own—not least because a comprehensive development of a whole area may have beneficial effects on the value of each building in it.[157]

Design of proposed redevelopment

19-49 As to the design quality (as opposed to the financial viability) of any proposed redevelopment, the Secretary of State in *Kent Messenger* had taken the view that it was not a material consideration, but the High Court specifically left the question open. In *Godden*, Stuart Smith J considered that:

> "Where an area...was an obvious candidate for redevelopment in a potentially attractive area, then such potential development was a material consideration, but it was probably not one to which great weight would be attached unless the nature of the development was reasonably well known...But weight was a matter for the Inspector and the Secretary of State."[158]

One notable case where the quality of a new building was considered to be a relevant matter in deciding whether to grant consent for the demolition of the listed building which it was to replace was the demolition of the Mappin and Webb building and seven other listed buildings in the City of London. The owners of the important site wished to demolish these and replace them with a modern building designed by James Stirling. The inspector at the inquiry considered that the existing buildings on the site were of less value than others in the area, that the proposed replacement "might just be a masterpiece", and that this was sufficient to override the undoubted presumption in favour of retaining listed buildings. The Secretary of State accordingly granted planning permission, listed building consent and conservation area consent.

Save Britain's Heritage, the national amenity group, applied to have the decision quashed. Simon Brown J upheld it at first instance, but his judgment was overturned by the Court of Appeal,[159] Woolf LJ considered that the reasoning of the Secretary of State was defective, and accordingly quashed the decision. The owners appealed to the House of Lords,[160] which reversed the decision of the Court of Appeal. The Secretary of State's general policy in favour of retaining listed buildings[161] was not absolute, and could in very special circumstances be overridden. This case was one of those special circumstances, the Secretary of State had specifically considered his general policy, and he had explicitly stated his reasons for departing from it.

This case, albeit widely reported, might well not have reached the House of Lords had it not concerned such a prominent site, or a design by such a notorious architect; and the Secretary of State's decision letter made it clear that the outcome was not to be regarded as a general precedent leading to the loss of listed buildings. As emphasised already, the Secretary of State's current policy (in the NPPF) is clear that total loss of listed buildings should be "exceptional" or even "wholly exceptional" depending on the grade.[162]

---

[157] *Godden v Secretary of State* [1988] J.P.L. 99; *P.G. Murdoch v Secretary of State* [2001] J.P.L. 841.
[158] *Godden* [1988] J.P.L. 99 at 1001.
[159] *Save Britain's Heritage v Number 1 Poultry Ltd* [1990] 3 P.L.R. 50; (1990) 60 P. & C.R. 539.
[160] *Save Britain's Heritage v No.1 Poultry Ltd and Secretary of State* [1991] 1 W.L.R. 153.
[161] In Circular 8/87, para.89; the Secretary of State's current policy at para.201 of the NPPF is quoted at para.19-21.
[162] NPPF, para.200, and see para.19-42.

A more typical case is *Davis & Co v Secretary of State*,[163] which concerned a **19-50** proposal to replace a recently listed building in a conservation area with a new office block. Malcolm Spence QC, sitting as deputy judge, started with the guidance in paragraph 95 of Circular 8/87, which strictly related to conservation area consent: "consent to demolish should normally be given only where there are acceptable and detailed plans for redevelopment".[164] He held that this applied even more to the demolition of listed buildings. He accordingly found it "quite impossible to imagine that listed building consent would have been granted by this inspector for the demolition of this listed building without there being in place a suitable redevelopment scheme".

Similarly, in *Kent CC v Secretary of State*,[165] the court upheld a refusal by the Secretary of State to grant conservation area consent for demolition, in the absence of a satisfactory replacement structure.[166]

As to the assessment of design quality, see the comments above on the design of alterations, and in particular the comments of Forbes J in *Winchester CC v Secretary of State*.[167] It is difficult enough assessing the quality of an existing building; evaluating a proposed replacement will be even harder.

H. DEVELOPMENT AFFECTING THE SETTING OF A LISTED BUILDING

Works affecting the setting of a listed building

Listed buildings will obviously be affected by proposals for their demolition, **19-51** alteration and extension, and changes to their use. But they can also be affected, and sometimes just as radically, by development nearby—and the effect may be negative, as with the construction of an insensitive office block towering over a small listed cottage next door, or positive, as with the removal of insensitively located pipework and extensions from a building next to a fine manor house. Indeed, the alteration of one listed building may have an effect (beneficial or otherwise) on the setting of another.

