Neutral Citation Number: [2022] EWHC 2752 (Admin)

Case No: CO/2116/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

The Moot Hall, Castle Garth,
Newcastle-upon-Tyne, NE1 1RQ

Tuesday, 1 November 2022

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

COUNCIL OF THE CITY OF NEWCASTLE UPON TYNE	**Claimant**
- and –	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
(1) EAST QUAYSIDE 12 LLP **(2) ST ANN'S QUAY MANAGEMENT LIMITED**	**Interested Parties**

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Anjoli Foster (instructed by **Newcastle City Council**) for the **Claimant**
Victoria Hutton (instructed by the **Government Legal Department**) for the **Defendant**
Paul Tucker KC (instructed by **Womble Bond Dickinson (UK) LLP** for the **First Interested Party**
David Hardy (instructed by **CMC Cameron McKenna Nabarro Olswang LLP**) for the **Second Interested Party**

Hearing dates: 12 and 13 October 2022

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Approved Judgment

This judgment was handed down remotely at 4.00pm on 1 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Hon. Mr Justice Holgate :

Introduction:

1. Newcastle City Council ("NCC") brings this application for statutory review against the decision dated 6 May 2022 of the Inspector appointed by the Secretary of State for Levelling Up, Housing and Communities, the defendant, in relation to Plot 12, East Quayside Newcastle-upon-Tyne ("the site"). The Inspector allowed an appeal brought by the developer, East Quayside 12 LLP ("EQ"), the first interested party, against a refusal of planning permission by NCC. The Inspector granted permission for a residential development comprising 289 apartments and up to 430m^2 residential amenity/commercial space on the ground floor within a building of between 11 and 14 storeys, with further residential amenity space, storage space, access, car parking, landscaping and urban realm works.

2. To the west of the site lies St. Ann's Quay, a large apartment complex, the eastern wing of which overlooks the site. St Ann's Quay Management Limited ("SAQML") is the management company representing 91 leaseholders of apartments. It objected to the proposal and appeared at the public inquiry into the appeal. SAQML also appeared in these proceedings as the second interested party to support the claimant's grounds of challenge.

3. The application to NCC was made jointly by EQ and by the owner of the site, the Homes and Communities Agency ("Homes England"), established under Part 1 of the Housing and Regeneration Act 2008. Although EQ and Homes England were both parties to the planning obligation dated 18 March 2022 under s.106 of the Town and Country Planning Act 1990 ("TCPA 1990"), which was treated as a material consideration in the planning appeal, Homes England did not appeal against NCC's refusal of planning permission and was not a party to the appeal.

4. The proposed scheme has proved to be highly controversial. NCC received objections from 308 local residents, SAQML and the Northumberland and Newcastle Society. The points they raised included the excessive scale and massing of the development, poor architectural quality, impact on the setting of a Grade I listed building, St Ann's Church and its link with the River Tyne, impact on the Tyne Gorge and the Quayside, and impact on residential amenity.

5. The Assistant Director of Planning at NCC presented a report to the Planning Committee in which she recommended that planning permission be granted. The members of the Committee disagreed. The Inspector who conducted the planning appeal noted that, although the scheme had been amended so that the height was reduced by 6m, or the equivalent of 2 storeys, there remained "fierce opposition" to the scale of the proposed building.

6. In view of this considerable controversy, it is appropriate to refer to the limitations of judicial review and statutory review (see e.g. *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 at [6]. It is not the role of the court to consider the merits or demerits of the proposed development, or to say whether it agrees with the Inspector's decision, or to decide whether or not planning permission should have been granted. Instead, the court's task is to consider the grounds of challenge which have been put forward by NCC and

SAQML and to decide whether or not the Inspector's decision contains an error of law. If the court finds no error of law, it cannot intervene.

7. The principles governing legal challenges under s.288 of the TCPA 1990 have been well summarised in a number of decisions, including *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 407 at [24]-[28]; *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88 at [50]; *St Modwen Development v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6]-[7]; *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [41]-[42]. In particular, decision letters should be read (1) fairly and as a whole, (2) in a straightforward and down-to-earth manner, without excessive legalism or criticism and (3) as if by a well informed reader who understands the principal controversial issues in the case. They should be read with "reasonable benevolence" (see also Sales LJ, as he then was, in *Daventry District Council v Secretary of State for Communities and Local Government* [2017] JPL 402 at [35]).

8. The principles governing an Inspector's legal obligation to give reasons for his or her decision are also well-established, and were set out in *Save Britain's Heritage v Number 1 Poultry Limited* [1991] 1 WLR 153 and *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 257.

9. I am grateful to all advocates for their written and oral legal submissions.

The regeneration context

10. The inspector noted that following a long period of industrial decline Newcastle Quayside was recognised from the 1960s as an area in need of regeneration (DL 8). ding

11. In 1987 the Tyne and Wear Development Corporation was established under s. 135 of the Local Government, Planning and Land Act 1980 to regenerate an "urban development area" comprising land on the banks of the Rivers Tyne and Wear. Plot 12 became vested in the Corporation.

12. In 1989 the Corporation published the Newcastle Quayside Masterplan, prepared by Terry Farrell and Partners, with a vision to create a new district for Newcastle (DL 8). The Masterplan envisaged a run of commercial buildings from the west with Plot 12 as an end stop, and thereafter lower scale residential development to the east (DL 32). It was planned that the site would be developed as a hotel/conference/leisure centre. However, that never came to fruition (DL 13).

13. As the Inspector noted in DL 9: -

> "Over the subsequent decades this area has been regenerated from its historic industrial past into a modern, vibrant area with commercial and residential uses and a wide paved footpath and cycleway to the riverside. The Quayside contains the Malmaison hotel conversion along with substantial office buildings and the Crown Court. There is also good connectivity with the

> Gateshead Quayside via the Millennium Bridge and access to cultural venues such as the Baltic and The Sage."

14. In 2003 an "Urban Landscape Study of the Tyne Gorge" was prepared for *inter alia* English Heritage (now Historic England) and NCC. The Study identified potential threats to the character of the Gorge and opportunities for new development.

