

Neutral Citation Number: [2017] EWHC 1456 (Admin)

Case No: CO/5004/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 June 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

PETER JOHN STEER	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	
(2) CATESBY ESTATES LIMITED	
(3) AMBER VALLEY BOROUGH COUNCIL	**Defendants**
HISTORIC ENGLAND	**Interested Party**

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- -

Nina Pindham (instructed by **Richard Buxton**) for the **Claimant**
Jacqueline Lean (instructed by the **Government Legal Department**) for the **First Defendant**
Rupert Warren QC (instructed by **Eversheds LLP**) for the **Second Defendant**
The **Third Defendant** did not appear and was not represented
Emma Dring (instructed by **Sharpe Pritchard LLP**) for the **Interested Party**

Hearing date: 24 May 2017

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Approved Judgment

Mrs Justice Lang:

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant ("the Secretary of State"), made by an Inspector on his behalf on 22 August 2016, in which he allowed two appeals by the Second Defendant ("the developer") against the refusal by Amber Valley Borough Council ("the Council") to grant planning permission for residential development in Allestree, Derbyshire.

2. The appeal site comprises currently agricultural land, situated off Kedleston Road and Memorial Road. The developer's first application was for outline planning permission for the erection of up to 400 dwellings and a convenience store. The developer's second application was for outline planning permission for the erection of up to 195 dwellings in the southern half of the same site.

3. The Claimant is a local resident who objected to the proposed development and gave evidence at the Inquiry. He is part of a local community group, Kedleston Voice, which opposed the development on the grounds, inter alia, of the harm which would be caused to the setting of Grade 1 listed Kedleston Hall (hereinafter "the Hall"), Grade 1 listed Kedleston Hall Registered Park and Garden (hereinafter "the Park"), and the Kedleston Conservation Area, as well as Kedleston Hotel and Quarndon Conservation Area.

4. The Hall and the Park are owned by the National Trust which objected to the proposed development because, in its opinion, it would have a harmful impact on the setting and significance of the heritage assets, which would not be outweighed by the benefits of the housing.

5. Historic England ("HE") is the Historic Buildings and Monuments Commission for England. Until 1 April 2015 it was known as English Heritage. It is a non-departmental body sponsored by the Department for Culture, Media and Sport and it is the government's statutory adviser on heritage matters. It has a statutory obligation under the National Heritage Act 1983 to preserve historic buildings and conservation areas and to promote public enjoyment and knowledge of them. In that capacity, it was a statutory consultee, and it objected to the grant of planning permission on the ground that the development would be harmful to the setting and significance of the heritage assets. However, its reason for participating in these proceedings was a wider concern about the implications of the Inspector's allegedly mistaken approach to the setting of a heritage asset which it considered to be a matter of public importance, affecting the future discharge of HE's functions.

6. The Council refused planning permission for the first application on the grounds of the harm which would be caused to the setting of the heritage assets. The reasons given were as follows:

    i) Section 38(6) of the Planning and Compulsory Purchase Act 2004 read in conjunction with sections 66(1) and 72(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 created a presumption against planning permission being granted if harm could be caused to the heritage assets. It was considered that the development caused less than substantial harm to the setting of heritage assets with the highest level of protection.

ii) On balance, the proposal was contrary to the policies in the Development Plan.

iii) The development would cause less than substantial irreversible and irreplaceable harm to the significance which the heritage assets derived from their setting.

iv) The development would result in a significant detrimental change to the landscape character and setting, visitor and visual experience across the largely unaltered historical estates, farmland landscape and the proposed mitigation was inappropriate for the landscape characteristics of the area and would not adequately mitigate against the harm caused.

v) The development was contrary to paragraphs 132 and 134 of the National Planning Policy Framework ("NPPF"), and therefore the requirements of paragraph 14 and footnote 9 were not satisfied, as the irreversible and irreplaceable less than substantial harm caused to the setting of highly important heritage assets was not outweighed by the public benefits derived from the development proposals.

vi) Upon consideration of social, economic and environmental factors, the development in overall terms was unsustainable, as the adverse impacts significantly and demonstrably outweighed the benefits associated with the development.

7. The Council did not determine the second application in time, but indicated that, if it had done so, it would have refused planning permission for the same reasons.

8. Both appeals were considered together. The Inspector, Mr John L. Gray DipArch MSc conducted an Inquiry in July 2016 and a site visit. In his Appeal Decision ("AD") dated 22 August 2016, he identified the main issue as the impact either proposal would have on the landscape character of the area and the heritage assets of the Hall, the Park, Kedleston Conservation Area, Kedleston Hotel and Quarndon Conservation Area.

9. It was agreed before the Inspector that the housing land supply as at 1 April 2015 was 3.08 years. The Development Plan comprised the saved policies of the Amber Valley Borough Plan 2006 which had an end date of 2011, so it was out-of-date. The Inspector found that, in the absence of an adequate supply of housing land and an up-to-date Local Plan, little weight could be given to the Local Plan policies for the supply of housing, and the weight to be given to the Local Plan policies which protected landscape character and heritage assets was reduced by their inconsistency with the NPPF. The proposals were more appropriately considered against the NPPF than against the Local Plan. These conclusions were not disputed before me.

