Neutral Citation Number: [2015] EWHC 108 (Admin)

Case No: CO/2459/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 23rd January 2015

Before :

Mr Justice Lindblom

- -

Between :

Benjamin Butterworth	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**First Defendant**
- and -	
City of Westminster Council	**Second Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Richard Ground (instructed by **Charles Russell Speechlys**) for the **Claimant**
Mr Mark Westmoreland Smith (instructed by **the Treasury Solicitor**) for the **First Defendant**

Hearing date: 18 November 2014

- -

Judgment

Mr Justice Lindblom:

Introduction

1. Consistency in decision-making is a well established principle in planning, which has been supported in many decisions of the court. In this case the court must consider whether that principle was neglected in an appeal under section 78 of the Town and Country Planning Act 1990.

2. The proceedings are brought under section 288 of the 1990 Act. The claimant, Mr Benjamin Butterworth, applies for an order to quash the decision of an inspector appointed by the first defendant, the Secretary of State for Communities and Local Government, dismissing his appeal against the refusal of the second defendant, the City of Westminster Council, to grant planning permission for the erection of a mansard roof extension at 10 St Stephen's Gardens, London W2, to enlarge his flat on the fourth floor of that building. The inspector determined the appeal on the parties' written representations. She visited the appeal site and its surroundings on 2 April 2014. Her decision letter was issued on 23 April 2014. Mr Butterworth's application is opposed by the Secretary of State. The council has not played any active part in the proceedings.

The issue for the court

3. The single ground of challenge in paragraph 4 of the details of claim attached to Mr Butterworth's Part 8 claim form is that the inspector failed to "deal lawfully" with two previous appeal decisions on proposals for roof extensions to other buildings nearby – at 4 St Stephen's Gardens and 26 St Stephen's Gardens. In the skeleton argument of Mr Richard Ground, who appears for Mr Butterworth, that ground is said to comprise these two alternatives: either the inspector failed to have proper regard to the two previous appeal decisions and the importance of consistency in decision-making or she has not properly explained the reasons for her decision (paragraphs 5 and 22 of Mr Ground's skeleton argument).

The appeal site

4. St Stephen's Gardens is a street of four-storey Victorian terraced houses in Bayswater, running between Chepstow Road to the west and Westbourne Park Road to the east. It is in the Westbourne Conservation Area. 10 St Stephen's Gardens is an unlisted building in the northern terrace, with four houses between it and Westbourne Park Road. Originally a single dwelling-house, it is now divided into flats. In 1994 the council granted planning permission for an extension to the rear of the building to provide additional accommodation on the first, second and third floors. But the roof, which forms part of the largely undisturbed pattern of "butterfly" roofs along the northern terrace, has not been altered. In 1991 the council rejected a previous proposal for the extension of the top floor flat by the creation of a "mansard" roof.

The previous appeal decisions

5. As I have said, there were two previous decisions of inspectors in cases where roof extensions had been proposed on buildings in St Stephen's Gardens. Those two appeals had different outcomes. One was dismissed, the other allowed.

6. The appeal decision refusing planning permission for a roof extension at 26 St Stephen's Gardens is in a decision letter dated 10 October 2001. The inspector in that case described the proposed development as "a [flat-topped] mansard roof extension". The main issue in the appeal was "whether the proposed extension would preserve or enhance the character or appearance of the Westbourne Conservation Area" (paragraph 3 of the decision letter). The inspector agreed with the council that the "mansard extension" built at 28 St Stephen's Gardens in the 1980's was "an incongruous feature which detracts from the architectural integrity of the terrace" (paragraph 4). In paragraphs 5 and 6 of his decision letter he said:

> "5. I acknowledge that the appellant has designed the extension so as to minimise its visual impact and I accept that it would be set back far enough so as not to be readily seen from the street in front of No 26. However, I do not consider that this would be the case in medium range views, and in particular those from the junction of St Stephen's Gardens and Chepstow Road. From what I saw on my visit, I am satisfied that the new party wall would be clearly seen from here and would be a prominent intrusion above the plain parapet. In my opinion, this would cause harm to the architectural integrity of the terrace and would conflict with the provisions of policy DES6. This says, among other things, that roof extensions are not acceptable in terraces where the existing roof-line is largely unimpaired. I consider that the relatively unspoilt appearance of the terrace makes a significant contribution to the conservation area and the appeal scheme would not preserve its appearance. I know that to some extent this has been prejudiced by the extension at No 28, but this was allowed prior to the current policies and I do not consider that it provides a good reason for allowing further visual harm.
>
> 6. The Council are concerned also about the effect of the proposed extension on the rear of the terrace, where the roof-line has a traditional butterfly form. Policy DES6 of the UDP seeks to protect unbroken runs of butterfly roofs and I accept that the proposed extension would sit uncomfortably within such a roof pattern. However, there are very limited public views of the rear roof pattern and the Council concede that the rear of No 26 itself is screened by other buildings. In these circumstances, I do not consider that this particular conflict with policy is sufficient to justify on its own the refusal of planning permission."