15. In 2004 consent was granted on plot 12 for residential units, office, food and drink uses and a multi-story car park. But this development never took place. In 2016 planning permission was sought for a 10-16 story building which would have included 124 apartments, but the application was later withdrawn. The Inspector noted (DL 10) that plot 12 formed a "notable gap site" which had been vacant for over 20 years. Along with Malmo Quay further to the east, it represents the last land within the area of the Masterplan to be developed on the Quayside.

16. Plot 12 became vested in Homes England as a statutory successor. By s.2 of the 2008 Act the objects of Homes England include securing (and supporting in other ways) the regeneration or redevelopment of land. By s.3 the Agency has a broad power to do anything it considers appropriate for the purposes of its objects. By s.5 the Agency may provide, or facilitate the provision of, housing. Under s.6 the Agency may regenerate or develop land, or facilitate such regeneration or development.

17. In 2018 Homes England published a Planning Brief prepared by consultants. This had been developed "in consultation with" or "in collaboration with" NCC. The document was not a local development document prepared by NCC as the local planning authority under the Planning and Compulsory Purchase Act 2004. However, in a letter dated 23 November 2018 and attached to the Brief, NCC stated that the document provides a framework for how plot 12 can be developed. "The brief provides clear, up to date guidance for prospective developers which reflects the discussions we have had over the last few months." NCC stated that the brief established some key principles while allowing flexibility. The Council particularly welcomed the introduction of development on both the lower and upper plateaus of the site (see below). The Planning Brief sets out design and planning considerations for a residential-led mixed use development of the site.

Plot 12

18. The site is an open, vacant area of land of about 0.72 hectares located on the northern bank of the River Tyne. It spans two levels between a lower plateau on the Quayside and an upper plateau adjoining City Road to the north. The site includes a steep grassed embankment between these two plateaus which conceals a large structural retaining wall. There is a 15m difference between the two levels (DL 11).

19. St. Ann's Church is located to the north of, and in an elevated position above, City Road. The Church is set in a locally listed graveyard which slopes down towards City Road (DL 63).

20. The Sailor's Bethel, a grade II listed building, is located to the east of the site in an elevated position above the Quayside and between City Road and Horatio Road (DL 62).

21. The site is located between, not within, the Lower Ouseburn Conservation Area to the east and the Central Conservation Area, covering the City centre, to the west (DL 62).

22. To the east of the site boundary, St Ann's Stairs gives access to the Quayside from City Road. Residential development known as Mariners Wharf lies beyond the Stairs (DL 12).

23. EQ's proposal was for 289 residential units in a Build to Rent ("BTR") scheme, which would include storage areas, communal living and workspace areas and a rooftop outdoor area. Commercial units would be provided on the ground floor fronting the Quayside and a "Pocket Park" along City Road (DL 14).

24. In several parts of her decision, the Inspector pointed to the challenging nature of the site because of its topography and constraints. She described it as "an exceptionally difficult site to develop with many competing elements" (DL 139).

25. Like NCC, the Inspector accepted that the development should not be required to provide any affordable housing (subject to an overage provision in the s.106 obligation) because of viability issues resulting from remediation costs for the site and the retaining wall supporting City Road (DL 15 and 129).

The decision letter

26. In DL7 the Inspector set out the main issues in the appeal: -

> "(a) The effect on the character and appearance of the area.
>
> (b) The effect on designated heritage assets.
>
> (c) The effect on the living conditions of future occupants in respect of internal space standards.
>
> (d) The effect on the living conditions of residents at St Ann's Quay in respect of daylight/sunlight and outlook."

27. The Inspector dealt with the effect of the scheme on character and appearance of the area at DL21 to DL61. NCC makes no legal criticism of this part of the decision.

28. At DL 21 to DL 27, the Inspector summarised relevant policies in the development plan, National Planning Policy Framework ("NPPF") and national design guides. She specifically referred to para. 130 of the NPPF, with its requirement for good quality design.

29. The Inspector referred to departures from the Farrell Masterplan, including the "large scale building" which had been erected on St. Ann's Quay (DL 29).

30. At DL 30 to DL 38, the Inspector considered the footprint of the proposed development. She judged it to be an appropriate response in the context of the Quayside area, including the bend in the river, the existing building line and the site's location at a pinch point between the Quayside and City Road. The set back of the building from City Road, the pocket park and landscaping would create some breathing space for St. Ann's Church (DL 33 to DL 37).

31. The Inspector dealt with the scale and massing of the scheme at DL 39 to DL 57. She assessed the varying scale of existing buildings on the Quayside. She noted that St Ann's Quay was the tallest and that the proposal would be higher still, although the Planning Brief had recommended that the development of Plot 12 be comparable. Having said that, the Inspector concluded that the proposal would "sit comfortably" in longer distance views. The building would be more readily apparent in close views along the Quayside and from the opposite bank, "but again, given the scale of the buildings in the wider area, would not appear out of place" (DL 43). The development would "sit comfortably within" the arches of the Tyne and Millennium Bridges (DL 44). The "large scale of the development would have a greater presence" in views from the east, but this was unavoidable given the change in the character of the development to the east of Plot 12 (DL 45). The Inspector considered that the scale would be appreciable in close up views from City Road and the massing less successful. However, with the set back, the building was not out of scale (DL 47).

32. The Inspector gave her detailed assessment of the design at DL 50 to DL 57. She criticised certain aspects, such as the flat roofscape. Her conclusions on this topic at DL 57 were: -

> "Taken together, there would be a somewhat regimented and serious appearance from the design. The eastern facing elevation would be the weakest, but to the Quayside I consider there would be depth and interest and the design would not appear out of character with its surroundings in this prominent location. The City Road elevation has some depth from the articulation of the materials which assists in the flatness of this elevation and the pocket park, although sloping, would help address a lack of clear base here. Care would, however, need to be taken in terms of the type of planting to ensure its suitability for a northern aspect."

33. The Inspector set out her overall conclusions on the effect of the proposal on character and appearance at DL 58 to DL 61: -

> "58. There can be no doubt of the importance of the development of Plot 12, as part of the iconic Newcastle Quayside. Plot 12 is an end stop to the run of buildings along the Quayside and development here is charged with implementing the last plot in the longstanding Masterplans.
>
> 59. I am satisfied that the development, as evidenced by the Design and Access Statement (DAS), has sought to address its overall context and visual connection with the Quayside. I find that the footprint and siting and the scale and massing would not appear incongruous with the established character of the Quayside and would provide an appropriate contextual response to the current character of the Quayside. The overall architectural design is less successful, due to the regimented appearance and a missed opportunity to the roofscape, and the eastern elevations would be the weakest.