10. The Inspector's main conclusions were as follows:

i) At present, the appeal site did not lie within the setting of the Hall. Thus section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 did not apply and nor did NPPF 131-137.

ii) Even if the Derby Screen (a band of trees in the parkland which screened out views of housing at Allestree, including the appeal site, from the Hall) were to be removed or opened out, and the appeal site were considered to fall within the setting of the Hall, the impact on the significance of the Hall would be "*less than substantial, indeed little more than negligible*".

iii) The appeal site lay within the setting of the Park and Garden and the Conservation Area. Overall, the harm to the significance of the Park and Conservation Area lay "*very much at the lower end of 'less than substantial*'".

iv) The public benefit of housing, which was much needed in the area, was more than sufficient to tip the balance in favour of the appeal proposals.

Therefore the appeals were allowed and planning permission was granted.

11. The issues raised in the section 288 application may be summarised as follows:

i) Did the Inspector adopt an unlawfully narrow approach when determining whether the appeal site was part of the setting of Kedleston Hall? Specifically, did he misdirect himself that a visual connection was necessary or determinative, in addition to the evidence of a historical connection?

ii) Did the Inspector give adequate reasons for rejecting the approach to setting which was put forward by objectors to the appeal proposal, including the National Trust and Historic England (the statutory consultee)?

iii) Dove J. granted permission on 14 December 2016, observing that the grounds were properly arguable and that the first ground raised issues of wide public importance.

Legal and policy framework

(i) Applications under section 288 TCPA 1990

12. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

13. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

14. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6]:

> "An application under section 288 is not an opportunity for a review of the planning merits….."

15. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

(ii) Decision-making

16. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

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

17. An Inspector is required to give adequate reasons for his decision, pursuant to rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The standard of reasons required was described by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953, at [36].

(iii) Planning (Listed Buildings and Conservation Area) Act 1990

18. Section 66(1) provides:

> "66. General duty as respects listed buildings in exercise of planning functions.
>
> (1) 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."

(iv) NPPF

19. The conservation of heritage assets is a core planning principle under the NPPF.

20. NPPF 17 provides:

> "17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> …..
>
> > "conserve heritage assets in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of this and future generations;""

21. The term "*heritage asset*" is defined in the Glossary:

> "**Heritage asset**: A building, monument, site, place, area or landscape identified as having a degree of significance meriting consideration in planning decisions, because of its heritage interest… "

22. The setting of a heritage asset and its significance are defined as follows:

> "**Setting of a heritage asset:** The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral."
>
> "**Significance (for heritage policy):** The value of a heritage asset to this and future generations because of its heritage interest. That interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset's physical presence, but also from its setting."

23. Part 12 of the NPPF is headed "Conserving and enhancing the historic environment". The Glossary defines historic environment as follows:

> "**Historic environment:** All aspects of the environment resulting from the interaction between people and places through time, including all surviving physical remains of past human activity, whether visible, buried or submerged, and landscaped and planted or managed flora."

24. Relevant paragraphs in Part 12 are set out below:

> "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."

"132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.

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."

(v) Planning Practice Guidance ("PPG")

25. The PPG includes the following guidance which is relevant to this case.

> "**Overview: historic environment**
>
> **What is the policy for the historic environment?**
>
> Protecting and enhancing the historic environment is an important component of the National Planning Policy Framework's drive to achieve sustainable development (as defined in paragraphs 6-10. The appropriate conservation of heritage assets forms one of the 'Core Planning Principles' (paragraph 17 bullet 10) that underpin the planning system. This is expanded upon principally in paragraphs 126-141 but policies giving effect to this objective appear elsewhere in the National Planning Policy Framework.
>
> Paragraph: 001"
>
> "**What is meant by the conservation and enhancement of the historic environment?**
>
> The conservation of heritage assets in a manner appropriate to their significance is a core planning principle. Heritage assets are an irreplaceable resource and effective conservation delivers wider social, cultural, economic and environmental benefits.
>
> …
>
> Part of the public value of heritage assets is the contribution that they can make to understanding and interpreting our past…
>
> Paragraph: 003"
>
> "**Why is 'significance' important in decision-taking?**
>
> Heritage assets may be affected by direct physical change or by change in their setting. Being able to properly assess the nature, extent and importance of the significance of a heritage asset, and the contribution of its setting, is very important to understanding the potential impact and acceptability of development proposals (see How to assess if there is substantial harm).
>
> Paragraph: 009"
>
> "**What is the setting of a heritage asset and how should it be taken into account?**
>
> The "setting of a heritage asset" is defined in the Glossary of the National Planning Policy Framework.

> A thorough assessment of the impact on setting needs to take into account, and be proportionate to, the significance of the heritage asset under consideration and the degree to which proposed changes enhance or detract from that significance and the ability to appreciate it.
>
> Setting is the surroundings in which an asset is experienced, and may therefore be more extensive than its curtilage. All heritage assets have a setting, irrespective of the form in which they survive and whether they are designated or not.
>
> The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors such as noise, dust and vibration from other land uses in the vicinity, and by our understanding of the historic relationship between places. For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each.
>
> The contribution that setting makes to the significance of the heritage asset does not depend on there being public rights or an ability to access or experience that setting. This will vary over time and according to circumstance.
>
> …
>
> Paragraph: 013"

(vi) Historic England: The Setting of heritage Assets (Historic Environment Good Practice Advice in Planning: 3)

26. HE's 'Good Practice Advice' does not constitute a statement of government policy. It is intended to provide information on good practice in implementing historic environment policy in the NPPF and PPG.