7. The appeal decision granting planning permission for a roof extension at 4 St Stephen's Gardens is dated 23 November 2011. As described by the inspector in paragraph 3 of the decision letter, the extension would have a "mansard-style form with two dormer windows" to the rear, and, at the front, a "glazed screen facing on to a small terrace behind the front parapet". Again, the main issue was "the effect of the proposed development on Westbourne Conservation Area and whether it would preserve or enhance its character or appearance" (paragraph 2). The inspector addressed this issue in paragraphs 5 to 8 of his decision letter. In paragraphs 5 and 6 he considered the design and likely visual impact of the proposed development:

> "5. No 4 has been designated by the Council as an unlisted building of merit within the Conservation Area. The terrace within which it is situated has a straight roofline to the front formed by a horizontal parapet. The proposed extension has been designed so that its position and height in relation to the chimneys and front parapet would mean that it would not be visible in views from the front of the dwelling in St Stephens Gardens. I am satisfied that these features would mean that it would also not be evident in longer views in the street scene. The top of the appeal extension may be glimpsed in private

views from the upper floors of properties opposite but this impact would be so limited that it would be insufficient reason by itself to dismiss the appeal.

6. Whereas there is a flat roof at No 6 St Stephens Gardens and a roof extension at No 28, the pattern of butterfly roofs on the terrace is otherwise undisturbed by any significant roof alterations. However, the appeal building and its neighbour at No 6 have been extended to the rear. As a result, while No 4 has a butterfly roof there is also a small flat roof area to the rear. Neither property has the v-shaped rear parapet characteristic of buildings with butterfly roofs in the locality. However a butterfly parapet would be included in the appeal scheme. No 4 is towards the end of the terrace, close to the junction with Westbourne Park Road. The rear of the appeal property can be seen from that road in a gap between buildings but I consider that the existing extension would conceal the proposed mansard and dormers from this viewpoint and as such they would not be visible in any public views. However, these features would be seen from other properties to the rear of the dwelling."

In paragraph 7 the inspector went on to consider the decision on the 26 St Stephen's Gardens appeal. He noted that the inspector in that case had been "concerned that it would be a prominent intrusion above the front parapet which would not be the case here", and that he had "also concluded that as the rear of that dwelling was screened from public views concern over the impact on the butterfly roof was insufficient to justify on its own the refusal of planning permission". His conclusion, in paragraph 8, was this:

"In my estimation the distinctive straight roofline at the front of the terrace would not be harmed by the appeal proposals. In the context of the existing rear extension and absence of public views, the alterations to the butterfly roof would not have a detrimental effect in this instance. As such, I conclude that the proposed development would preserve the character and appearance of Westbourne Conservation Area. It would not conflict with the aims of Policies DES 1, DES 6 and DES 9 of the City of Westminster Unitary Development Plan and Policies CS 24 and CS 27 of the City of Westminster Core Strategy."

Mr Butterworth's proposed development

8. Mr Butterworth applied to the council for full planning permission for his proposed development on 29 July 2013. As described in the application for planning permission, the proposal was for the "[construction] of [a] roof extension including bi-folding front doors, two rear dormers, creation of front roof terrace and associated works (top floor flat)". The extension would be inserted between the existing chimney stacks, which would be left in place. In the written representations submitted for Mr Butterworth in his subsequent appeal it was described as a "mansard". In fact, it was not a mansard, which, as I understand that term (after the French architect Francois Mansart), is a roof in which each face has two slopes, the lower steeper than the upper – or an apartment under such a roof. Rather, it would have a vertical wall with folding doors at the front and a single-pitched slate roof to the rear, with a horizontal roof in between, 80 centimetres higher than top of the front parapet. At both front and rear it would be set back – by 1.8 metres from the front parapet, thus allowing a roof terrace to be created outside the folding doors, and by 1.7 metres from the V-shaped parapet at the back. The two dormers in the pitched roof at the rear would be aligned with the windows on the floors below.

9. There were no objections to the proposal from local residents, or from the Westbourne Neighbourhood Association.

The council's decision

10. In its decision notice dated 23 September 2013 the council's reasons for refusing planning permission alleged that "[because] of its position, form, materials and detailed design and as it would lead to the loss of the original roof form …" the proposed development would "harm the appearance of [the] building and fail to … preserve or enhance … the character and appearance of the Westbourne Conservation Area", thus offending several policies of the development plan, and that it would also be contrary to advice in the council's supplementary planning Guidance: "Roofs: A Guide to Alterations and Extensions on Domestic Buildings", "Development and Demolition in Conservation Areas" and its "Westbourne Conservation Area Audit"."

The parties' written representations in the appeal

11. On 8 November 2013 Mr Butterworth appealed to the Secretary of State against the council's decision. The appeal was dealt with on the parties' written representations. Mr Butterworth's were submitted to the Planning Inspectorate on his behalf by Savills UK in their Appeal Statement on 20 December 2013. The council's were submitted on 8 January 2014.

12. In the Appeal Statement Savills summarized Mr Butterworth's case in this way (in paragraph 1.5):

> "… [The] roof extension would be invisible from the street and the roofline of the property and the group of which it forms a part would not be affected. The distinctive straight roofline of the terrace will not be harmed by the proposals. To the rear, the butterfly shaped parapet would be retained. The rear of the building is not visible from any public viewpoints and has limited visibility from private views. The proposals therefore will not cause harm to the appearance of the building, street scene or Westbourne Conservation Area."

