referring to the proper test under s. 66(1) to dispel that impression. In my judgment, the relevant standard to be applied in assessing the adequacy of the reasons given in the present case is indeed the usual approach explained in Save Britain's Heritage and *South Bucks DC v Porter (No.2)*, which is what the deputy judge correctly thought it ought to be.
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> …
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> 28 If one applies the correct approach in the present case, as set out in *Save Britain's Heritage* and *South Bucks DC v Porter (No.2)*, it cannot be said that the reasoning of the Inspector gives rise to any substantial doubt as to whether he erred in law. On the contrary, the express references by the Inspector to both Policy EV12 and para.134 of the NPPF are strong indications that he in fact had the relevant legal duty according to s. 66(1) of the Listed Buildings Act in mind and complied with it. … Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the s. 66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions (as the Inspector referred to para.134 of the NPPF in the Decision Letter in this case) then—absent some positive contrary indication in other parts of the text of his reasons—the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. Working through these paragraphs, a decision-maker who had properly directed himself by reference to them would indeed have arrived at the conclusion that the case fell within para.134, as the Inspector did."

34. Accordingly, unless ***Mordue*** is to be treated as going further with respect to the statutory duties other than in terms of reasons, it is necessary for a decision-maker to attach considerable weight to the harm identified even if it is less than substantial within para. 134 before embarking on the balancing exercise. In some respects, Sales LJ's judgment suggests a softening of the ***Barnwell Manor*** approach but since it does

not purport to contradict it or ***Forge Field***, and ***Barnwell Manor*** is binding on the High Court and Court of Appeal, it is prudent to regard those decisions as fully applicable until there are further decisions from the Court of Appeal or Supreme Court.

35. In the present case, with regard to the character and appearance of the conservation area HE makes the following points:

    (1) The proposals in respect of 156 Gray's Inn Road are considered to cause "*serious harm"*;

    (2) The works in relation to 156-164 Gray's Inn Road are considered to cause "*significant harm"*;

    (3) The works in respect of the tram substation, the alleyway to Brain Yard and the loss of workshop uses are considered to cause "*harm";*

    (4) The works in respect of Panther House are considered to cause "*significant harm"*; and,

    (5) The Development overall causes "*significant harm"* and "*serious harm"*.

36. Whilst it might be assumed that some of the language, e.g. significant harm, might indicate "substantial harm" I have seen views expressed by HE in other contexts which specifically state that the harm is less than substantial but nonetheless significant. There is not even that degree of clarity in HE's letter;

37. The HE letter of 13 January is unimpressive for a number of other reasons apart from the inconsistent use of terminology in the familiar context of the NPPF:

    (1) Under the heading "Historic England Position" the letter, somewhat ironically, fails to state a clear position and this ambiguity appears twice in the last three paragraphs before the "Recommendation" where it refers to justification "under paragraph 133 or 134" and does not clearly state which, in its view, is applicable;

    (2) It might be expected that, when advising of its views under the NPPF, HE should give clear guidance in terms of the NPPF and in terms of the correct legal position and properly understand the requirements. The failure to give clear advice or to apply the terms of the NPPF is not merely a technical argument but goes to heart of which of the policy tests in 133 or 134 applies, which is important given they are very different in their nature an effect. NPPF 133 is plainly much more difficult to satisfy;

    (3) I note that the last sentence of the final paragraph before the Recommendation

applies the simple balance found in para. 134. This may be because 134 is intended or possibly because HE considers that the proposals fail even that simple balancing test, still less the presumption in 133 (although that is not stated).

(4) Since HE has not reached a clear view whether NPPF 133 or 134 apply this somewhat taints the recommendation but it might be said that the last paragraph before the recommendation says it fails even the lesser test in para. 134;

(5) The letter to some extent confuses HE's own view on the value of the undesignated buildings and their use with the effect of their removal on the character and appearance of the conservation area. This may be significant since the last paragraph but one under "Historic England Position" wrongly states the duty on the planning authority to be "to ensure that new development within conservation areas enhances or better reveals their significance". In my opinion, this is a serious misstatement of the legal duty. 72 of the 1990 Act when considering planning decisions -

> "with respect to any buildings or other land in a conservation area … special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area"

The duty was considered by Lord Bridge in ***South Lakeland DC v. Secretary of State*** [1992] 2 A.C. 141 at 146 where he stated (my emphasis) –

> "There is no dispute that the intention of section 277(8) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria."

At p. 150 Lord Bridge endorsed the view of Mann LJ in the Court of Appeal who had stated (my emphasis):

> "'In seeking to resolve the issue I start with the obvious. First, that which is desirable is the preservation or enhancement of the character or appearance of the conservation area. Second, the statute does not in terms require that a development must perform a preserving or enhancing function. Such a requirement would have been a stringent one which many an inoffensive proposal would have been inherently incapable of satisfying. I turn to the words. Neither 'preserving' nor 'enhancing' is used in any meaning other than its ordinary English meaning."

38. HE's response in March 2016:

(1) Continues in the lack of clear advice as to which of paras. 133 or 134 applies. This appears to be a basic failure by HE to provide advice as to the application of well-known national policy; and

(2) Despite the error in characterising the legal duty in the letter of 13 January, the response compounds the error by confusing the legal duty with the policy requirements of the NPPF without accepting that the legal duty had been misstated. It might have been expected that the author of the letter at least accepted that the legal duty was as stated in South Lakeland but that the policy requirements of the NPPF go further. However, the letter does not do so.

39. At no stage has HE considered or advised with regard to the guidance in the NPPG (see above).

40. Consequently, HE continues to fail to use the NPPF's terminology as to the specific category of harm it considers the Development will cause to the conservation area and is less than clear in the expression of its views. It has also advised the local planning authority based on an incorrect understanding of the statutory duty which assumes a stricter approach (e.g. "duty to ensure that new development enhances"), contrary to authority, which (on HE's erroneous approach) would be more difficult to satisfy than the true statutory duty. It is a matter of considerable concern that HE has given misleading advice to Camden on the legal requirements that have been long-established. This also significantly taints its approach and recommendations that are given in the context of a flawed understanding and approach. In my opinion, Camden is entitled to take these errors into approach in attaching reduced weight to HE's representations.

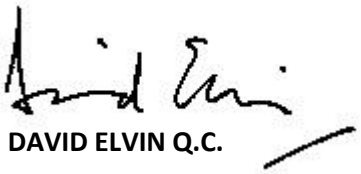
41. It may be impressed on Camden that HE has approached the issues in a confusing and incorrect manner, have not properly considered or applied the NPPF, though it has reached a conclusion with applying 134, not considered the NPPG, and have based their recommendations on a legally incorrect understanding of the duty under s. 72.

42. Camden should therefore be urged to treat the HE representation with considerable caution as it may mislead officers and members and to view HE's judgments critically. In any event, if amendments to the Development are tabled[13], Camden would also have to consider the implications of the revisions with regard to the effect of the Development

[13] Amendments can be accepted provided there is consultation of those who are concerned with the Scheme – see ***Bernard Wheatcroft Ltd v. Secretary of State*** (1982) 43 P. & C.R. 233.

(as revised) with respect to the Conservation Area.

43. I have nothing to add as presently instructed but would be pleased to advise further should it be necessary.



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