27. Paragraph 4 states:

> "**The extent of setting**
>
> 4. The NPPF makes it clear that the setting of a heritage asset is the surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral

(NPPF glossary). All of the following matters may affect the understanding or extent of setting:

- While setting can be mapped in the context of an individual application or proposal, it does not have a fixed boundary and cannot be definitively and permanently described for all time …

- Extensive heritage assets, such as landscapes and townscapes, can include many heritage assets and their nesting and overlapping settings, as well as having a setting of their own. A conservation area will include the settings of listed buildings and have its own setting, as will the village or urban area in which it is situated (explicitly recognised in green belt designations.

- The setting of a heritage asset may reflect the character of the wider townscape or landscape in which it is situated, or be quite distinct from it, whether fortuitously or by design …."

28. In a section headed "Views and setting", paragraph 5 states:

> "[t]he contribution of setting to the significance of a heritage asset is often expressed by reference to views, a purely visual impression of an asset or place which can be static or dynamic, including a variety of views of, across or including that asset, and views of the surroundings from or through the asset, and may intersect with, and incorporate the settings of numerous heritage assets"

29. Paragraph 9 provides:

"**Setting and the significance of heritage assets**

Setting is not a heritage asset …. Its importance lies in what it contributes to the significance of the heritage asset. This depends on a wide range of physical elements within, as well as perceptual and associational attributes pertaining to, the heritage asset's surroundings.

Cumulative change

Where the significance of a heritage asset has been compromised in the past by unsympathetic development affecting its setting, to accord with NPPF policies, consideration still needs to be given to whether additional change will further detract from, or can enhance, the significance of the asset. Negative change could include severing the last link between an asset and its original setting …

Change over time

Settings of heritage assets change over time. Understanding this history of change will help to determine how further development

within the asset's setting is likely to affect the contribution made by setting to the significance of the heritage asset. Settings of heritage assets which closely resemble the setting in which the asset was constructed are likely to contribute to significance but setting which have changed may also themselves enhance significance …

Appreciating setting

Because setting does not depend on public rights or ability to access it, significance is not dependent on numbers of people visiting it; …..

Buried assets and setting

Heritage assets that comprise only buried remains may not be readily appreciated by a casual observer, they nonetheless retain a presence in the landscape and, like other heritage assets, have a setting. For instance:

- The location and setting of historic battles, otherwise with no visible traces, may include important strategic views, routes by which opposing forces approached each other and a topography that played a part in the outcome.

- Buried archaeological remains may also be appreciated in historic street of boundary patterns, in relation to their surrounding topography or other heritage assets or through the long-term continuity in the use of the land that surrounds them.

While the form of survival of an asset may influence the degree to which its setting contributes to significance and the weight placed on it, it does not necessarily follow that the contribution is nullified if the asset is obscured or not readily visible.

Designed Settings

Many heritage assets have settings that have been designed to enhance their presence and visual interest or to create experiences of drama or surprise and these designed settings may also be regarded as heritage assets in their own right. Furthermore they may, themselves, have a wider setting: a park may form the immediate surroundings of a great house, while having its own setting that includes lines-of-sight to more distant heritage assets or natural features beyond the park boundary. Given that the designated area is often restricted to the 'core' elements, such as a formal park, it is important that the extended and remote elements of design are included in the evaluation of the setting of a designed landscape.

> Reference is sometimes made to the 'immediate' 'wider' and 'extended' setting of heritage assets, but the terms should not be regarded as having any particular formal meaning."

30. Under the heading "*A staged approach to proportionate decision-taking*", a five stage approach is recommended: Step 1: identify which heritage assets and their settings are affected; Step 2: assess whether, how and to what degree these settings make a contribution to the significance of the heritage asset(s); Step 3: assess the effects of the proposed development, whether beneficial or harmful, on that significance; Step 4: explore the way to maximise enhancement and avoid or minimise harm; Step 5: make and document the decision and monitor outcomes. There is a degree of overlap between these stages.

31. Each of these steps is then considered in more detail. Paragraph 13 provides guidance on Step 1:

> "**Step 1: identifying the heritage assets affected and their settings**
>
> 13 The starting point of the analysis is to identify those heritage assets to be affected by the development proposal. For this purpose, if the development is capable of affecting the contribution of a heritage asset's setting to its significance, it can be considered as falling within the asset's setting."

32. Paragraphs 18 to 21 provide guidance on Step 2: Assessing whether, how and to what degree these settings make a contribution to the significance of the heritage asset(s). Paragraph 18 states:

> "18. The second stage of any analysis is to assess whether the setting of a heritage asset makes a contribution to its significance and/or nature of that contribution. We recommend that this assessment should first address the key attributes of the heritage asset itself and then consider:
>
> - the physical surroundings of the asset including its relationship with other heritage assets
>
> - the way the asset is appreciated, and
>
> - the asset's associations and patterns of use."

33. Paragraph 19 refers to a non-exhaustive check-list of potential attributes of a setting that it may be appropriate to consider in order to define its contribution to the asset's heritage and significance.

Grounds of challenge

34. The Claimant's first ground of challenge was that the Inspector erroneously applied a narrow interpretation when determining the setting of the Hall, in which a physical or visual connection was needed, despite the existence of an historical, social and

economic connection between the Hall and its agricultural estate lands. This approach was inconsistent with the broad meaning given to setting in the NPPF, the PPG and HE's 'Good Practice Advice'. At the Inquiry, there was a body of expert evidence stating the historical connection did bring the appeal site within the setting of the Hall. If the basis of the Inspector's decision was that he rejected this evidence, and preferred the evidence of the developer's expert that the historical connection was insufficient to bring the appeal site within the setting, then he failed to provide adequate reasons for this conclusion, particularly bearing in mind that he was disagreeing with a specialist statutory consultee. The Claimant relied upon the inadequacy of the Inspector's reasons as its second ground.