13. When discussing the "Main issues", in paragraphs 5.10 to 5.31, Savills said that the appearance of "the unbroken roof lines and strong parapet line" of the building would not be affected by the proposed extension, and that in views along the street it would "remain hidden behind the parapet due to the incorporation of significant set backs from both the front and rear elevations" (paragraph 5.17). They went on to refer to the appeal decisions for the proposals at 26 Stephen's Gardens and 4 St Stephen's Gardens, and also an appeal decision of 14 March 2013 granting permission for a roof extension at 11 Wetherby Gardens, London SW5, in the royal borough of Kensington and Chelsea. Copies of the decision letters in those three cases were appended to the representations. In paragraph 5.20 Savills said this:

> "An appeal relating to a similar extension at No.4 St Stephen's Gardens was allowed in 2011 (decision notice and plans attached at Appendix 1). It is considered that significant weight should be given to this decision. The Inspector made two key observations relating to that extension in response to the Council's refusal … on the grounds that the Conservation Area's unbroken rooflines would be affected. Firstly, that the extension would not be visible from the front as a result of the design which

> locates the extension behind the front parapet. The Inspector noted that it would neither be visible from in front of the building nor from long views along the street. He noted that whilst the extension may be *"glimpsed in private views from the upper floors of properties opposite"*, the impact would be *"so limited that it would be insufficient reason by itself to dismiss the appeal"*. The section drawings for the mansard extension at no. 4 and the appeal site are shown below and it [is] considered that the same conclusion can be drawn."

Drawings comparing the two proposals in section were inserted between paragraphs 5.20 and 5.21. Then in paragraph 5.21 Savills said:

> "To the rear of the property, again the proposed roof extension will not be visible from Westbourne Park Road where there is a small gap affording some view along the rear of the terrace, due to the set back from the rear elevation and due to the projecting extensions at nos. 4 and 6 St Stephen's Gardens concealing the roof from view. Nor will it be visible from St Stephen's Mews where it is not possible to see the rear elevations or roofs of the appeal terrace."

Photographs showing views from Westbourne Park Road and from St Stephen's Mews were inserted between paragraphs 5.21 and 5.22. Savills continued in paragraph 5.22:

> "The Inspector at no. 4 also discussed the rear of the building. No. 4 St Stephen's Gardens had been altered at the rear, with a rear extension and the insertion of a small flat roof terrace which had resulted in the loss of the v shaped parapet beyond the retained butterfly roof. The proposals reinstated the v shaped parapet at the rear of no.4. At no.10 St Stephen's Gardens, the butterfly roof remains as does the v shaped parapet. The proposed roof extension will maintain the v shaped parapet at the rear. The reason for refusal relating to this appeal said that because the extension would lead to the loss of the original roof form, the extension would harm the building."

and in paragraph 5.23:

> "The Inspector noted in his decision relating to no.4 that the extension would not be visible from the rear except from the other properties facing it, and went on to reference the decision of another Inspector relating to an appeal decided in 2001 for another similar extension at 26 St Stephen's Gardens (… attached at Appendix 2). In this particular decision, the Inspector dismissed the appeal, but pointed out that as the rear of that building was screened from public views, concern over the impact on the butterfly roof was insufficient to justify on its own the refusal of planning permission. Considering the effect of the extension on views from the rear at no. 4, and the loss of the butterfly roof form, the Inspector stated[:] *"in the absence of public views, the alterations to the butterfly roof would not have a detrimental effect in this instance. As such I conclude that the proposed development would preserve the character and appearance of the Westbourne Conservation [Area]."* It is our opinion that this applies in equal measure to no.10."

Savills then referred to the appeal decision on the proposal at 11 Wetherby Gardens. In that case the retention of a "hidden" roof form for the sake of its historic interest had not been seen as a sufficient basis for the refusal of planning permission. In his opinion, said Savills, "the judgement as to whether or not something is 'alien', i.e. not in keeping, must be based on the degree to which it visibly harms the host property and the character and appearance of

the area". Because the extension proposed in this case would be "largely invisible from vantage points" around the site, Savills contended, in effect, that the same approach should be taken here (paragraph 5.24). They then set out their assessment of the proposal's compliance with relevant policy. They said that they found no conflict with any of the policies relied upon by the council (paragraphs 5.25 to 5.31).

14. In their conclusions, in section 6 of the Appeal Statement, Savills referred again to the decisions of the inspectors in the previous appeals in St Stephen's Gardens. In both of those decisions, they said, the visibility of the proposed extensions and thus their likely impact on the buildings themselves and on the wider area had been found to be "minimal" (paragraph 6.3). The fact that this development would be "visible from so few vantage points" indicated that "the effect on the heritage asset in the form of the Conservation Area is not harmful". There would be benefit in providing "more useful residential accommodation". The appeal should therefore be allowed and planning permission granted (paragraph 6.4).

15. The council's written representations expanded on its reasons for refusing planning permission. It referred to the policies of the development plan on which it had relied in its decision notice (paragraphs 4.6 to 4.12). The policy specifically relevant to proposed roof extensions was Policy DES 6 of the City of Westminster Unitary Development Plan, adopted in 2007, which states in part (A):

> "Permission may be refused for roof level alterations and extensions to existing buildings in the following circumstances:
>
> 1) where any additional floors, installations or enclosures would adversely affect either the architectural character or unity of a building or group of buildings;
> 2) where buildings are completed compositions or include mansard or other existing forms of roof extension;
> 3) where the existing building's form or profile makes a contribution to the local skyline or was originally designed to be seen in silhouette;
> 4) where the extension would be visually intrusive or unsightly when seen in longer public or private views from ground or upper levels;
> 5) where unusual or historically significant or distinctive roof forms, coverings, constructions or features would be lost by such extensions."