As would be expected, the NPPF addresses the significance of heritage assets and specifically states that:

> "Significance derives not only from a heritage asset's physical presence, but also from its setting."[168]

Accordingly, in considering whether to grant planning permission for development which affects the setting of a listed building, the planning authority, the Secretary of State or the Welsh Ministers are to have special regard to, amongst other things, the desirability of preserving that setting.[169]

In particular, where a new building is proposed that affects the setting of a listed building, it will be important to ensure that it is sensitively designed. Paragraph 130

---

[163] *Davis & Co v Secretary of State* [1992] J.P.L. 1162.
[164] See now NPPF, para.204.
[165] *Kent CC v Secretary of State* [1995] J.P.L. 610.
[166] See para.20-28.
[167] *Winchester CC v Secretary of State* (1987) 36 P. & C.R. 455; see para.19-37.
[168] NPPF, Annex 2: Glossary–definition of "significance".
[169] P(LBCA)A 1990 ss.16(2) and 66(1); HE(W)A 2023 s.96(2) and TCPA 1990 s.214A (inserted by HE(W)A 2023 Sch.13, para.90) (see paras 19-06, 19-08).

of the NPPF advises that:

"Planning policies and decisions should ensure that developments:

a) will function well and add to the overall quality of the area, not just for the short term but over the lifetime of the development;
b) are visually attractive as a result of good architecture, layout and appropriate and effective landscaping;
c) are sympathetic to local character and history, including the surrounding built environment and landscape setting, while not preventing or discouraging appropriate innovation or change (such as increased densities);
d) establish or maintain a strong sense of place, using the arrangement of streets, spaces, building types and materials to create attractive, welcoming and distinctive places to live, work and visit;
e) optimise the potential of the site to accommodate and sustain an appropriate amount and mix of development (including green and other public space) and support local facilities and transport networks; and
f) create places that are safe, inclusive and accessible and which promote health and well-being, with a high standard of amenity for existing and future users; and where crime and disorder, and the fear of crime, do not undermine the quality of life or community cohesion and resilience."[170]

As for Wales, see Technical Advice Note TAN 12, Design.

19-52 There will be more scope for new designs here than would be the case with alterations to an existing listed building (pastiche neo-Georgian is not always, or even often, the right answer) but local authorities (and amenity groups) will understandably be more concerned with architectural and aesthetic aspects of new proposals in such locations than they would be elsewhere.

In general, planning authorities have in the past been criticised, both by architects and developers and by the government, for becoming too involved in the design of proposed new development; but current government advice, as can be seen above, requires planning authorities to promote good design as an integral part of the planning process. And see the comments in Chapter 16 in relation to design statements to be submitted with applications.[171] See also the comment above on the design of alterations to and replacements for listed buildings,[172] which apply with even greater force to new buildings affecting the setting of existing ones.

The extent of the "setting" of a listed building has already been considered, but it may mean something wider than just its curtilage, or just the land that can be seen from it.[173] In practice, the question is not—as it is with "curtilage"—what is the boundary of the setting, but rather does a particular proposed development affect the setting of a listed building in the vicinity. The answer to this is likely to depend on the nature of the proposal as much as on that of the listed building. Thus the erection of a tall radio mast may affect the setting of a number of listed buildings, some considerable distance from it; whereas the erection of a small shed in the garden of a listed house is likely to affect its setting only if it is reasonably close.