35. HE supported the Claimant's grounds, whilst emphasising that its major concern was about the implications of the Inspector's interpretation of setting for future cases, and for the discharge of its statutory functions.

36. The Secretary of State, supported by the developer, submitted that the Claimant was, in reality, making a merits challenge to the Inspector's exercise of judgment, which was impermissible. On a fair reading of the AD, the Inspector correctly applied the NPPF and PPG to the issues in these particular appeals. He concluded that the historic, economic and social connections between the appeal site and the Hall were insufficient to bring the appeal site within the setting of the Hall. The Inspector's reasons were adequate, as there was no genuine doubt as to what he decided and why. He was not required to explain why he did not agree with the evidence of the objectors. Moreover, even if the Inspector had erred in his interpretation of setting, as alleged by the Claimant, it was apparent from the Inspector's alternative findings that he would have found the harm to be negligible and easily outweighed by the benefits of the proposed scheme.

Conclusions

The material before the Inspector on the historical, social and economic association between the Hall and the appeal site

37. There was a significant amount of material before the Inspector in support of the submission that the appeal site formed part of the setting of both the Hall and the Park because of the historical, social and economic association between the Hall and the agricultural lands of its Estate.

38. It was common ground that the appeal site was about 19.35 ha and that it was situated no less than 550m west of the Park and in the main around 830m away. It was formerly part of the agricultural lands of the Kedleston estate, and remained in agricultural use.

39. HE's response to the consultation, dated 17 November 2014, written by Louise Brennan, Principal Inspector of Historic Buildings and Areas, stated (emphasis added):

> "The setting of Kedleston Hall and Park has long been recognised as highly sensitive to the encroachment of development. A key issue is the extent to which the cumulative

impact of new development adjacent to extensive inter-war and post-war housing on the fringe of Derby marks a 'tipping point' in safeguarding the setting of these highly graded heritage assets. In this important respect, our assessment differs from that of the applicant's advisers and I set out below the advice of English Heritage that development in this location would be harmful to the significance of Kedleston Hall and its associated designated parkland and wider agricultural landscape.

Significance

The proposed development site consists of agricultural land immediately off Memorial Road and Kedleston Road, Allestree. The land appears to have formed part of the wider Kedelston site since at least the mid-late 18th century, concurrent with Adam's transformation of the park. The site is bounded to the east by Kedleston Road, which is the turnpike road created during this period. Adam located his new North Lodge on the Kedleston Road, north of the Grade 11* Kedleston Hotel and this forms the main entrance to Adam's Hall and Park.

The significance of Kedelston Hall and the registered park and garden is well documented and the Heritage Setting Assessment submitted [by the developer] acknowledges the importance of both assets and the conservation area – as a Grade 1 listed building the Hall is considered nationally to be of exceptional historic and architectural interest and character. The Hall is described by Pevsner as 'one of the most magnificent apartments of the C18 in England' and 'the most splendid Georgian house in Derbyshire, in extensive grounds'. The Grade 1 registered [Park and Gardens] is considered to be largely the work of Robert Adam – its layout closely conforms to Ingmans 1764 map. Described by the National Trust as a naturalistic pleasure ground, which blends seamlessly with the landscape and parkland beyond, the PAG is a important example of the picturesque approach embodied by the work of Capability Brown.

The Hall and PAG are now managed by the National Trust, open to the public as a visitor attraction that received 120,000 visitors last year. Kedleston Road forms the main entrance to the Hall from the south (Derby), connecting to the major local national roads and rail services. Thus the application site forms a part of the visitor experience of approaching Kedleston.

Impact of the proposals on Significance

…..

In our view the primary impact of the development is upon the Grade 1 registered park and garden, related conservation area and Grade 1 listed Kedleston Hall in relation to the significance that the Hall derives from its wider setting.

The application site remains in its historic agricultural use, with hedges and mature trees characterising the field boundaries. There are views across the site towards the registered [Park and Garden] and conservation area and vice versa. The site contributes to the setting of both assets in terms of aesthetic value – a pleasant and open agricultural landscape. In terms of the historic relationship between the Hall and its surrounding landscape, the site forms part of the Estate which would have been managed historically as an economic and social entity. Thus the preservation of this site in its historic form as agricultural land associated with the Kedleston estate contributes materially to the significance which these highly graded designated heritage assets derive from their setting.

This is a case where the development site also makes a contribution to the experience of approaching the registered [Park and Garden] and Hall from Derby. Whilst the suburban character of the inter-war development is apparent to the east of Kedleston Road, the landscape to the west remains in agricultural use, affording open views towards the [Park and Gardens]. The component parts of designed park and gardens supported by wider agricultural estate which characterise the great English country house are readily apparent when approaching on the Kedleston Road with the experience of anticipation as historic structures are revealed in the approach.

…..

The draft HSA concluded that only the PAG was affected by the proposed development site. We welcome revision of the HSA to include the conservation area commensurate with the boundary of the PAG as affected by the proposal. Likewise we believe the significance of the Hall as the principal building within the PAG – without which it would not exist – is also affected.