> 60. Plot 12 is a challenging site given its location and topography and plot size. The proposed development would be of a scale which would make its presence known in the Newcastle cityscape and in key views along the Quayside. Aspects of the architectural design treatments would fall slightly short, but the design cannot be said to be poor quality, or even close to that, and indeed many of the clear design expectation of the Masterplans and Planning Brief would be met.
>
> 61. Today there is significant policy emphasis on high quality and beautiful design and this is a matter of judgement for the decision maker. In this regard, I find that there would be some limited conflict with CS Policies CS15 and UC12 and DAP Policy DM20 and the Framework. I find no conflict with UC13 which seeks to avoid *significant* harm [my emphasis] to the Tyne Gorge and major movement corridors."

34. The Inspector dealt with the second main issue, the effect of the scheme on designated heritage assets, at DL 62 to 87.

35. She explained why she considered that the proposal would cause no harm to the setting of the Sailor's Bethel (DL 72 to 77) or to the character or appearance of the Central Conservation Area or of the Lower Ouseburn Conservation Area (DL 78 to DL 82) or to any other designated heritage asset (DL 83). There is no legal challenge to any of these conclusions.

36. Instead, NCC challenges the Inspector's approach to the effect of the proposal on the setting of the Grade I listed building, St Ann's Church, which she addressed at DL63 to DL71.

37. The Inspector assessed the significance of the church (DL 63 to DL 65). It is a fine example of a Georgian church and rare in Newcastle. It has a historic association with the Quayside. Because of its position on top of the plateau above City Road, it has a visual presence in the wider area, its tower being visible over a long distance as a backdrop forming part of the Newcastle skyline. Plot 12 falls squarely within the setting of the Church (DL 65). The Planning Brief acknowledged that any proposals for development on the site would result in harm to that setting, but the object should be to limit that harm to "less than substantial harm" in terms of the policy in the NPPF (DL 66).

38. The Inspector concluded that the location and scale of the proposed development would harm the significance of the Church as regards its setting. She rejected a suggestion made on behalf of EQ that there would be no such harm (DL 68). She then expressed her specific findings on the nature of the harm that would be caused in DL 69:-

> "That said, the positioning of the development would retain a framed open view of the Church from the Quayside to the east of the proposed building. This would be to a smaller degree than what is currently experienced, however I am mindful that the Quayside is a vibrant and predominantly pedestrian space (to both the Newcastle and Gateshead sides), and thus it would be

> experienced from kinetic movements rather than from fixed vantage points. The visual link from the Church, across the Graveyard to the Tyne River would also be retained, albeit reduced. Longer distance views of the spire would largely be retained. The set back of the northern elevation of the proposed building and the landscaping would also provide space along City Road and to the heritage asset."

39. Paragraph 195 of the NPPF states: -

> "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 into account when considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset's conservation and any aspect of the proposal."

40. The Inspector applied that policy in DL 70: -

> "The Framework requires that proposals should avoid or minimise any conflict between a heritage asset's conservation and any aspect of the proposal. While I have identified issues with specific design elements of the development, my view is that it is not these which would cause heritage harm, and I agree with the Planning Brief that any development at Plot 12 would affect the setting of St Ann's Church [my emphasis]. In this regard I consider that there could not be a vastly different design response which could further minimise the harm caused to this Grade I listed building."

41. In DL 71 the Inspector gave her overall conclusion on harm to St. Ann's Church:-

> "Overall, the level of harm to St Ann's Church is less than substantial. This assessment of harm still amounts to a significant objection and I am mindful that the more important the asset, the greater the weight should be. However, given the key constraints of the plot and the nature of the harm identified, this is towards the lower end of any such scale within that classification."

42. Given the finding of "less than substantial harm", the policy in para. 202 of the NPPF applied: -

> "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, where appropriate, securing its optimum viable use."

43. The Inspector addressed the third main issue, the effect of the proposal on the living conditions of future occupants, at DL 88 to DL 97. At DL 88, the Inspector referred specifically to para. 130 of the NPPF which requires the provision of "high standards of amenity" for occupants. In addition, policy DM7 of NCC's Development and Allocations Plan required the design of all new homes to meet the Nationally Described Space Standards ("NDSS"). "As part of high quality design", the purpose of policy DM7 and the NDSS is to ensure that residents do not live in undersized homes (DL 89). The minimum standard for 1 bed units is 50 m^2 if occupied by two persons (or 39 m^2 if occupied by one person). The Inspector concluded that 163 units providing 46 m^2 of floorspace would breach the 50 m^2 standard if occupied by two persons and hence would conflict with Policy DM7. The proposed development satisfied all other standards (DL 90). Although she accepted that it was unlikely that all of the 1 bed units would be occupied by two persons, no condition had been formulated to secure single occupancy (DL 94).

44. However, for the reasons given at DL 95 to DL 97 the Inspector concluded that the development would achieve acceptable living standards, taking into account both the shared residential amenity space proposed and the BTR model: -

> "95. Nevertheless, as a BTR scheme, the development would incorporate 277.3m^2 of shared internal residential amenity space. This was reduced as part of the revisions during application stage, but would be available to residents and would include co-working areas, private dining facilities and a gym. There would also be an 11th floor internal area opening out to a roof deck. In addition, there would be separate storage areas and a large bike store. The amended plans also remove the need for a fire protected lobby through the use of a sprinkler system giving more usable internal floor area.
>
> 96. Such communal amenity space would have a different function to private space, but it is a fundamental part of the BTR model and it does go some way to compensate for the 4m^2 deficit to the 1 bed units, taking pressure away from the private spaces. The BTR concept is also a flexible one, with the option to move apartments within the development as individual needs change and as families expand and lifestyles change.
>
> 97. Overall, the development would conflict with Policy DM7 as the minimum space standards would not be met. However, in light of the site-specific circumstances as a BTR development and the wider offer of internal amenity space as a material consideration, on balance, I am satisfied that the development would achieve acceptable living standards."