The extent of a building's setting is a matter of planning judgement for the decision maker in each case, but "setting" is to be given its natural meaning considering a number of factors, including the reasons for listing.[174] The Court of Appeal

[170] NPPF 2021, para.130.
[171] See paras 16-18 to 16-20.
[172] See paras 19-33, 19-49, 19-50.
[173] *R. v South Herefordshire DC, Ex p. Felton* [1989] 3 P.L.R. 81; see para.17-23.
[174] *Liddell, petitioner* [2019] CSOH 57, upheld [2020] CSIH 30.

considered this at length in *Catesby Estates v Steer*, concluding that there must be a "distinct visual relationship" but other factors, such as economic, social or historical factors, should also be considered.[175]

19-53 This is reasonably straightforward, but it is important to take into account not just the setting of the listed building nearest to the proposed development, but also the settings of those further away, if they are also likely to be affected. Thus, in *R. v Bolsover DC, Ex p. Paterson*, it was argued that the planning authority had taken account of the effect of a proposed development on the setting of one nearby listed building, but not on that of another. The court accepted the evidence of the planning officer that he had considered both, and would not have quashed the resulting permission had there not also been a fatal procedural defect.[176] But such challenges should be avoided, by ensuring that the record makes it clear (usually within the report to the relevant committee, and in the reasons for refusal) that the effect of the proposal has been considered in relation to each of the nearby listed buildings.

In *Ryan v Secretary of State*, on the other hand, the court quashed a grant of planning permission for the extension of 17 Upper Mall, Hammersmith (listed Grade II) on the basis that the inspector had considered the effect of the extension on No.17 itself and its setting, and on the conservation area within which it lay, but not had not fully considered its effect on the setting of Sussex House (on the opposite side of the street to No.17, and listed Grade II*).[177] The deputy judge accepted that the character and appearance of the conservation area, which had been considered, undoubtedly included the view of Sussex House from the river or the towpath, and to that extent its setting had been considered. However, he held that its setting also included the view out from the House across the river—which had not been fully taken into account—and therefore, after some hesitation, remitted the decision for re-determination.

Ryan is a slightly strange decision, in that it appears to establish that, although there is generally considered to be no right in law to a view from a building, there is if it is listed. However, it is a helpful reminder that all listed buildings near to the site of a proposed development must be considered, not just the one that is directly involved.

19-54 But there are limits. Where a proposal is on a site close to a large number of listed buildings, as with a major redevelopment scheme in a historic town centre, it may be unrealistic to expect an officer's report to draw attention specifically to the effect on the setting of each one—particularly where visual material, such as drawings and models, is also available.[178]

Policy advice on works affecting the setting of a listed building is in Chapter 16 of the NPPF.[179] The same policy considerations as set out above[180] apply equally where the proposed development is in the setting of a listed building. Here too, the decision-maker must decide whether the impact on the significance of the listed building(s) would be substantial or less than substantial. If substantial, then permission should only be given in exceptional circumstances (paragraph 201); if less than

[175] *Catesby Estates v Steer* [2018] EWCA Civ 1697; [2019] 1 P. & C.R. 5, overturning *Steer v Secretary of State* [2017] EWHC 1456 (Admin); [2017] J.P.L. 1281.
[176] *R. v Bolsover DC, Ex p. Paterson* [2000] E.G. 83 (C.S.); [2001] J.P.L. 211 (see para.17-12 for the facts).
[177] *Ryan v Secretary of State* [2001] EWHC (Admin) 722; [2002] J.P.L. 711.
[178] *British Telecommunications Plc v Gloucester CC* [2002] J.P.L. 993 at [118].
[179] In Wales see TAN 24, paras 1.22–1.28.
[180] See paras 19-18 to 19-21.

substantial, the benefits of the proposal must be weighed against the harm to the significance of the listed building(s) (paragraph 202).

The courts have ruled that this is not a simple balancing exercise. Due weight must be given both to the importance of the listed building(s) and of the statutory duty under section 66(1) of the Listed Buildings Act to have special regard to the desirability of preserving the building or its setting etc.[181]

Case law confirms that the setting of a listed building is an important consideration to which considerable weight should be attached.[182] But the impact on the setting of a listed building may not be negative, or may be outweighed by other considerations. For an example of the latter see *HBMCE v Secretary of State*[183] which concerned a 43-storey building in Lambeth which, it was common ground, would harm the setting of listed buildings including Somerset House, as well as conservation areas in both Lambeth and Westminster. The court held that the decision maker was entitled to conclude that nevertheless the benefits of the scheme outweighed the harm to the heritage assets.

