



PINS NOTE 05/2014r2

To: All Inspectors

Date of Issue: 9 April 2014

Currency: review at 6 months after issue

Last updated: 10 December 2015 - to include alterations to paragraphs 9 & 13, deletion of previous paragraph 14 and insertion of new paragraph 17, to take account of the recent Mordue Judgment.

COURT OF APPEAL JUDGMENT: BARNWELL MANOR WIND ENERGY LTD v EAST NORTHANTS D C, ENGLISH HERITAGE, NATIONAL TRUST & SSCLG - IMPLICATIONS FOR HERITAGE CONSIDERATIONS

Action

1. Inspectors will need to be aware of the Court of Appeal¹ judgment as this case is likely to be quoted at appeal and has direct implications for casework involving proposals affecting heritage assets in England and Wales. The Court emphasised the need for decision makers to apply the intended protection for heritage assets as specified under s66(1) of the relevant 1990 Act² and the parallel duty under s72(1) of that Act.
2. The Court of Appeal judgment has wider applicability than to wind turbines and should be taken into account in all cases where issues concern the effect of proposals on heritage assets.
3. In essence the judgment re-iterates the previous High Court judgment³ in this case, which stated that Inspectors need to give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out a 'balancing exercise' in planning decisions.

¹ [\[2014\] EWCA Civ 137, 18 February 2014](#)

² Planning (Listed Buildings and Conservation Areas) Act 1990 (c.9)

³ [\[2013\] EWHC 473 \(Admin\), 8 March 2013](#)

4. The judgment is concise and contains some very important findings impacting on sections 66 and 72, the provisions of the NPPF concerning the weight to be attached to harm thereto (although the Inspector's decision pre-dated the NPPF and hence the judgment makes no reference to the NPPF) and the overall balancing exercise that Inspectors must undertake, (paragraphs 23-29). There are also some important - more generally applicable - findings under grounds 2 and 3 (paragraphs 35-37 and 40-44).
5. The Court of Appeal held that:
 - "despite the slight difference in wording, the nature of the duty is the same under both" s66 and s72(1); and
 - a decision-maker, having found harm to a heritage asset, must give that harm "considerable importance and weight"
6. This test goes further than simply balancing the effect on a listed building and its setting, or on the character or appearance of a conservation area, against the benefits of the proposed development, in the way you would other material considerations, even if that is the way in which development plan policies might suggest is appropriate.
7. An Inspector must first assess whether or not there is harm to the listed building or its setting (or to the character or appearance of a conservation area) and, if there is, the degree of such harm. This is a matter of planning judgment.
8. If harm is found, that does not mean that the Inspector can then give that harm such weight as he/she chooses when carrying out any policy based balancing exercise of harm -v- benefit. The finding of harm is a consideration to which the decision-maker should attach considerable importance and weight. This is necessary to reflect the duty to have special regard to the relationship with heritage assets or as the case may be the conservation area. The weight to be apportioned is not therefore a matter of unfettered discretion.
9. The overarching statutory duty imposed by s66 or s72 applies even where the harm to heritage assets is found to be less than substantial. Inspectors should be careful not to equate less than substantial harm with a less than substantial planning objection, as paragraph 29 of the Court of Appeal's judgment makes clear.
10. If the harm to a heritage asset is substantial, then the weight to be attached to this will have to reflect appropriately the desirability of preserving such assets and their setting and the requirement to have special regard to such considerations.
11. The need to apply the relevant provisions of the NPPF is unaffected by this Court of Appeal judgment. As a result of it, however, any balancing exercise under the NPPF, in relation to a listed building

or its setting or to the character or appearance of a conservation area, will need to be carried out against a presumption that preservation is desirable.

12. In all cases a balancing exercise of harm -v- benefit must still be carried out but the duty and the presumptive desirability of preserving the assets and their setting must be given considerable importance and weight. How that balance will be performed will depend on the factors in the case but it will always be important to recognise the special status which s.66 and s.72 confers upon the relevant relationship with heritage assets and conservation areas.
13. The following practical steps may assist Inspectors. First, it will inevitably be helpful to recognise the statutory duties expressly in the decision. Second, the nature of the relationships between the proposal and the listed buildings/setting⁴ or conservation areas will need to be carefully assessed and clear findings made which take account of the views expressed on all sides of the debate. Third, it will be necessary to show how considerable importance and weight has been afforded to the considerations to which s.66 and s.72 apply and, where appropriate to explain how benefits have been weighed against such matters (which could be achieved by working through paragraphs 131 to 134 of the NPPF in accordance with their terms⁵).

Background

14. The developer, (Barnwell Manor Wind Energy Ltd) appealed against the previous High Court decision, which quashed the Inspector's decision⁶ to grant planning permission for the construction of a wind farm development of 5 turbines (max height 126.5m). The local authority had refused to grant planning permission on grounds of unacceptable harm to the local setting and conflict with planning policy and guidance, specifically PPS5 and PPS22⁷. On appeal, a balancing exercise had been carried out and it concluded that, although the proposal would not accord with the development plan, the benefits of the proposed development outweighed any harm caused to the setting of "heritage assets", including listed buildings, and the wider landscape. The High Court held that special regard had not been had to the desirability of preserving the settings of listed buildings as required by the general duty imposed under s66(1) of the 1990 Act; planning policy on the effect of development on the setting of heritage assets had been incorrectly interpreted and applied; and

⁴ The setting should be clearly described in the decision letter.

⁵ Court of Appeal judgment in *Jones v Mordue, SSCLG & South Northamptonshire Council* [2015] EWCA Civ 1243, 03 December 2015, paragraphs 19, 20, 26 & 28.

⁶ APP/G2815/A/11/2156757, 12 March 2012.

⁷ PPS5 & PPS22 were cancelled by the NPPF 27 March 2012; [PPS5 Practice Guide](#) remains extant (until revised guidance is published); PPS22 Companion Guide was replaced by the Planning Practice Guidance for Renewable and Low Carbon Energy on 29 July 2013 and is now incorporated into the web-based [Planning Practice Guidance](#) suite, published on 6 March 2014. The PPG was cancelled and its contents have been incorporated into the web-based [Planning Practice Guidance](#), following its publication on 6 March 2014, with minor alterations regarding visual impact of solar farms.

inadequate reasons for the decision had been given. At the Court of Appeal, the developer submitted that (1) s66(1) did not require a decision-maker to give any particular weight to the desirability of preserving the settings of listed buildings; (2) the judge had taken an over-rigid approach to PPS5 and its Practice Guide, which were not intended to be prescriptive; (3) the planning Inspector had given adequate reasons.

15. The Appeal was dismissed by the Court of Appeal on all grounds.

16. The **subsequent** decision of the Secretary of State on an appeal by Peel Wind Farms (UKC) Limited relating to the Former Asfordby Mine/Existing Asfordby Business Park⁸ provides examples of the Secretary of State's approach to material considerations and the statutory duties (s66 and s72), following this Court of Appeal decision.

17. The recent Court of Appeal judgment in the Mordue case⁹ has elucidated aspects of the Barnwell Manor Court of Appeal judgment in relation to giving reasons in decision letters involving the application of the s66 duty.

18. Please contact XXXX if you have any general queries on this Note or XXXX in relation to casework.

⁸ [APP/Y2430/A/13/2191290, 4 March 2014](#)

⁹ [2015] EWCA Civ 1243, 03 December 2015.