16. Setting out its case in section 5, the council pointed out that its Conservation Area Audit, adopted in 2002, had identified this terrace as one in which roof extensions are unacceptable. The proposed development was therefore "unacceptable in principle" (paragraph 5.1). It "would lead to the loss of a traditional and an unaltered butterfly roof" and was therefore contrary to policy DES 6 of the UDP. Even if the principle of the extension were acceptable – which it was not – "the form, materials and detailed design" were not. Two buildings in the same terrace had roof extensions or alterations. At 26 St Stephen's Gardens the extension appeared to be "historical". The flat roof at 6 St Stephen's Gardens was approved in 1991. Neither would be considered acceptable "when assessed against the currently adopted policies and guidance" (paragraph 5.5). The council also sought to distinguish the circumstances in this appeal from those in which planning permission had been granted for the roof extension at 4 St Stephen's Gardens. In that case, it said (in paragraph 5.6):

> "… [The] Inspector notes and takes into consideration that the roof at that property had been subject to alterations and did not retain a V shaped rear parapet. Additionally the Inspector states that the pattern of butterfly roofs on the rest of the terrace is otherwise

undisturbed by any significant roof alterations. Given the unaltered nature of the application property no significant weight can be given to the appeal decision for No. 4. …".

17. In its observations on Mr Butterworth's grounds of appeal, in section 6, the council noted his contention that the proposed roof extension had been designed so that its position and height would prevent it from being seen in views towards the front of the property from the street, and that the distinctive front parapet line would not be harmed (paragraph 6.1). But in its view the retention of the parapet line would not overcome the harm resulting from "the loss of the traditional and unaltered butterfly roof". The development would, it said, "significantly harm the architectural integrity and character of the building, the terrace and the Westbourne Conservation Area" (paragraph 6.2). In its conclusions in section 7 it therefore urged the inspector to uphold its decision to refuse planning permission.

The inspector's decision letter

18. In paragraph 3 of her decision letter, the inspector said that the main issue in the appeal was "the effect of the proposal on the character and appearance of the conservation area".

19. In paragraphs 6 to 9 she referred to the relevant policies and guidance. She said in paragraph 7 that Policy DES 6 "is very clear that development at roof level which adversely affects the architectural character or unity of a group of buildings or results in the loss of distinctive roof forms is unlikely to be allowed". She referred in paragraph 8 to the council's supplementary planning guidance on roof alterations and extensions, which, she said, "states, among other things, that where proposals for these affect terraces where an historic pattern of roofs survives largely unimpaired, they will not normally be allowed". In paragraph 9 she concluded that the policies to which she had referred were consistent with the National Planning Policy Framework ("the NPPF"). In paragraph 10 she said that the terrace in which the appeal site is located "is identified in the Council's Conservation Area Audit as one of several in the conservation area which make a distinctive contribution to the local scene because of their unbroken roof lines and butterfly roof form concealed behind straight cornices, particularly where they affect local views".

20. The inspector went on, in paragraph 11, to say that she considered the proposed development "unacceptable because its form, location and detailing would be out of keeping with the distinctive butterfly roof form which still exists on the appeal building and which continues almost unbroken along the length of the terrace". It would, she said, "fill in most of the 'butterfly' and the bi-folding glazed doors extending across much of the front elevation would be at odds with the general pattern of fenestration." Then in paragraphs 12 to 17 she said:

> "12. I accept that [the proposed development] would not be readily visible from ground level at the front or the back and that some expression of the butterfly form would remain at the rear with the retention of the parapet, although it would be visible from the upper floors of surrounding properties. However, the distinctive character of terraces such as this depends not only on the strong and cohesive architectural style of the main elevations but also on the less obvious elements at roof level.
>
> 13. Where these survive they help to maintain the unity of the group of buildings and make a valuable and significant contribution to the overall character of the conservation

area. To allow this extension would result in an erosion of the character of the terrace, which although relatively limited in itself, would if subsequently repeated, have a cumulative effect which would cause significant harm to the character and appearance of the conservation area.

14. There are a small number of properties in this part of St. Stephens Gardens which have roof extensions. There is some disagreement between the appellant and the Council regarding the history and circumstances of the construction of these. I have taken account of previous Inspectors' more recent decisions on extensions to properties in the street and elsewhere which have been brought to my attention, particularly in respect of the limited visibility of the extension from street level and of the existence of any earlier alterations to the roof in some of those cases.

15. However, the Council has had clear policies in place for many years to protect the historic environment which it considers to be one of its greatest assets. These policies have been brought up to date in the City Plan and are consistent with the Framework. The latter stresses that heritage assets are an irreplaceable resource and that they should be conserved in accordance with their significance.

16. I conclude that the proposal would fail to respect the architectural character of the building and the terrace as a whole because of its design and because it would result in the loss of a distinctive roof form. It would therefore cause unacceptable harm to the character and appearance of the building and would not preserve or enhance the character of the wider conservation area in general. It is contrary to City Plan policies S25 and S28, UDP policies DES 1 and DES 6, the SPG and the Framework.

17. In determining this appeal I have given careful consideration to all the representations made and all other matters raised. I have considered the proposal on its own merits and in the context of relevant planning policies and I have found nothing to alter my conclusion that for the reasons given above, the proposal is contrary to local and national planning policies and the appeal should not succeed."

Did the inspector fail to deal lawfully with the previous appeal decisions?