19-55 As noted above, it may be unrealistic, depending on the circumstances, to expect every heritage asset to be individually addressed. The courts have long held that committee reports are not to be read in an overly legalistic manner—most recently in the Court of Appeal in *Mansell v Tonbridge & Malling BC*, where Lindblom LJ commented:

> 'The Planning Court (and this Court) must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court…[Planning officers and inspectors] are entitled to expect—in every case—good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt."[184]

This advice was followed in *Pagham Parish Council v Arun DC*,[185] where it was held that it was sufficient for the provisions of the NPPF to be brought to the attention of the planning committee. The effect on the setting of the heritage asset concerned was a matter of planning judgement, not expert opinion. It was not for the local planning authority to demonstrate that it had complied with its legal duty under section 66 of the Listed Buildings Act, but rather for the challenger to show that, at the very least, there is substantial doubt that it has.

Similarly in *R. (Austin) v Wiltshire Council*[186] the claim was that the officer's report had failed to address properly the section 66 duty or the relevant NPPF policy (paragraph 135—now 202). Hickinbottom J decided that the report "read fairly and as a whole", had considered the relevant provisions of the Act and the NPPF. And it was clear that the officer's opinion was that the development would have no detrimental effect on the setting of the listed church.

However, Lindblom LJ's clear advice has not deterred a number of unsuccess-

[181] *Barnwell Manor Wind Energy Ltd* [2015] 1 W.L.R. 45; *Jones v Mordue* [2016] 1 W.L.R. 2682. Wales: TCPA 1990 s.314A, inserted by HE(W)A 2023 Sch.13, para.90.

[182] See *R. (Garner) v Elmbridge BC* [2011] EWHC 86 (Admin); [2011] P.T.S.R. D25 and see para.19-06.

[183] *HBMCE v Secretary of State* [2009] EWHC 2287 (Admin); [2010] J.P.L. 451 (affirmed by the Court of Appeal in [2010] EWCA Civ 600; [2011] 1 P. & C.R. 5).

[184] *Mansell v Tonbridge & Malling BC* [2017] EWCA Civ 1314; [2019] P.T.S.R. 1452.

[185] *Pagham Parish Council v Arun DC* [2019] EWHC 1721 (Admin).

[186] *R. (Austin) v Wiltshire Council* [2017] EWHC 38 (Admin).

ful challenges in recent years, often based on a "legalistic" analysis of committee reports or inspector's decisions.[187]

Not all challenges fail. In *R. (Liverpool Open and Green Spaces Community Interest Co) v Liverpool CC*,[188] a failure to include in the report the concerns of the city council' s conservation team was held to render the report as a whole misleading, as it could be taken as implying the absence of objections on a heritage basis. The decision to grant permission was accordingly quashed. Similarly in *R. (Kinsey) v Lewisham LBC*[189] the conservation officer's views were not included in the report, and insufficient weight was given to concern as to the harm to the significance of listed buildings. And the application should have been, but was not, referred to the council's design panel. Unsurprisingly, the decision was quashed. In *R. (Wyeth-Price) v Guildford BC*[190] the officer's report failed to properly advise the committee on the balancing exercise to be undertaken, thus seriously and materially misleading them. Again, the permission was quashed.

But note that these decisions were largely based on procedural mistakes; the court remains very vigilant to ensure that its views on the merits of a proposal are not in some way regarded as superior to those of the decision-maker (planning authority, Secretary of State or Welsh Ministers).

19-56 The effect of development on the setting of listed buildings (and other heritage assets) has been considered in a series of cases since the introduction of the NPPF tests described above.

It should be borne in mind when reading them that many of these court challenges were brought by those seeking to avoid the erection of wind farms, which were, at the time, strongly supported by central government policy on alternative energy. In such cases, reliance on other government policies, designed to protect the heritage, was therefore the only hope of those opposed to the proposals. And in many cases, at least initially, they were successful. However, more recent decisions have emphasised that heritage policies are not an infallible weapon to defeat all development proposals—the key is simply to ensure that all relevant policies, national or local, have been properly considered. In most but not all of the more recent cases, therefore, court challenges have failed.[191]

Thus, initially, *Macarthur v Secretary of State*[192] confirmed that the effect of a proposal on the setting of a scheduled monument or a listed building was an effect on its significance. As noted above, *Bedford BC v Secretary of State*[193] clarified that "substantial harm" to significance means wiping out that significance. *East*