45. At DL 98 to DL 119, the Inspector explained why the effects of the proposal on living conditions for occupants of St. Ann's Quay were not unacceptable. No legal challenge is made to that part of the decision.

46. At DL 130 to DL 145 the Inspector struck the planning balance, first in relation to heritage harm and then overall.

47. She identified the benefits of the proposal at DL 132 to DL 137. The benefits included: -

- Economic benefits.
- Socio-economic benefits through the provision of a BTR scheme.
- The development of a sustainable location.
- The provision of the Pocket Park and public realm improvements.
- Improvements to St. Ann's Churchyard (including the retaining wall) and St. Ann's Stairs.

48. At DL 137, the Inspector said this: -

> "It is also important to note that as a site in public ownership by Homes England, the site is fully funded and deliverable. Although the site is not in a poor condition which detracts, the development would realise a longstanding development site in a prime Quayside location, one of which has never 'got off the ground' throughout the lifespan of the Masterplan. The significant remediation needs of the site and lack of viability are an undisputed factor in that regard. I consider that these factors attract substantial weight."

49. The Inspector struck the balance required by para. 202 of the NPPF at DL 139 to DL 140: -

> "139. What is extremely clear to me is that Plot 12 is an exceptionally difficult site to develop with many competing elements and, in this regard, this is a finely balanced decision with clear policy conflict but with important and weighty material considerations in play. Both the Council and SAQML also had very credible witnesses, particularly for the design and living conditions issues.
>
> 140. Beginning with heritage, any harm to heritage assets should be given considerable importance and weight, nevertheless greater weight can be afforded to the public benefits. The benefits, as outlined above, would comprise public benefits for the purpose of this balancing exercise. Taken together, the improvements to the churchyard, the repairs to St Ann's Stairs, plus the more general economic, social and environmental benefits are more than sufficient to outweigh the lower level of less than substantial harm to the significance of St Ann's Church. I am thus satisfied that there is clear and convincing justification for that harm, in accordance with paragraph 202 of the Framework."

50. As part of the wider planning balance, the Inspector said at DL 142 to DL 143:-

> "142. Design is also a high policy test, and I have sympathy with the concerns of the Council, SAQML and local residents with regard to the development of 289 units seeking to 'squeeze every last drop' out of the site which has led to compromises and a rigidity in the design concept. It is also said that another development of a better design quality would deliver the benefits of the current scheme, but without significant effects and it would be worth waiting for this to come forward.
>
> 143. The site does offer an opportunity for development and to fulfil the missing piece of the Farrell Masterplans. Is the architecture exceptional? My answer is no. But, in design terms the policy conflict is limited, the development does have positive design attributes and has sought to balance a number of competing site constraints. The benefits offered are significant and crucially, I have found that substantial weight should be attributed to the fact that the development is in public ownership, fully funded and deliverable in the context of a site which has never been realised in over 30 years and with significant remediation needs and viability issues."

51. Then finally at DL 145 the Inspector said: -

> "Overall, in light of my analysis above, I consider that the benefits would outweigh the planning harms as material considerations and there would be no justification to hold back permission for an unknown future scheme which may or may not come forward given the site constraints. This points towards the grant of planning permission."

Grounds of challenge.

52. In summary, NCC advances three grounds of challenge: -

> **Ground 1**
>
> In having regard to the site being "in public ownership by Homes England" and thus being "fully funded" and "deliverable" (DL 137), the Inspector took into account irrelevant considerations and/or acted irrationally. Further, and/or alternatively, the Inspector failed to provide intelligible and adequate reasons.
>
> **Ground 2**
>
> In assessing the harm to the significance of St Ann's Church as at the "lower end of less than substantial harm" the Inspector failed to pay special regard to the desirability of preserving the Church's setting contrary to section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 and failed to attribute great weight to the conservation of the Church contrary to the National Planning Policy Framework, and/or had regard

> to irrelevant considerations and/or acted irrationally. Further, and/or alternatively, the Inspector failed to provide proper reasons.
>
> **Ground 3**
>
> In finding that the Development would achieve acceptable living standards for future occupiers, the Inspector failed to have regard to material considerations and/or had regard to immaterial considerations. Further, there was a failure to provide intelligible and adequate reasons.

I will begin with ground 2.

Ground 2

Submissions

53. Section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 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."

54. It was common ground at the inquiry that any harm caused by the appeal proposal to the setting of St. Ann's Church fell into the "less than substantial harm" category in the NPPF, and not "substantial harm". But the national Planning Practice Guidance advises that the effect of harm within either category may vary and "should be clearly articulated". On that aspect, there was an issue at the inquiry.

55. When consulted by NCC on the planning application, Historic England advised that the proposed development would cause a "moderate" degree of "less than substantial harm" to the significance of the setting of the Church. NCC's witness at the public inquiry and SAQML agreed with Historic England's judgment on this point. On the other hand, EQ's case was that the development would cause a "low" level of harm, revised to no harm, to the setting of the Church (DL 67).

56. In DL 71 the Inspector concluded that the proposal would cause harm "towards the lower end" of the "less than substantial harm" category. She therefore disagreed with Historic England, NCC and SAQML who had said that the level of harm would be greater. In part, her conclusion was based upon "the key constraints of the plot". Ms. Foster submits that that could only be a reference back to DL 70 where the Inspector had said that any development of Plot 12 would affect the setting of St. Ann's Church and "there could not be a vastly different design response which could further minimise the harm caused to this Grade I listed building."

57. Ms. Foster advances two lines of argument: -

(i) The Inspector's conclusion in DL 71 that the degree of harm to the significance of St Ann's Church was towards the lower end of "less than substantial" was based not only upon her findings in DL 68 to DL 69, but also her conclusion in DL 70 that the level of harm could not be further minimised by a different design. That reasoning in DL70 was legally irrelevant to the assessment in DL 71 of the degree of harm that would be caused to the significance of the Church by the appeal proposal. The fact that any scheme would cause a similar degree of harm as the appeal proposal was of no relevance for determining what that level of harm amounted to. It could not, for example, lessen the level of harm caused by the appeal scheme. The effect of the Inspector's approach was that she failed to comply with s.66(1).