21. The classic statement of the law on consistency in planning decision-making, which encapsulates the essential principles, is the well-known passage in Mann L.J.'s judgment in *North Wiltshire District Council v Secretary of State for the Environment and Clover* (1993) 65 P. & C.R. 137 (at p.145):

> "… It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.

> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

Mann L.J. went on to acknowledge (at p.146) that "an inspector is under no obligation to manifest his disagreement with other decisions which are distinguishable". That, he said, "would be a gratuitous and pointless exercise". In that case an inspector had failed to refer at all to an earlier appeal decision rejecting an identical proposal for the erection of a dwelling-house on the same land, which on that occasion had been found to be outside the physical limits of the village. In allowing the second appeal, the inspector found the site to be within those limits and took a very different view about the impact of the development on the site. This, said Mann L.J., was a "critical aspect" of the decision in the previous appeal. But the second inspector had given no indication of having taken the other decision into account, let alone of why he had disagreed with it (p.146).

22. In *Dunster Properties Ltd. v First Secretary of State* [2007] EWCA Civ 236 an inspector refused planning permission for an extension to a building in a conservation area, having found the design acceptable but the development objectionable in principle. An inspector in a previous appeal had rejected a differently designed proposal for the extension, having found the principle of the development acceptable but the design unacceptable. In his decision letter the second inspector referred to the first inspector's conclusion that, in principle, an extension of sympathetic appearance, scale and siting might not harm the appearance of the conservation area, but said that he had no comment to make about this other than that "each case is judged on its own merits", and that he had already stated his conclusions on the scheme before him. Lloyd L.J. observed (in paragraph 21 of his judgment, with which Chadwick L.J. and Stanley Burnton J. agreed) that it was "not sufficient for [the second inspector], having expressed the exact opposite view from [the first inspector] on the question of principle, to decline to comment on the inconsistency". To explain the differences as being attributable to the different merits of the different schemes was "clearly inadequate when it comes to a general question such as whether any first floor extension could be consistent with the relevant planning policies". There was no relevant difference between the two proposals in that respect, even though they differed in their detailed design. If the reader could not tell why the second inspector had disagreed with the first on the question of principle then the "salutary safeguard" inherent in the decision-maker's duty to give reasons had not been effective (paragraph 22). Lloyd L.J. went on to say that in his view the second inspector "did not adequately perform his obligation to give reasons … in respect of his refusal to follow the basis of the earlier appeal decision which was a material consideration". By declining to comment other than by referring to the reasons he had already expressed, he "[appeared] not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration" (paragraph 23). The second inspector's "unarticulated disagreement" with the first inspector had caused the developer

substantial prejudice "by impairing its ability to consider whether a yet further application would have a reasonable prospect of being approved …" (paragraph 24).

23. Both *North Wiltshire* and *Dunster* were cases of inconsistency between decisions on successive proposals for the same or closely similar development on the same site. In other cases the court has had to consider allegations of inconsistency between decisions on proposals for different sites, put on the basis that the decision-maker has failed to adopt a consistent approach or has failed to explain properly why that has not been done. A recent example of that kind of case is to be seen in *R. (on the application of Fox Strategic Land and Property Ltd.) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198. There the Secretary of State had rejected a proposal for 280 dwellings, giving "no weight" to his own previous decision on development of a similar scale nearby, in which he had taken a materially different view of the "spatial vision" for the area. His only reason for giving that decision no weight was that it was now subject to a legal challenge. The judge at first instance – H.H.J. Gilbart Q.C., as he then was – quashed the second decision. The Court of Appeal dismissed the appeal. In his judgment, with which Rimer and Black L.JJ. agreed on this point, Pill L.J. referred (at paragraphs 12 and 13) to *North Wiltshire* and *Dunster*, and also (at paragraphs 13 and 14) to the decision of Mr George Bartlett Q.C., sitting as a deputy High Court judge, in *J.J. Gallagher Ltd. v Secretary of State for Local Government, Transport and the Regions* [2002] EWHC 1812 (Admin), where he said (at paragraph 58) that "the need for an express explanation of an apparent inconsistency between the decision under consideration and an earlier decision will depend on the circumstances", that "[if] the explanation of the inconsistency is obvious, a formal statement of it will be unnecessary", but that "[where] the inconsistency is stark and fundamental … it will … usually be insufficient to leave it to the reader to infer the explanation for the inconsistent decisions", the reason for this being that "unless the decision-maker deals expressly with the earlier decision and gives reasons that are directed at explaining the apparent inconsistency, there is likely to be a doubt as to whether he has truly taken the earlier decision into account". Pill L.J. found a "serious inconsistency" between the two decisions in the respective conclusions on the "spatial vision" (paragraph 30). The Secretary of State could not properly ignore the still extant first decision when making the second (paragraphs 31 and 34). The "inconsistencies against which the *North Wiltshire* principles guard" were present, and had led to an unlawful decision by the Secretary of State (paragraph 35).