[187] See *Safe Rottingdean Ltd v Brighton and Hove City Council* [2019] EWHC 2632 (Admin); *R. (Advearse) v Dorset Council* [2020] EWHC 807 (Admin); *Spitfire Bespoke Homes Ltd v Secretary of State* [2020] EWHC 958 (Admin); *City and Country Bramshill Ltd v Secretary of State* [2019] EWHC 3437 (Admin) (upheld by *City and County Bramshill Ltd v Secretary of State* [2021] EWCA Civ 320; [2021] 1 W.L.R. 5761); *Old Sarum Airfield v Secretary of State* [2020] EWHC 2112 (Admin); [2021] P.T.S.R. 93; *R. (Kinnersley) v Maidstone BC* [2022] EWHC 1825 (Admin).

[188] *R. (Liverpool Open and Green Spaces Community Interest Co) v Liverpool CC* [2019] EWHC 55 (Admin)—upheld at [2020] EWCA Civ 861; [2021] 1 P. & C.R. 10.

[189] *R. (Kinsey) v Lewisham LBC* [2021] EWHC 1286 (Admin).

[190] *R. (Wyeth-Price) v Guildford BC* [202] EWHC 3355 (Admin).

[191] See also *South Northamptonshire Council v Secretary of State* [2013] EWHC 11 (Admin); *RWE Innogy v Secretary of State* [2014] EWHC 4136 (Admin); *Pugh v Secretary of State* [2015] EWHC 3 (Admin); *North Cote Farms v Secretary of State* [2015] EWHC 292 (Admin); *Ecotricity v Secretary of State* [2015] EWHC 801 (Admin); *R. v Higham v Cornwall Council* [2015] EWHC 2191 (Admin); *R. (Butler) v East Dorset DC* [2016] EWHC 1527 (Admin); *Save Our Greenhills Community Group v Secretary of State* [2016] EWHC 1929 (Admin).

[192] *Macarthur v Secretary of State* [2013] EWHC 3 (Admin).

[193] *Bedford BC v Secretary of State* [2013] EWHC 2847 (Admin); see para.19-22.

Northamptonshire DC v Secretary of State[194] emphasised that the duty to consider the effect on the significance of a listed building must be given "considerable importance and weight" in the decision-making process. *Forge Field Society v Secretary of State*[195] confirmed that this is so even where the harm to the listed building is less than substantial.

However, *Jones v Mordue*[196] has confirmed that the question that the court has to ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the applicant's interests have been substantially prejudiced by the deficiency of the reasons given. It is not necessary to rehearse in detail in a report or decision the whole reasoning process gone through; it is sufficient simply to make it clear that the relevant considerations have been properly taken into account.

19-57 Further, the duty under section 66 does not mean that any harm, however minor, would necessarily require planning permission to be refused. In a case where poultry broiler units were proposed some 50m from an affected listed building, the local authority was entitled to conclude that the harm caused by noise and smell could be avoided by appropriate mitigation measures.[197] Indeed, in a 2014 case, where a planning authority had granted permission for two large warehouses, offices, service yards and car parking, even though it would substantially harm the setting of nearby Grade I and II listed buildings, a park and garden of special historic interest and an ancient monument, the court held that the authority had been entitled to take the view that the economic benefits would outweigh the harm.[198]

Other decisions have applied the same principles in cases where it was alleged that the setting of a listed building would be harmed by a travellers site, wind turbines or agricultural development permitted by the GPDO.[199]

Finally, the Historic England advice contained in its *Good Practice Advice Note 3: Setting of Heritage Assets* is worthy of note. It suggests the following approach to heritage developments affecting setting:

(1) identify the heritage assets affected and their settings;
(2) assess whether, how and to what degree those settings make a contribution to the significance of the assets;
(3) assess the effect of the proposed development on the significance of the assets;
(4) maximise the enhancement and minimise the harm; and
(5) make and document the decision and monitor the outcomes.

This seems to be an eminently sensible approach, which, if followed, should minimise the risk of legal challenge.