(ii) The Inspector failed to deal with the advice of Historic England. She failed to give "great" or "considerable" weight to that advice and she failed to give "cogent and compelling reasons" for departing from their views;

58. In relation to ground 2(i), the defendant submitted that the Inspector's conclusion at DL 71 (and DL 140) on the level of harm to St Ann's Church was based upon DL 63 to DL 69 and not upon DL 70 (para. 36 of skeleton). EQ made the same submission (para. 47 of skeleton). Reading the decision letter in that way, they both submit that the error of law alleged by NCC and SAQML did not in fact arise.

Discussion

59. Many of the principles in the case law on the duty under s.66(1) and related national policy were summarised by Sir Keith Lindblom SPT in *City and Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761 at [60]-[61] and developed further at [71]-[83]. They do not need to be repeated here. I would simply note that the issue of legal irrelevance advanced under ground 2(i) did not arise in *Bramshill* and so [74] of that judgment does not assist me on that point.

Ground 2(i)

60. Ground 2(i) is concerned with the relationship between:

a) para. 195 of the NPPF (the requirement to take into account the significance of any heritage asset in order to avoid or minimise conflict between a proposal and the conservation of that asset) (see [39] above); and

b) the assessment of the level of harm that a proposal would cause to the significance of that asset, so that the policy tests in para. 202 of the NPPF (less than substantial harm) (see [42] above) or in paras. 200 and 201 (total loss of, or substantial harm to, an asset) may be applied.

61. Paragraph 008 of the Historic Environment section of the Planning Practice Guidance issued by the Department gives further guidance on the application of para. 195 of the NPPF:-

> "**How can proposals avoid or minimise harm to the significance of a heritage asset?**
>
> Understanding the significance of a heritage asset and its setting from an early stage in the design process can help to inform the development of proposals which avoid or minimise harm. Analysis of relevant information can generate a clear understanding of the affected asset, the heritage interests represented in it, and their relative importance.
>
> Early appraisals, a conservation plan or targeted specialist investigation can help to identify constraints and opportunities arising from the asset at an early stage. Such appraisals or investigations can identify alternative development options, for example more sensitive designs or different orientations, that will both conserve the heritage assets and deliver public benefits in a more sustainable and appropriate way."

Plainly this guidance and para. 195 of the NPPF are concerned with whether the assessed level of harm to a heritage asset that would be caused by a proposed development could be reduced by alternative designs.

62. The PPG also refers to guidance given by Historic England. At the inquiry NCC's heritage expert, Ms. Charlotte Coyne, and the Council's closing submissions (e.g. paras 28 and 34) placed particular reliance upon Historic England's document GPA3: "Historic Environment Good Practice Advice in Planning: 3" (2nd Edition - 2017). The document advises that an assessment be carried out which includes the following steps:

> "Step 1: Identifying which heritage assets and their settings are affected
> Step 2: Assess the degree to which these settings and views make a contribution to the significance of the heritage asset(s) or allow significance to be appreciated
> Step 3: Assess the effects of the proposed development, whether beneficial or harmful, on the significance or on the ability to appreciate it
> Step 4: Explore ways to maximise enhancement and avoid or minimise harm"

63. The sequence in which steps 3 and 4 are addressed could vary from case to case without affecting the legality of a decision to grant planning permission. But what is significant for the purposes of ground 2(i) is that step 4 is addressed separately from the other steps, in particular step 3.

64. In relation to step 4, para. 39 of GPA3 advises:

> "Options for reducing the harm arising from development may include the repositioning of a development or its elements, changes to its design, the creation of effective long-term visual or acoustic screening, or management measures secured by planning conditions or legal agreements. For some developments

> affecting setting, the design of a development may not be capable of sufficient adjustment to avoid or significantly reduce the harm, for example where impacts are caused by fundamental issues such as the proximity, location, scale, prominence or noisiness of a development. In other cases, good design may reduce or remove the harm, or provide enhancement. Here the design quality may be an important consideration in determining the balance of harm and benefit."

65. This passage recognises that there may be some cases where an alternative design option is not available, and so harm cannot be reduced further, and other cases where an alternative could reduce harm. These considerations are treated as being relevant to the balance between scheme harm and benefit, not to assessing the level of harm that the proposed scheme would cause. Ms Foster made the same point in her oral submissions. It was not disputed by the defendant or by EQ. Not surprisingly, GPA3 does not suggest that either the availability or non-availability of an alternative option reducing the harm that would be caused by the scheme for which consent is sought can be relevant to deciding how much harm that particular scheme would actually cause. I do not see how logically a contrary view could be taken. Here again, the defendant and EQ did not suggest otherwise. They sought to defend DL 71 on the basis that it had no regard to DL 70 and so the issue of law did not arise.

66. NCC addressed the subject of para. 195 of the NPPF in paras. 53 to 54 of its closing submissions. The Council relied upon evidence from EQ's planning consultant in which he disavowed any suggestion that no alternative scheme would come forward if the appeal were to be dismissed. Building on that answer, NCC submitted that another scheme with a better design and of high quality could deliver many similar benefits as the appeal proposal but without the significant impacts. The Council said it would be better to accept a delay in realising the benefits from developing the site by a scheme of "the highest quality", than to accept the long-lasting harm to the character and appearance of Newcastle and living conditions which would result from the appeal scheme.

67. The Inspector addressed that issue in DL 70. She found that none of her earlier criticisms of specific design elements of the proposal would cause "heritage harm". She agreed with the Planning Brief that any development of Plot 12 would affect the setting of St. Ann's Church. More particularly, she did not consider that a different design response could further reduce the harm caused to that setting.