English Heritage Position

In our view the proposed housing development would harm the significance that Kedleston Hall and the Grade 1 registered [Park and Garden] derives from its setting. The development will also harm the significance of the conservation area through fundamental change to its setting owing to the transformation of character from agricultural land, historically part of the Kedleston estate, to housing. This harm is assessed as less than substantial. In identifying less than substantial harm the NPPF

> remains clear on the need for a 'clear and convincing justification' for any level of harm, weighing up public benefits ….. against the level of harm. …."

40. HE's pre-application advice to the Council, dated 24 July 2014, also written by Louise Brennan, was in similar terms to the consultation response.

41. Claire Searson, Historic Environment Planning Adviser at Historic England, made formal objections to the proposed allocation of this site in the Local Plan on 8 September 2014, on the ground that it would harm the significance that the Hall and Park and Conservation Area derive from their setting. Commenting on the absence of recommended mitigation measures, she observed:

> "We are uncertain whether any mitigation can be realistically achieved as we consider that the harm is caused by the transformation of agricultural land, historically part of the Kedleston Estate, to housing, and as such the principle of development in this location is called into question."

42. Mr Warren QC, for the developer, referred to minutes of meetings in December 2014 with EH, in which he submitted that its officers relied particularly on the visual connection. I observe that it was apparent from the Minutes that the historic and social/economic connection was explained to the developer by the officers. In any event, in my judgment, the corporate view of EH was expressed in the formal written responses, which were a more reliable expression of view than the minutes of a meeting.

43. The National Trust objected to the development in a detailed letter dated 8 December 2014. It included the following:

> "EDP also recognise that 'the residential expansion west of Derby has clearly had a profound and significant impact on Kedleston Park, in respect of its setting to the east, as agricultural fields have gradually been replaced by the widespread growth of Derby and Allestree'. The report also refers to 'chronic light pollution' arising from this area. The gradual historic erosion of a heritage asset's setting does not justify further harm. Nor, within the context of the modern planning system, does the historic sale of land by the Kedleston Estate set a precedent for further development that is harmful to the historic environment.
>
> As well as in the design of the property, the significance of Kedleston lies in the impression that the estate made – and still makes – on other people, including the numerous visitors. For generations, the family had been acutely conscious of the ways in which its estate represented its ambitious and achievements, its politics and its taste, to both the general public and its peers. The approach to, and views of, the wider setting of Kedleston Hall, Park and Garden – including the agricultural setting, which helped to provide the economic underpinning of the estate –

> played a vital role in building anticipation of what Kedleston had to offer in the 18th Century. The same is true today."

44. The Gardens Trust objected to the application by letter dated 4 February 2016, on the ground of its adverse impact on the setting of both the Park and the Hall. It stated:

> "It is important to understand that the setting of a heritage asset …. is a much wider concept than mere visibility, although there are often confused or conflated. Historic England defines setting as "the surroundings in which [the asset] is **experienced**" [our emphasis]. Views, while they may be an important part of this experience and clearly identify the presence of a setting, do not constitute its totality, or even the greater part of it. The whole of Kedleston Park for example is part of the setting of Kedleston Hall even where the Hall may not be actually be visible from it. Similarly the defined setting of Kedleston Park referred to above, functions on a number of levels, only one of which relates to views."
>
> …..
>
> "We further note that in Historic England's analysis of the impact of the proposed development on the setting of the overall heritage asset comprising Kedleston, the development site is identified as affecting the experience of the visitor's approach to, and understanding of Kedleston by virtue of its disruption of the hierarchy of designed pleasure grounds and parkland supported by a wider agricultural Estate which remains apparent on the approach to Kedleston along Kedleston Road. We support this view and the conclusion that further incremental development …… will significantly impact on an area which retains its historic, agricultural character in the immediate vicinity of the Park boundary."

45. Steve Baker, Development Control Archaeologist at Derbyshire County Council, commented on the proposal in an email dated 4 February 2016, as follows:

> "**Setting impacts to designated heritage assets**
>
> …..
>
> The proposal site forms part of the estate farmlands which reflect a shared history of landscape evolution between the Hall/Park and their wider estate surroundings. From the east the proposal site forms the landscape and historic landscape context within which the assets are viewed. The landscape east of Kedleston Park, including the proposal site, has been identified as conforming to a high degree with the 'Estate Farmlands' landscape character type, and forms part of an 'Area of Multiple Environmental Sensitivity' (AMES) within the Derbyshire County Council dataset, straddling both Primary and Secondary

sensitivities. These observations suggest that the landscape on this side of the Kedleston assets retains much of its historic character as the estate setting to the Hall and Park. This historic character and relationship can be appreciated in views from the east across the proposal site towards the edge of the park, from the line of Kedleston Road where the hall is screened by planting but the edge of the Park is clearly visible, and from higher up the ridge within Allestree where the Hall is clearly visible within its parkland and estate setting. Because of the limited remaining buffer between the urban edge of Derby and the RPG, the proposal site forms a meaningful component of the total surviving estate setting between the east of the RPG and the edge of Allestree, comprising perhaps one twelfth (c8%) of the total farmland setting to this side.