24. The case law on consistency in decision-making must be seen in the broader context of the jurisprudence on challenges in which the Secretary of State's or his inspector's reasons are impugned. That jurisprudence is familiar and need not be rehearsed at any length here. The reasons for an appeal decision must be intelligible and adequate, enabling one to see what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No.2)* [2004] 1 W.L.R. 1953, at p.1964B-G). In *Save Britain's Heritage v Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153, Lord Bridge of Harwich (at p.166G-H) emphatically rejected the proposition that in planning decisions the requisite standard of reasons depended on the degree of importance attaching to the decision being made, though he accepted (at p.167C) that "the degree of particularity required will depend entirely on the nature of the issues falling for decision".
25. On behalf of Mr Butterworth, Mr Ground submits that the inspector failed to heed the importance of consistency in decision-making, failed to grasp the full significance of the previous appeal decisions, which were put squarely before her in Savills' representations, and

failed to give clear and adequate reasons for reaching a decision plainly inconsistent with them. Though she recognized that those decisions needed to be dealt with in her decision – as is clear in paragraph 14 of her decision letter – she does not seem to have appreciated that she was disagreeing with both of the inspectors in those cases and therefore had to explain why she disagreed. The last sentence of paragraph 14 does not do that. It merely refers to particular aspects of the other decisions – specifically "the limited visibility of the extension from street level" and "the existence of any earlier alterations to the roof in some of those cases". Paragraph 15 does not do it either. The inspector referred there to the development plan policies for the protection of the historic environment which had been "in place for many years". Neither in those two paragraphs nor anywhere else in her decision letter did she acknowledge her disagreement with the inspectors in the previous appeals, or clearly spell out the basis for it. Indeed, she did not even grapple with the representations Savills had made about the approach those inspectors had adopted and the conclusions they had reached.

26. Mr Ground points out that the inspector did not say she accepted the council's contention (in paragraph 5.6 of its written representations) that "no significant weight" should be given to the appeal decision on the proposal for 4 St Stephen's Gardens because the roof of that building had already been altered at the rear. But even if she had done that, she would still have had to explain why she was differing in this respect from the inspector in the 26 St Stephen's Gardens appeal. There too the question of the likely visibility of the development was critical. The inspector in that case was dealing with a building whose roof had not already been altered and a proposal for an extension which he found would "sit uncomfortably within such a roof pattern" (paragraph 6 of his decision letter). Nevertheless, he made it clear that because of the limited potential visibility of the extension in views from the rear of the building he did not see this conflict with policy as being enough on its own to justify the refusal of planning permission. That appeal failed only because the inspector was concerned about the likelihood of the "new party wall" being a "prominent intrusion above the plain parapet" in certain views, and the harm it would thus cause the architectural integrity of the terrace (paragraph 5). The inspector in the 4 St Stephen's Gardens appeal adopted the same approach. A conclusion to be seen in both of those appeal decisions is that if there are only limited public views of the rear of the building, a roof extension will not be unacceptable in principle even though the roof remains in its original butterfly form. In this case, having found in paragraph 12 of her decision letter that the proposed extension at 10 St Stephen's Gardens "would not be readily visible from ground level at the front or the back", the inspector ought to have spelt out why, on this crucial point in the appeal, she was apparently departing from the "pragmatic approach" taken by the inspectors in the previous appeals. But she did not.

27. For the Secretary of State, Mr Mark Westmoreland Smith submits, rightly, that the inspector's decision letter must be read fairly and as a whole, not with the rigour one would apply in construing a contract or a statute, and remembering that it was written principally for parties familiar with the evidence and argument presented in the appeal. The inspector did not ignore the previous appeal decisions. She took care to refer to them. As Mr Westmoreland Smith put it in his skeleton argument, she "clearly recognized she was taking a different view" from the inspectors in the previous appeals (paragraph 18), and had "come to a different view on visibility and [the] effect of previous alterations" (paragraph 21). In exercising her own planning judgment, she could do that. In his oral submissions Mr Westmoreland Smith argues that the principle of consistency was not engaged in this case, but, even if it was, the inspector explained her decision adequately. There were clear factual differences between this case and the previous appeals. The inspector recognized that she was reaching a different decision from the inspector in the appeal at 4 St Stephen's Gardens,

though "not necessarily" that she was taking a different approach. She did not say that this is what she was doing, but the reasons why she differed from the other inspectors are apparent – as, for example, were the inspector's in *Arun District Council v Secretary of State for Communities and Local Government* [2013] EWHC 190 (Admin). In paragraph 14 she referred to the two matters she saw as significant in the previous decisions, namely the visibility of development and the existence of earlier alterations to the roof in question. She had dealt with those two matters in the preceding three paragraphs. Assessing this proposal under relevant and long-established policy, to which she referred in paragraphs 15 and 16, she found it "unacceptable". Judged "on its own merits", as she said in paragraph 17, it had to be rejected.

28. But in any event, submits Mr Westmoreland Smith, even if the inspector's reasons for differing from the earlier appeal decisions are deficient, Mr Butterworth has suffered no "substantial prejudice" – because, notwithstanding those decisions, she found the proposal inherently unacceptable when tested against relevant policy. It follows that further reasons amplifying her disagreement with the other inspectors would not assist Mr Butterworth.

29. I am not convinced by Mr Westmoreland Smith's submissions in defence of the inspector's decision, skilfully presented as they were. In my view, Mr Ground's argument is essentially correct.

30. The significance of the previous appeal decisions was a contentious matter in Mr Butterworth's appeal, and the inspector could not have failed to be aware of this. That the significance of those decisions was contentious is plain from the representations made about them on either side (see paragraphs 13 and 16 above). Savills maintained that "significant weight" should be given to the decision at 4 St Stephen's Gardens, with which, they contended, the earlier decision at 26 St Stephen's Gardens was consistent in approach (paragraphs 5.20 to 5.23 and 6.3 of the Appeal Statement). The council, for its part, had contended that "no significant weight" should be given to the decision in the 4 St Stephen's Gardens appeal (paragraph 5.6 of its representations). So the parties were very much at odds on this matter. And I think one can see in paragraph 14 of her decision letter that the inspector recognized this was so.