68. For completeness I mention a suggestion by Ms. Foster that because the Inspector had said in DL 68 that the scale of the development would cause harm to the setting of the Church, *it followed as a matter of logic* that an alternative development on a lesser scale would cause a lesser degree of harm to that setting. This appeal to logic was really an attack on the merits of the Inspector's conclusions at the end of DL 70. The issue raised by Ms. Foster about alternative designs was a matter for exploration at the public inquiry. The Inspector's conclusions about it were a matter for her judgment, whether favourable or adverse to NCC. That judgment would have been informed by her expert appraisal of the proposals (i.e., the scheme drawings and supporting material), the evidence before the inquiry, the Planning Brief and her site inspection. This was a sensitive design issue, and not a matter of logic qualifying as a point of law to be raised in the High Court. There is no basis for challenging the rationality of the Inspector's

judgment that the harm to the setting of the Church could not be reduced further by an alternative scheme (see e.g. *Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Region* [2017] PTSR at [5]-[7]). Nor is there any basis for criticising the legal adequacy of the reasons given on this particular point.

69. However, that last submission by NCC does not go to the heart of ground 2(i). The question still remains: did the Inspector's conclusion in DL 71 that the appeal proposal would cause harm to the significance of St. Ann's Church towards the lower end of "less than substantial harm" take into account her findings in DL 70 that the harm could not be further minimised by alternative designs.

70. Reading the decision letter fairly and as a whole, with reasonable benevolence, and avoiding excessive legalism and criticism, I am in no doubt that the last sentence of DL 71 makes it clear that the Inspector's conclusion on the level of harm to the Church was partly based on her conclusions in DL 70. There is no other way of reading DL 71. That sentence relies expressly upon the nature of the harm previously identified (e.g. in DL 69) and in the same breath relies expressly upon "the key constraints of the site". Those constraints were referred to in several parts of the decision letter specifically in the context of considering alternative design solutions. I accept Ms Foster's submission that the "key constraints of the site" can only be read as including the reasoning in DL 70. The fact that the reasoning in DL 70 was placed immediately before DL 71 supports this reading.

71. For the reasons I have previously given, it follows that the Inspector took into account a legally irrelevant consideration when she reached her judgment in DL 71 on the level of harm that would be caused by the appeal proposal itself. Even if that level of harm had been "minimised", in the sense that it could not be reduced further by adopting a different design solution, that tells the reader nothing about what that "minimised" level of harm amounts to. In any given case harm to a heritage asset might be "minimised" by the design solution selected, but nevertheless still be "substantial", or at the upper end or in the middle of the "less than substantial harm" range.

72. Alternatively, even if I had not been certain about the proper reading of the decision letter, I would have accepted Ms. Foster's fallback submission that the reasoning in DL 71 was inadequate in the sense explained in *Save* and *South Bucks.* The question of the level of harm that would be caused by the appeal proposal to the significance of St Ann's Church was a "principal important controversial issue". Neither the defendant nor EQ suggest otherwise. The Inspector's reliance in DL 71 upon "the key constraints of the plot" raises at least a "substantial doubt" as to whether she took into account a consideration which was irrelevant to her assessment of the level of harm that would be caused by the appeal scheme, namely her conclusion in the last sentence of DL 71 applying para. 195 of the NPPF. That inadequacy in the reasons actually given has caused genuine and substantial prejudice to NCC, and also to SAQML.

Ground 2(ii)

73. This criticism is based upon a number of decisions in which it has been stated that where a statutory consultee, such as Natural England or Historic England, has given its advice on a proposal, the decision-maker should give great weight to that opinion and, if departing from that opinion, should give cogent and compelling reasons for doing so (see e.g., *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010]

Env. L.R. 33 at [112]; *Shadwell Estates Limited v Breckland District Council* [2013] EWHC 12 (Admin) at [72]; *Steer v Secretary of State for Communities and Local Government* [2017] J.P.L. 11 at [51]-[54]).

74. Ms Victoria Hutton, on behalf of the Defendant, submitted that the authorities do not establish the principle upon which NCC relies. For my part, I have substantial reservations about whether they do, particularly in the case of a statutory review of a planning appeal decision. In a planning appeal the obligation to give reasons is to be found in the relevant statutory procedural rules. The legal standards for the adequacy of reasons has been long-established at the highest level in *Save* and in *South Bucks District Council*. In *Save*, Lord Bridge rejected the notion that the standards governing the obligation to give reasons may vary according to *inter alia* the degree of importance of the issue falling to be decided (see [1991] 1 WLR at p.166G).

75. So, for example, where a decision-maker departs from a previous relevant planning decision, the duty to give reasons for that departure is not heightened (see e.g. *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137). The most that can be said, perhaps, is that the length of the reasoning expected in order to comply with the usual standard may depend upon the nature of the issues to be resolved. On a matter of aesthetics it may be relatively short (p.145). Likewise, I am not aware of any heightened legal test where the Secretary of State disagrees with a finding or the recommendations of an Inspector. Why should there be a different test where a decision-maker differs from the views of a statutory consultee? How is the court to assess whether the reasons given are "compelling and cogent" without trespassing into the "forbidden territory" of assessing the merits of the appeal proposal? It does not appear from the decisions shown to the court that the legal basis for the statements cited, and how that relates to established principle, was argued in any detail.

76. Where the decision under challenge is that of a planning committee, perhaps different considerations may arise. The members of the committee may well be dependent upon the content of the officer's report (or other documentation put before them) to provide material which enables them to disagree with the view of a consultee on an expert issue, such as whether an "appropriate assessment" is required under The Conservation of Habitats and Species Regulations 2017. In the present case, however, there was ample material before the public inquiry, as well as her own site inspection, to enable the Inspector to disagree with Historic England on the degree of harm to the setting of the Church. No one suggests otherwise.

77. There has not been full argument on the appropriate legal test and it is unnecessary for me to resolve the issue in order to decide this part of ground 2. I will proceed on the basis that the test given in, for example, *Akester* and *Shadwell* is applicable. Even on that basis, there is no merit in NCC's complaint.

78. The difference between the opinion of Historic England and that of the Inspector was a matter of degree as to the level of harm that would be caused to the setting of St. Ann's Church. Ms Foster accepted that the reasons given by Historic England for their view that the harm would be "moderate" were contained in two short paragraphs in their letter dated 15 May 2020. The reasoning was relatively sparse. In DL 68 and DL 69 the Inspector gave a more detailed assessment. If the matter had stopped there, that would have provided her with ample reasons for disagreeing with Historic England, by treating the level of harm as "towards the lower end" of "less than substantial harm".

79. However, it does not end there. The legal error identified under ground 2(i) above also taints the basis upon which the Inspector disagreed with Historic England's advice.