The proposal site also forms part of the primary visitor route to Kedleston Hall/Park from the south, along the line of Kedleston Road. Moving along Kedleston Road northwards along the edge of Allestree and north-eastwards towards the edge of the RPG there is around 1100m where the visitor can view the edge of the Park – clearly discernible as a continuous line of planting - across its estate farmland setting – of which the proposal area contribute 210m. The concentric influence of the Hall on its landscape forms a clear narrative for this line of approach, across estate farmland beyond which the edge of the park approaches, followed by immersion within the inner parkland landscape and the final disclosure of the built form of the Hall. The drama of this approach to Kedleston therefore forms an important part of the visitor experience, a physical narrative which encapsulates the spatial and cultural relationships between the Hall and its surrounding landscape and therefore contributes to the significance of both Hall and Park.

From the Hall and the RPG the surrounding rural context is important in preserving a sense of a parkland landscape at the centre of a managed rural estate (rather than in a suburban context). The proposal site contributes here in views only from the eastern edge of the RPG, but in the wider sense as part of the buffer against intrusive noise and light pollution from the urban edge of Derby.

The proposal site therefore makes a contribution in a number of ways to an understanding and experience of the historic relationship between Kedleston Hall/Park and the surrounding estate landscape. Part of the significance of Kedleston Hall lies in its historic role in shaping and managing the character of the surrounding landscape – the RPG and the surrounding estate farmlands – and the proposal site therefore contributes to this element of significance of both Hall and Park.

……

> The harms to significance detailed above do not constitute 'substantial harm' sensu NPPF chapter 12; given the reduction in the proposed development area I would place these impacts towards the lower end of 'less than substantial harm'. However, they do strike at an important element of the significance of both Hall and RPG in a non-trivial way. A loss of perhaps one twelfth of the historic setting to the eastern side of the park, and a fifth of the visitor approach where the RPG can be viewed across estate farmland is a meaningful degree of harm to assets of international importance."

46. Melanie Morris, a chartered town planner specialising in the historic environment, gave evidence at the Inquiry on behalf of the Council. In summary, her evidence was that the appeal site was part of the manor lands owned by Sir Nathaniel Curzon, 1st Baron Scarsdale, in 1761 when he was reconstructing his park and house with the assistance of the architect Robert Adam. The appeal site was located on the main road from Derby from which most visitors arrived. It gave a clear view into the park which incorporated a designed view of the Hall. The Curzon family also enjoyed views outwards from the park to Derby but today "*the park turns its back on Derby*". Encroaching urbanisation and light pollution led to the filling in of the main view between the park and the southern approach by a screen of trees, in the 1960's, which has been gradually thickened.

47. In her proof of evidence she stated:

> "1.9 Despite the loss of the view of the Hall, there is still a view of the park and the views looking towards the park from Kedleston Road and Memorial Road have changed relatively little since the 1835 Sanderson map depicted the field boundaries.
>
> 1.10 The setting of the Hall will be affected by development on both appeal sites. This is because the significance of the Hall is in part meshed with its landscape setting, which was manipulated to control views of it. It lies at the heart of parkland, which lies within an area of agricultural land that was controlled and managed by the estate, like concentric rings of influence, designed to be experienced, moving inwards."

48. Stephen Levrant, an architect specialising in historic buildings and conservation, gave evidence on behalf of Kedleston Voice. In his view, the appeal site fell within the setting of the Hall, the Park and the Kedleston Conservation Area. The appeal site with its open rural nature and the existing historical field boundaries positively contributed to the significance of these heritage assets, including the Hall, through the retention of its historical appearance and the legibility of the urban boundary of Derby.

49. Christopher Gallagher, an historic landscape consultant with a specialist knowledge of historic parks and gardens, gave evidence on behalf of Kedleston Voice, focusing on the Park and Garden. He provided a detailed history, including the blocking of designed views inwards and outwards by the Derby Screen. In his view, the proposed

development would impact negatively by removing the last remnants of the important view of the Hall and Park from Kedleston Road, and render it irretrievable.

50. Andrew Crutchley, Director at the Environmental Dimension Partnership, and a specialist in heritage issues, gave evidence at the Inquiry on behalf of the developer. He also authored the Heritage Setting Assessment, which was commented upon by HE and others. In his Summary and Conclusions, he stated as follows:

> "**The impact on Kedleston Hall Grade 1 Listed Building**
>
> S.6 It is also considered that there would be no impact in respect of Kedleston Hall Grade 1 listed building in terms of the change to the contribution which its setting makes to its significance as a designated heritage asset. This is on the basis that there would be no change to views in towards or out from the Grade 1 listed building which contribute to its heritage 'significance', and moreover those wider relationships that contribute positively to its heritage significance are principally focused within the enclosing confines of the surrounding parkland landscape (and would therefore not be impacted).
>
> S.7 Insofar as there is any experience of the Grade 1 listed building from Kedleston Road, on the approach to Kedleston Hall RPG, it would be unchanged by the implementation of the appeal proposals. Whilst the Council and its heritage consultees claim that the listed building would experience a loss of significance ('harm') because of the development of estate farmland which economically supported the house, my evidence concludes that this is an historic relationship which cannot be understood or appreciated without access to the estate records. There are no physical features marking the extents of the estate's ownership, in direct contrast to a great many other country estates.
>
> **The impact on Kedleston Hall RPG & Kedleston Conservation Area**
>
> S.9 It is concluded that there would be a negative impact (i.e. a loss of significance from just two designated heritage assets … in both instances through change within their setting. These comprise:
>
> - Kedleston Hall Grade 1 Registered Park and Garden
>
> - Kedleston Conservation Area
>
> …..
>
> S.11 The harm would result from the loss of views west, towards the planation woodland defining the eastern boundary of the RPG and conservation area from the north-south section of Kedleston

> Road adjoining the appeal sites, and the consequent reduction in the ability to experience it as a feature in the surrounding farmland landscape."