31. Did the inspector differ from the inspectors in the previous appeals, and, if so, how? Mr Westmoreland Smith's answer to the first part of that question – in both his written and oral submissions – is clear. It is "Yes". But his response to the second part of the question is somewhat equivocal, and understandably so. He says the inspector either differed from the other two in her approach or else she found Mr Butterworth's case materially distinguishable on its facts. The difficulty here, as I see it, is that although one can infer some disagreement from the inspector's use of the word "However" at the beginning of paragraph 15 of the decision letter, which follows directly from her reference to the previous appeal decisions in paragraph 14, she did not say in so many words that she was unable to agree with the inspectors in the other appeals, or in what way she did disagree.

32. Does that matter? I think it does. The previous appeal decisions were not peripheral in Mr Butterworth's appeal. They were prominent in the representations made by Savills on his behalf. Not only that, but the design of the proposed development had clearly been informed by that of the roof extension for which planning permission had been granted on appeal at 4 St Stephen's Gardens. Savills had taken great care in analysing both of the two previous appeal decisions on proposed roof extensions in the same terrace, made under the same local policies relating to such developments, with a view to persuading the inspector to grant

planning permission for Mr Butterworth's proposal. They gave considerable emphasis to their argument that that decision should have "significant weight", and that the decision on the appeal at 26 St Stephen's Gardens, though planning permission there was refused, had displayed the same approach on similar issues. They were clearly inviting the inspector, in the interests of consistency, to adopt that approach in determining Mr Butterworth's appeal. In urging her to give "no significant weight" to the appeal decision at 4 St Stephen's Gardens the council had sought to distinguish that case on its facts. The dispute here was not only obvious; it went to the heart of Mr Butterworth's appeal.

33. In these circumstances I think there can be no doubt that the inspector had to face the "practical test" posed by Mann L.J. in the passage I have quoted from his judgment in *North Wiltshire*, namely whether, if she was to reject Mr Butterworth's proposal, she was necessarily agreeing or disagreeing with some critical aspect of the two previous appeal decisions. If she did not think that the principle of consistency applied in this case, she had to say so and make clear why this was her view. If, on the other hand, she accepted that the principle of consistency did apply but found herself unable to agree with the approach taken by the other inspectors, or if she agreed with their approach but was able to distinguish Mr Butterworth's appeal from the other cases on its facts, again she had to say so, and explain why.

34. In my view it is here that she fell into error.

35. In paragraph 14 of her decision letter she came for the first time to the two appeal decisions in St Stephen's Gardens on which Savills had relied. Having mentioned those decisions, she acknowledged, in what reads as a perfectly neutral way, the two considerations she saw as having been particularly emphasized in the parties' representations on them – whether and to what extent a roof extension was visible from the street and whether earlier alterations had been made to the roof. But she did not go on to say whether she accepted what Savills had said about the approach adopted by the other inspectors, or whether she thought that was the right approach, or how she saw this case as being materially different on its facts in either of the two particular respects she had mentioned, or in any other respect.

36. If she intended what she said in paragraph 15 to stand as her explanation for disagreeing with the other inspectors, or at least as part of that explanation, I do not believe she could reasonably do that. To say the council had had "clear policies in place for many years to protect the historic environment" was not to identify a logical basis for differing from the conclusions of inspectors in similar cases in the same street under the same local policy regime. If anything, it was to identify a sound basis for adopting an approach consistent with theirs. It was not the council's case that since the previous appeals were decided there had been any material change in the relevant policies of the development plan. And the inspector did not identify any such change, either in paragraph 16, where she referred to the relevant local policies and guidance, or in the earlier part of her decision letter – in paragraphs 6 to 8 – where she summarized their content. She did not say that local policy – or government policy in the NPPF, to which she also referred in paragraph 16 – required a different approach to Mr Butterworth's appeal from that taken by the inspectors in the other appeals. The same can be said of the council's Westbourne Conservation Area Audit of 2002 – to which she referred in paragraph 10. Indeed, that document was explicitly taken into account by the inspector in the appeal at 4 St Stephen's Gardens (in paragraph 4 of his decision letter).
37. I do not believe one can say with any confidence that the inspector's reasons for disagreeing with the inspectors in the previous appeals can be discerned on a fair reading of her decision letter as a whole. Indeed, I do not think one can say that she was even attempting to provide

such reasons, either in the discussion of the planning merits which precedes paragraph 14, or in the conclusions she set out at the end of her decision letter, in paragraphs 16 and 17.