Conclusion

80. I uphold ground 2(i) and (ii) to the extent set out above.

Ground 1

Submissions

81. The Inspector decided at DL 140 that the public benefits of the scheme were "more than sufficient to outweigh the lower level of less than substantial harm to the significance of St. Ann's Church". Although the Inspector gave considerable importance and weight to that harm, she found that there was a clear and convincing justification for that harm satisfying para. 202 of the NPPF. Those benefits included the matters set out in DL 137 relating to deliverability (see [48] above).

82. When she struck the overall planning balance at DL 145, the Inspector decided once again that the benefits outweighed the harm, adding that "crucially" the deliverability benefits she had identified in DL 137 attracted "substantial weight" (DL 143).

83. NCC submits that this reasoning was flawed by three legal errors: -

(i) The current identity of the landowner, and the fact that Homes England is a public body, were legally irrelevant considerations. They did not relate to the character and use of the land, nor did they fairly and reasonably relate to the development. In any event, the Inspector failed to impose a condition making the grant of planning permission personal to Homes England, so as to reflect the contribution they would make to delivery and the planning balance;

(ii) There was no evidence before the inquiry to support the finding that the ownership of the site by Homes England meant that the development was fully funded;

(iii) The deliverability of the proposal development was a legally irrelevant consideration. That factor was incapable of adding anything to the benefits which the Inspector had identified. By definition deliverability simply results in the benefits in question. It must be a neutral factor. It cannot make acceptable a development which, on balance, is otherwise unacceptable. Furthermore, EQ's planning witness had accepted in evidence that if the appeal were to be dismissed, another development scheme would come forward on the site.

Discussion

84. It is convenient to deal first with the last of the three arguments put forward by NCC.

85. Ms. Foster rightly accepted that there is no authority stating that deliverability is an irrelevant planning consideration, whether as a generality or in the type of circumstances which the Inspector identified in the present case.

86. Ms. Foster relied upon *Satnam Millennium Limited v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 2631 (Admin). There the Secretary of State had dismissed an appeal because the proposal was not deliverable, the appellant lacking control of a part of the site. The High Court held that that reasoning was immaterial and so the decision should be quashed.

87. In doing so the court applied the principle established by the decision of the House of Lords in *British Railways Board v Secretary of State for the Environment* [1994] JPL 32 that it is generally irrelevant to the determination of the planning merits of a proposal whether the owner of the whole or part of the site is willing to allow it to be developed. There is no general rule that the existence of such difficulties, even if apparently insuperable, necessarily leads to a refusal of planning permission. A would-be developer is entitled to a decision from the planning authority on the merits of his proposal, notwithstanding that he holds no interest in any of the land, or any difficulties in relation to ownership or control of land. The position would be different if, for example, the merits of a proposal depend upon the development being desirable in the public interest or there being a need for the scheme.

88. In *Satnam* the legal challenge succeeded because there was no reasoning in the decision to say why non-deliverability of the proposed development could be considered to be an adverse factor or in some way harmful ([93]). But Sir Duncan Ouseley accepted, in line with the *BRB* decision, that permission may be refused where non-deliverability is relevant to the planning merits of the proposal, giving some examples ([91]).

89. I see no reason why, as a matter of legal principle, deliverability cannot be a material consideration in the determination of a planning application or appeal if relevant to the planning merits of the proposal (for a recent example see *London Historic Parks and Garden Trust v Minister of State for Housing* [2022] JPL 1196).

90. In the present case the Inspector gave ample reasons as to why the deliverability of the scheme was relevant to her decision. It is necessary to read DL 137 and DL 143 in the context of the decision as a whole. The site forms part of an area identified in the 1960s as being in need of regeneration. It is one of the two last sites to be developed. It is an end stop to a run of buildings along the Quayside. It is an exceptionally difficult site to develop with competing interests. Extensive remediation is required of the site and the retaining wall. There are substantial viability issues. Although Plot 12 is not in a poor condition detracting from the area, development would realise a longstanding objective for a site in a prime Quayside location, which has never got off the ground throughout the duration of the Masterplan, a period of more than 30 years.

91. In these circumstances, I reach the firm conclusion that deliverability of the proposed scheme was a material planning consideration, which could properly be treated as an additional benefit. Overcoming longstanding problems in achieving the regeneration of the site was in itself a benefit.

92. In this context, Mr. Paul Tucker KC on behalf of EQ had made similar points in the developer's closing submissions at the public inquiry. He had specifically relied upon the delivery of the scheme through the partnership between EQ and Homes England, with the latter being involved at every significant stage.

93. Ms. Foster rightly accepted that if I should decide that the Inspector had been entitled to treat deliverability as a relevant consideration in this case then, as a matter of law, the Inspector had also been entitled to give "substantial weight" to it. No criticism can be made of the Inspector for having treated this as a factor which tipped a fine balance and, therefore, was decisive or "crucial".

94. This analysis is not undermined by the evidence of EQ's planning consultant that if the appeal were to be dismissed, another scheme would come forward. As previously mentioned, the Inspector concluded that such alternatives would not further minimise the harm to St. Ann's Church (DL 70).

95. I can deal more briefly with the other points raised by NCC under ground 1. Once it is accepted that deliverability was a material consideration, then the delivery mechanism was also relevant. Here the ownership of the site by Homes England was relevant (a) because of its statutory function to promote regeneration, and (b) its partnership with the developer EQ to bring that about. The tests for materiality, as restated by the Supreme Court in *R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562 at [32] *et seq*, are satisfied. Furthermore, there was no legal requirement to impose a condition making the permission personal to Homes England. It is not clear whether any such condition was suggested to the Inspector. But in any event, it has not been explained why any such condition would have been necessary, given the statutory functions of Homes England and its ownership of the site. It has also not been explained how a permission personal to Homes England would have been compatible with the agency's partnership arrangement with EQ.

96. There was evidence before the inquiry to the effect that the proposed development was fully funded (see para. 188 of the officer's report to NCC's Planning Committee on 14 March 2021 and para 8.8 of the proof of evidence of Mr. Emms). The court was told that NCC did not challenge or question that material. This complaint boils down to a suggestion that the Inspector implied in DL 137 that the development was fully funded by Homes England. That is an overly forensic reading of that paragraph. DL 143 made the position sufficiently clear. There is nothing in this point.