The Inspector's decision

51. The extracts from the evidence which I have set out above demonstrate that there was a significant body of evidence, from HE, the National Trust, the Gardens Trust, the Development Control Archaeologist at Derbyshire County Council, and the experts called on behalf of the local community, Kedleston Voice, that the appeal site was part of the setting of both the Grade 1 listed Hall and the Park, as well as the conservation area, even though the proposal would not intrude upon views to and from the Hall. The evidence was that the appeal site was part of the setting of the Hall because it had formed part of the estate, managed historically as an economic and social entity, and it remained in its historic agricultural use, with hedges and mature trees characterising the field boundaries. From the Hall and the Park, the surrounding rural context was important in preserving a sense of a parkland landscape at the centre of a managed rural estate, rather than in a suburban context. The site was on the primary visitor route to the Hall and Park and so visitors would experience the historical narrative, and the concentric influence of the Hall on its landscape, as they traversed the agricultural estate, then entered the enclosed, designed park and gardens, enjoying the drama of anticipation as a great English country house was revealed to them.

52. The Inspector was required to address this evidence in his AD, whether or not he agreed with it, for the following reasons. It related to a main issue in the appeal, on which the developer disagreed with the objectors. Much of the evidence was given by experts. HE was a statutory consultee and a "*decision-maker should give the views of statutory consultees … 'great' or 'considerable' weight. A departure from those views requires 'cogent and compelling reasons"*": *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), at [72]. As an experienced Inspector, he would have been aware of these requirements.

53. On my reading of the decision, the Inspector accepted the evidence that there existed historic social and economic connections between the Hall and Park and the area in which the appeal site was situated since he did not set out any reasons for rejecting this evidence, wholly or in part, and in his conclusions at AD 37 he expressly accepted it, saying:

> "The Hall and its Park were at the centre of a large estate, socially and economically, though not geographically (there was estate land in Staffordshire). The agricultural land around the Park certainly forms part of its setting in historical and cultural terms. In visual terms what forms part of its setting is less extensive."

54. However, the Inspector rejected the evidence and submissions that the appeal site was part of the setting of the Hall, despite the historic social and economic connections. On a fair reading of the entirety of the AD, I accept the submission by the Claimant and HE that the Inspector concluded that the

appeal site was not part of the Hall's setting because of the lack of a physical or visual connection, which he treated as essential to the identification of "*surroundings in which a heritage asset is experienced*" (NPPF definition of setting). The Inspector said, at AD 32:

> "It was also argued that the historical, social and economic connection – the appeal site being part of the estate of which the Hall and Park were the hub – brought the appeal site within the setting of the Hall. There has, though to be more of a physical or visual connection than that, otherwise land completely remote from the Hall could be deemed within its setting."

55. In line with that approach, the Inspector then went on to identify "*two ways to look at the setting of Kedleston Hall*", both of which were concerned with the existence of inter-visibility between the site and the Hall. The first "*way to look at the setting*" was to consider the current position. The Inspector referred to the fact that the Derby Screen had obscured the views from and to the Hall and "*thus, today, the appeal site forms no part of the setting*": AD 33.

56. The second "*way to look at the setting"* was to take *"a more historical approach*", and consider the views that would have existed prior to the planting of the Derby Screen: AD 34, AD 35. The Inspector concluded that "*if one holds the opinion that the view both to and from Kedleston Road was a deliberate part of the design of the Park and that the Derby Screen, or part of it, could be opened out to restore that view, then the appeal site does indeed fall within the setting*": AD 36. The Inspector thus identified two conditions which, if satisfied, would bring the appeal site within the setting of the Hall on the basis of an historic visual connection.

57. The Inspector concluded at AD 50 that it was "*unclear that the view from Kedleston Road was a designed view*", and that "*there is nothing to suggest that a view from Kedleston Road giving a glimpse of the Hall might at some time be restored*". On that basis, he concluded, at AD 51, it was "*entirely reasonable to conclude that the appeal site does not lie within the setting of Kedleston Hall….*".

58. At AD 52, the Inspector considered what the impact would be if, contrary to his findings, the visual connection could be restored. He concluded that "*the view from Kedleston Road would be lost*", "*the view from the Hall would be little changed*", and that overall the impact would be "*less than substantial*" – in fact the effect on significance would be "*negligible*".

59. In his assessment of the impact of the proposed development upon the Hall, the Inspector concluded, at AD 42:

> "The Derby Screen is key to any impact on the significance of Kedleston Hall. At the present time, the existence of the Screen means that the proposed development would have no impact whatsoever on the setting of the Hall…."

60. In my view, the Inspector's findings set out above clearly indicate that the Inspector's focus was upon identifying a visual connection, and assessing the proposal's impact upon it. The historic social and economic connections were set to one side in this

exercise. I therefore cannot accept the Secretary of State's submission that the Inspector merely formed a planning judgment that the historic social and economic factors were of insufficient weight, as there was no assessment of the weight to be accorded to them in the Inspector's decision-making process.

61. In my view, the Inspector's approach to the other heritage assets also confirms that he treated the physical and visual connection as determinative.