19-58 Finally, it may be noted that the principles outlined in this part of this chapter apply equally to an application for a certificate of alternative development under section 17 of the Land Compensation Act 1961.[200]

[194] *East Northamptonshire DC v Secretary of State* [2013] EWHC 473 (Admin), and *R. (Cecil Trustees) v South Kesteven DC* [2015] EWHC 1978 (Admin).
[195] *Forge Field Society* [2014] EWHC 1895 (Admin).
[196] *Jones v Mordue* [2016] 1 W.L.R. 2682 overturning *Mordue v Secretary of State* [2015] EWHC 539 (Admin); and see *R. (Blackpool BC) v Secretary of State* [2016] EWHC 1059 (Admin).
[197] *R. (Palmer) v Herefordshire Council* [2016] EWCA Civ 1061; [2017] 1 W.L.R. 411; and see para.17-23.
[198] *R. (Lady Hart of Chilton) v Babergh DC* [2014] EWHC 3261 (Admin); [2015] J.P.L. 491.
[199] *Surrey Heath BC v Robb* [2020] EWHC 2014 (QB); *R. (Williams) v Powys CC* [2017] EWCA Civ 427; [2018] 1 W.L.R. 439; *Forest of Dean DC v Secretary of State* [2013] EWHC 4052 (Admin); *R. (Evans) v Cornwall Council* [2013] EWHC 4109 (Admin); [2014] P.T.S.R. 556.

I. ENABLING DEVELOPMENT

Restoration of historic buildings as planning gain

19-59 It has already been noted that the preservation of a historic building may be a factor justifying the grant of planning permission for an otherwise unacceptable change in its use. This principle has in some cases been carried further, where the preservation of one building is only possible if funds are made available through the realisation of profits from other, otherwise unacceptable, development. Here too, the development "affects" the listed building, not directly as with an alteration or extension, nor by its geographical proximity to it, but by virtue of its economic effect. It follows that in this situation, too, the determination of the planning application is subject to the duty under the Listed Buildings Act to have special regard to the desirability of preserving a listed building or its setting or special features.[201]

Thus in *Brighton BC v Secretary of State*, a school sought permission to develop an unused area of one of its playing fields as a housing estate.[202] On appeal, the decision to grant permission (against the policies of the development plan) was influenced by the desire of the school to realise sufficient profit from the sale of the site to allow them to refurbish the main school buildings, which were listed Grade II and in a conservation area.

The *Brighton* decision was cited with approval in *R. v Westminster CC, Ex p. Monahan*, in relation to the partial redevelopment of Covent Garden Opera House in London. Here the planning authority was satisfied that the restoration of the principal parts of the (Grade I) Opera House (only half of the cost of which could be raised by donations) justified the raising of finance by demolishing other listed buildings of less importance in order to carry out an otherwise unacceptable office development. The local residents objected, and challenged by way of judicial review the resolution of the authority to grant planning permission.[203] Webster J in the High Court held that the fact that the finances made available from the commercial development would enable the improvements to be carried out was capable of being a material consideration, and could thus be taken into account by the authority. This decision was subsequently upheld by the Court of Appeal.[204]

See also *Northumberland CC v Secretary of State*.[205]

19-60 A further example was the quashing by the High Court of a decision of the Secretary of State to refuse planning permission for development in the grounds of Formby Hall in Lancashire. He stated that everything possible should be done to preserve and restore the building, and noted that the proposals appeared to offer a last opportunity to preserve and restore it, but did not consider that sufficient to overrule the presumption against substantial new buildings in the green belt. His decision was considered to be perverse, and could not stand.[206] This indicates that the possibility of such restoration might be sufficient to overturn other policy objections to a proposal.

[200] *Pro Investments Ltd v Hounslow LBC* [2019] UKUT 319 (LC); [2020] R.V.R. 88.
[201] England: P(LBCA)A 1990 ss.66(1) and 16(2); Wales: TCPA 1990 s.314A (inserted by HE(W)A 2023 Sch.13, para.90 and HE(W)A 2023 s.96(2)); (see para.19-06).
[202] *Brighton BC v Secretary of State for the Environment* (1980) 39 P. & C.R. 46.
[203] *R. v Westminster CC, Ex p. Monahan* [1988] J.P.L. 557.
[204] *R. v Westminster CC, Ex p. Monahan* [1990] 1 Q.B. 87; [1989] 1 P.L.R. 36.
[205] *Northumberland CC v Secretary of State* [1989] J.P.L. 700.
[206] *Care Link v Secretary of State* [1989] 2 P.L.R. 47.