38. In paragraph 11 she said the design of the proposed development was "unacceptable" because its "form, location and detailing would be out of keeping with the distinctive butterfly roof form …". She mentioned in particular the filling-in of "most of the butterfly", and the proposed glazed doors in the front elevation being "at odds with the general pattern of fenestration". But she did not differentiate the design of Mr Butterworth's proposal in these respects, or any others, from the roof extensions proposed in the previous appeals in St Stephen's Gardens. She did not refer to the exercise Savills had undertaken to compare the design of Mr Butterworth's proposal with the designs of those proposals in the light of the conclusions expressed by the other inspectors. In paragraph 12 she acknowledged the likely limited visibility of the proposed development, at both front and rear, and that "some expression of the butterfly [roof] form would remain at the rear …" – but said the development would still be visible in views from some nearby properties. This was, effectively, to accept the factual basis for Savills' comparison of Mr Butterworth's proposal with the proposals in the previous cases. Against this finding she set her comments, in paragraphs 12 and 13, about the importance of "the less obvious elements at roof level". She did not, however, say that this was a point she thought the previous inspectors had ignored or misunderstood, nor whether, in her view, it justified a different approach from theirs, and, if so, why. In paragraph 13 she expressed her concern about "an erosion of the character of the terrace", and the possibility of there being "a cumulative effect which would cause significant harm to the character and appearance of the conservation area". This, however, was not a point that seems to have troubled the inspectors in the previous appeals in St Stephen's Gardens. And she did not say why the fear of a single proposal setting a bad precedent for future development in the street was a significant consideration in this appeal when it had not been in those other cases.

39. I come finally to paragraphs 16 and 17, where the inspector set out her conclusions. In those two paragraphs she said nothing about the previous appeal decisions And it cannot be suggested – nor does Mr Westmoreland Smith submit – that in saying she had "given careful consideration to all the representations made and all other matters raised" she explained what conclusion she had reached, if any, on everything Savills had said about the previous appeal decisions.

40. In short, the inspector did not acknowledge the principle of consistency in decision-making, nor did she distinguish Mr Butterworth's proposal from the previous proposals for roof extensions in St Stephen's Gardens, or explain her own conclusions in the light of the inspectors' in the other appeals. Although the issues in Mr Butterworth's appeal were not complex, and although they plainly involved the exercise of aesthetic judgment, I do not think this was one of those cases referred to by Mr George Bartlett Q.C. in his judgment in *J.J. Gallagher Ltd.* (at paragraph 58) in which a decision-maker can properly avoid giving "an express explanation of an apparent inconsistency" with previous decisions relevant to the case in hand. On the contrary, this was a case in which "reasons … directed at explaining the apparent inconsistency" were called for. I should also add that I think Mr Westmoreland Smith's reliance on the decision in *Arun* is misplaced. As the judge in that case acknowledged, the circumstances there – an appeal decision quashed by the court and the appeal re-determined with a different result – are not analogous to cases in which the decision-maker is obliged to consider the principle of consistency (see paragraphs 17 to 22 of the judgment).

41. But for the previous appeal decisions on similar proposals in the same terrace of the same street, made within the same – or effectively the same – framework of development plan policy, the inspector's reasons might have been a sufficient explanation of her conclusions on the merits of Mr Butterworth's proposal. In my view, however, they do not suffice as reasons for deciding an appeal in which decisions of other inspectors were themselves an aspect of the planning merits. The representations Savills had made for Mr Butterworth about the previous appeal decisions went not simply to matters of aesthetic judgment, but also to matters of approach and principle. Savills had stressed that in each of those cases, albeit in different ways, the question of the likely visibility of proposed development, at both front and rear, was critical. The points they made about that may or may not have been cogent. This required the exercise of planning judgment, which is not the task of the court. But whether or not those points were good points, they were plainly an important part of Mr Butterworth's case in his appeal. Savills' analysis of the planning merits was largely built upon them. In these circumstances, although the inspector was not bound to agree with the other inspectors in their approach or to find that Mr Butterworth's case could not be materially distinguished on its facts from the appeals they had had to decide, I do not think it was good enough for her to leave the parties to deduce her reasons for differing from them. What was required was an express and unambiguous explanation of the approach she was taking in the light of the previous decisions, directed specifically at the points Savills had made.

42. Unfortunately, the inspector did not provide that explanation. It did not have to be elaborate. It could have been quite succinct. But in the absence of some reasoning which shows that she really had got to grips with what Savills were saying about the previous appeal decisions, that she had had regard to the importance of consistency in planning decision-making, and that she had resolved both whether and why she was differing from the other inspectors, one is left with the uncomfortable impression that she may not have done all of that. Mr Ground's submissions to this effect seem to me to be well founded.

43. I accept that the inspector's failure to provide intelligible and adequate reasons has caused substantial prejudice to Mr Butterworth. I reject Mr Westmoreland Smith's contention that there is no real prejudice here because the inspector concluded that, however much help Mr Butterworth might get from the other appeal decisions, the design of his proposal was in any event unacceptable. The difficulty with that submission is that it finds no support in what the inspector actually said. She did not say that the previous appeal decisions made no difference to her assessment of Mr Butterworth's proposal, let alone why they made no difference. So Mr Westmoreland Smith's submission only reinforces my conclusion that the inspector's reasons were deficient. It does not confront the obvious prejudice to Mr Butterworth in at least one, if not two, of the respects referred to by Lord Bridge of Harwich in *Save* (at p.167E-H) – either that there is "a substantial doubt whether the decision was taken within the powers of the Act", or that "the planning considerations on which [it] is based are not explained sufficiently clearly to enable [Mr Butterworth] reasonably to assess the prospects of succeeding in an application for some alternative form of development", or both.

44. Of course, Mr Butterworth should not assume that the outcome of his appeal will necessarily be different when it is re-determined. It may not be. But he is, in my view, entitled to a sufficiently reasoned decision which shows that his case has been properly dealt with.

Conclusion

45. For those reasons this application succeeds. The inspector's decision will be quashed and the appeal remitted to the Secretary of State for redetermination.

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