62. When considering the Park, after referring to the historic social and economic connections in AD 37, the Inspector went on to say that "*in visual terms, what comes within the setting is less extensive*". He found that the appeal site was within the setting of the Park because of its "*relative proximity*" and the fact that there were "*clear views of the boundary of the Park*", although the views into the Park had been obscured: AD 38. It is apparent that the Inspector concluded that these physical and visual connections distinguished the Park from the Hall, as Mr Crutchley, witness for the developer, had contended at the Inquiry.

63. The Inspector's assessments of whether the appeal site was within the setting of the Kedleston Hotel and Quarndon Conservation Area were entirely based upon visual attributes: AD 39 and AD 40.

64. In my judgment, although the Inspector set out the NPPF definition of setting at AD 31, he adopted a narrow interpretation of setting which was inconsistent with the broad meaning given to setting in the relevant policies and guidance which were before him (see the extracts from the NPPF, the PPG, and HE's 'Good Practice Advice', set out above). Whilst a physical or visual connection between a heritage asset and its setting will often exist, it is not essential or determinative. The term setting is not defined in purely visual terms in the NPPF which refers to the "*surroundings in which a heritage asset is experienced*". The word "*experienced*" has a broad meaning, which is capable of extending beyond the purely visual.

65. Paragraph 013 PPG expressly states (emphasis added):

> "The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors such as noise, dust and vibration from other land uses in the vicinity, and by our understanding of the historic relationship between places. For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each.
>
> The contribution that setting makes to the significance of the heritage asset does not depend on there being public rights or an ability to access or experience that setting. This will vary over time and according to circumstance."

66. HE's 'Good Practice Advice' confirms the PPG guidance stating, at paragraph 9, that the importance of setting "*lies in what it contributes to the significance of the heritage asset. This depends on a wide range of physical elements within, as well as perceptual*

and associational attributes pertaining to, the heritage asset's surroundings". It advises that even buried remains, or the sites of historic battles, will have settings, despite the absence of any visible traces, and being unrecognisable by the casual observer.

67. At AD 32 the Inspector concluded that there had to be a physical or visual connection going beyond the historic social and economic connections between the Hall and its estate "*otherwise land completely remote from the Hall could be deemed within its setting*". Later on, at AD 37, he referred to the fact that there was estate land in Staffordshire. In my view, the Inspector's justification for his narrow interpretation was misplaced because the term "*surroundings*" in the NPPF definition of setting does place a geographical limitation on the extent of the setting. The estate in Staffordshire could not be treated as part of the Hall's "*surroundings*".

68. The five step approach in HE's 'Good Practice Advice' advises at Step 1 that "*if the development is capable of affecting the contribution of a heritage asset's setting to its significance, it can be considered as falling within the asset's setting*" (paragraph 13). The guidance on Step 2 refers to a non-exhaustive check-list of potential attributes of a setting which may define its contribution to the asset's heritage and significance (paragraph 19). Although the list includes many visual attributes, it also includes non-visual attributes. Under the heading "*The asset's physical surroundings*": attributes such as "*Land use*", "*Functional relationships and communications*", "*History and degree of change over time*" are non-visual attributes referred to in the evidence in this case. Under the heading "*Experience of the asset*": attributes such as "*Surrounding landscape or townscape character*", "*Degree of interpretation or promotion to the public*", "*The asset's associative attributes*", "*Associative relationships between heritage assets*", "*Cultural associations*" and "*Traditions*" are all non-visual attributes referred to in the evidence in this case.

69. I agree with the submission of the Claimant and HE that the Inspector adopted an artificially narrow approach to the issue of setting which treated visual connections as essential and determinative. In adopting this approach, the Inspector made an error of law.

70. In view of my conclusion on ground 1, it is unnecessary to determine ground 2.

Discretion not to quash

71. I accept the Claimant's submission that it is not possible for me to judge that the outcome of the appeal would have been the same had the Inspector adopted the correct approach to the setting of the Hall. This would have required evaluation of the whole range of attributes – both visual and non-visual – which were capable of contributing to the significance of the Hall or the appreciation of its significance. If the appeal site was found to be within the setting of the Hall, further statutory and policy tests would be applicable.

72. The Inspector concluded that, as the appeal site was outside the setting of the Hall, section 66(1) of the Planning (Listed Buildings and Conservation Area) Act 1990 did not apply.

73. In *Barnwell Manor Wind Energy Limited v East Northamptonshire District Council & Ors* [2014] EWCA Civ 137, the Court of Appeal held that "*Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise*" (per Sullivan LJ, at [29]).

74. In this case, the application of section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, read together with section 38(6) of the PCPA 2004, was one of the reasons why the Council refused planning permission for what it described as "*less than substantial harm to the setting of heritage assets with the highest level of protection*".

75. The Inspector also concluded that NPPF 131-137 did not apply. NPPF 132 states:

> "When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification."

76. In this case, the Council refused planning permission on the ground that the development was contrary to NPPF 132, finding that the irreversible and irreplaceable less than substantial harm caused to the setting of highly important heritage assets was not outweighed by the public benefits derived from the development proposals.

77. In my view, it is inappropriate for the High Court effectively to step into the shoes of the decision-maker in this case and exercise a planning judgment on matters of such sensitivity and importance as the setting of a Grade 1 listed heritage asset, on which the local planning authority and the Inspector have disagreed.

Conclusion

78. The application under section 288 TCPA 1990 is granted and the decision is quashed.