97. For the above reasons I reject ground 1.

Ground 3

Submissions

98. NCC and SAQML advance four criticisms under this ground. In summary they say:-

    (i) The Inspector relied upon the development providing 277 sqm of shared internal residential amenity space, including co-working areas, private dining facilities and a gym. That was unlawful because there was no mechanism to secure the provision of those facilities;

    (ii) The Inspector failed to have regard to, or provide adequate reasons in relation to, NCC's case that the amount of shared internal residential amenity space was inadequate for the estimated number of occupants of the property;

(iii) The Inspector failed to reach a conclusion on whether the development would provide a "high standard of amenity" as required by para.130 of the NPPF. The Inspector only found that the development "would achieve acceptable living standards;"

(iv) The Inspector found that the provision of communal amenity space would "go some way to compensate" for the non-compliance with the design standard for the size of 1 bed units occupied by 2 persons, implying that it did not fully compensate for that shortfall. She therefore failed to give adequate reasons for her conclusion that the development would nevertheless achieve acceptable living standards.

Discussion

99. There is no merit in any of these points.

100. On the first point, NCC does not criticise the Inspector for assessing the development on the basis that it would provide a BTR scheme. A condition was imposed requiring the development to be carried out in accordance with floor plans which show the provision of communal residential amenity space. The Inspector was also entitled to proceed on the basis that such space forms "a fundamental part of the BTR model" (DL 96). She also referred to the need for flexibility in that model. On a fair reading of the decision letter, the Inspector's acceptance of the living standards proposed did not depend upon the communal amenity space being tied down to specific facilities.

101. As to the second point, there was no need for the Inspector to deal expressly with NCC's contention. She addressed the shortfall against the internal space standard for 2-person occupancy and was also plainly aware of the potential number of occupants in the development (see e.g. DL 94), as well as the size and distribution of the communal amenity areas (DL 95). It is obvious that she was satisfied with the overall provision of internal floorspace within the apartments in combination with the shared floorspace. The Inspector was under no legal obligation to give any further reasons, which would amount to giving "reasons for reasons."

102. As for the third point, there is no dispute that the Inspector had regard to the relevant parts of para. 130 of the NPPF. In addition the Inspector correctly referred in DL 88 to footnote 44 of the NPPF which entitles a local planning authority to rely upon the NDSS for the purposes of achieving "a high standard of amenity." She then went on to apply policy DM7 and the relevant standards. In DL 97 she acknowledged the conflict with those standards and with policy DM7. She then applied her judgment to decide, on balance, that the development would achieve acceptable living standards (DL 97). She later said that there would be no unacceptable effects in respect of living conditions, despite that policy conflict (DL 141). It is obvious that she found the development acceptable in this respect in the context of para. 130 of the NPPF as well. There was no legal requirement for anything more to be said.

103. There is no merit either in the fourth criticism. NCC is really questioning the Inspector's judgment that despite the shortfall, she found the living standards of the proposed BTR development to be acceptable. The Inspector was under no legal obligation to go any further than she did in her decision letter.

104. For the above reasons I reject ground 3.

Discretion

105. I have upheld ground 2 for the reasons set out above. The upshot is that the decision must be quashed unless the Court can be satisfied that the decision would necessarily have been the same (*Simplex GE Holdings Limited v Secretary of State for the Environment* [2017] PTSR 1071). Here, the question is whether the court can be satisfied from the decision letter that planning permission would necessarily have been granted for the appeal scheme if the Inspector's assessment of the level of harm to St. Ann's Church, in order to apply the test in para. 202 of the NPPF, had not taken into account an irrelevant consideration, the conclusion at the end of DL 70.

106. The court can only refuse relief if satisfied that the decision "would inevitably have been the same" absent the legal error. "The court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision" (*R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 at [10]).

107. In my judgment it is impossible for the court to say that the Inspector would necessarily have determined that the harm from the proposal would fall towards the lower end of the "less than substantial" category if at that point she had disregarded her conclusion in DL 70. The decision letter does not say that she considered "the nature of the harm identified" as being sufficient in itself to arrive at that conclusion. I also note that the harm identified by the Inspector included the location and scale of the development and its effect upon views to and from the Church (DL 68 and 69). The Inspector also had regard to para. 199 of the NPPF which states that the more important the asset, the greater the weight to be given to the significance of that asset, even where the harm is less than substantial. Here the Church is a Grade I listed building and plot 12 "falls squarely" within its setting.

108. On this analysis, it follows that, absent the reliance upon DL 70, the Inspector could have found the harm to the Church to be further up the scale of "less than substantial harm". That would then have been relevant to striking both the heritage balance (DL 140) and the planning balance (DL 145). The Inspector's finding in the decision letter that the harm would be at "the lower level of less than substantial harm" (see e.g. DL 140) was, on any view, an important consideration, which affected both of those assessments.

109. At DL 139 the Inspector recognised that plot 12 is an exceptionally difficult site to develop, with many competing elements. In the same part of the decision letter she referred to the "competing site constraints" and the uncertainty of whether an "unknown future scheme" might come forward (DL 142, DL 143 and DL 145). Looking at the matter as a whole, the Inspector regarded the decision she had to make as "finely balanced". That conclusion also took into account (a) the crucial importance she attached to the delivery of a scheme for the regeneration of plot 12 and (b) her judgment that there could not be an alternative causing less harm to the setting of the Church. Consequently, the court is unable to say that if the Inspector had not made the legal error in the assessment of the level of harm to the setting of this Grade I listed building she would necessarily have struck both the heritage and planning balances in favour of granting planning permission.

110. Taking the decision letter as a whole, it is impossible for the court to say that the decision to grant planning permission would inevitably have been the same if the legal error had not been made. The same goes for the claimant's fallback criticism under ground 2 that the reasoning was legally inadequate.

Conclusion

111. For the reasons set out above the decision must be quashed and the appeal redetermined afresh. Because of the nature of the error identified in this judgment and the Inspector's view that the decision she had to make was finely balanced, the redetermination should be made by a different Inspector.