[HOUSE OF LORDS]

SOUTH LAKELAND DISTRICT COUNCIL. . . APPELLANTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT AND ANOTHER . . . . . RESPONDENTS

1991 Dec. 9, 10;
1992 Jan. 30

Lord Bridge of Harwich, Lord Templeman, Lord Griffiths, Lord Ackner and Lord Oliver of Aylmerton

Town Planning—Conservation area—Preservation and enhancement policy—Requirement that special attention be paid to preserving or enhancing character or appearance of conservation area—Proposed development neither making positive contribution to preservation or enhancement nor harming character or appearance—Whether "preserving"—Town and Country Planning Act 1971 (c. 78), s. 277(8) (as substituted by Town and Country Amenities Act 1974 (c. 32), s. 1(1))

The appellant council refused an application for planning permission to erect a new house within the curtilage of an existing house in a conservation area. An appeal against that refusal was allowed by an inspector appointed by the Secretary of State for the Environment. In his decision letter the inspector stated that the first main issue was the effect that the proposal would have on "the character and appearance of the . . . conservation area, having regard to the desirability of preserving or enhancing that character," and went on to express the view that the effect of the development on the character and appearance of that part of the conservation area would be small, that the curtilage of the existing house was large enough to accommodate a new house "without serious detriment to the setting of the existing building," that provided that great care was exercised in the detailed design the new house could be accommodated "without damaging consequences to the appearance of the village" and that allowing the appeal would not make it difficult for the council to refuse applications elsewhere that "might have more damaging consequences" to the character of the conservation area. On an application by the council under section 245 of the Town and Country Planning Act 1971, the deputy judge quashed the inspector's decision, holding that he had failed to discharge the duty imposed on him by section 277(8) of the Act of 1971, as substituted,[1] in that he had not properly addressed the question of whether the proposed development would preserve the character or appearance of the conservation area. The Court of Appeal allowed an appeal by the Secretary of State.

On appeal by the council:—

Held, dismissing the appeal, that, while the intention of section 277(8) of the Town and Country Planning Act 1971 was that a high priority was to be given to the preservation or enhancement of the character or appearance of a conservation area, that object could be achieved either by a positive

[1] Town and Country Planning Act 1971, s. 277(8), as substituted: see post, p. 146D.

contribution to preservation or enhancement or by development that left character or appearance unharmed; and that, since the inspector had clearly concluded that the proposed development, subject to approval of details, would not adversely affect the character or the appearance of the conservation area, he had been entitled to grant planning permission for it (post, pp. 146E–F, 148E–F, 150E–F, 151A–D).

The Bath Society v. Secretary of State for the Environment [1991] 1 W.L.R. 1303, C.A. considered.

Per curiam. Excessively legalistic textual criticism of planning decision letters is something the courts should strongly discourage (post, pp. 148G, 151A–D).

Decision of the Court of Appeal [1991] 1 W.L.R. 1322; [1992] 1 All E.R. 45 affirmed.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

Bath Society, The v. Secretary of State for the Environment [1991] 1 W.L.R. 1303; [1992] 1 All E.R. 28, C.A.

Steinberg v. Secretary of State for the Environment (1988) 58 P. & C.R. 453; [1989] 2 P.L.R. 9

No additional cases were cited in argument.

APPEAL from the Court of Appeal.

This was an appeal by the South Lakeland District Council from the decision of the Court of Appeal (Butler-Sloss and Mann L.JJ. and Sir Christopher Slade) [1991] 1 W.L.R. 1322 given on 12 March 1991 allowing an appeal by the first respondent, the Secretary of State for the Environment, from the decision of Mr. Lionel Read Q.C. [1991] J.P.L. 144, sitting as a deputy judge of the Queen's Bench Division. The deputy judge had granted an application by the council under section 245 of the Town and Country Planning Act 1971 for an order quashing the decision of the Secretary of State by his inspector, Mr. N. A. C. Holt, on 13 July 1989 to allow an appeal by the second respondents, the Carlisle Diocesan Parsonages Board, against the council's refusal on 12 September 1988 to grant it planning permission to erect a new vicarage within the curtilage of the existing vicarage at Priest Lane, Cartmel, Cumbria in the Cartmel Conservation Area.

The Court of Appeal refused an application by the council for leave to appeal from their decision, but on 3 June 1991 the Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Ackner and Lord Lowry) allowed a petition by the council for leave.

The facts are set out in the opinion of Lord Bridge of Harwich.

Nigel Macleod Q.C. and *Anne Williams* for the council. The requirement of section 277(8) of the Town and Country Planning Act 1971 that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of a conservation area is essentially positive in purpose, and an assessment of harm is in itself insufficient to fulfil that duty. The reasons given by the Court of Appeal for disagreeing with this argument and with the view expressed by the

A deputy judge in *Steinberg v. Secretary of State for the Environment* (1988) 58 P. & C.R. 453 and applied in the present case are wrong for the following reasons.

(i) Section 277 is concerned with areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance. Positive steps are required under the section to identify such areas (section 277(1)); to designate them as conservation B areas (section 277(1)); to review the exercise of functions under the section (section 277(2)); and to formulate and publish proposals for preservation of the areas (section 277B). Section 277(8) is positive in character and part of a positive approach to conservation areas.

(ii) Any development will result in change. A development proposal that, at highest, does not harm a conservation area does not add C anything to the process of preserving or enhancing the area, and there is no reason why such a proposal should be desirable. In contrast, if a development proposal does take a positive step in preserving or enhancing a conservation area, that is desirable.

(iii) If the standard set by the section includes the negative requirement of no harm being done to the conservation area, that could easily and clearly have been stated in the statute.

D (iv) Unless a positive purpose is attributed to preservation or enhancement there will be no greater duty on the decision-maker than that under section 29 of the Act of 1971, which requires that regard be given to the fact that a development proposed in a conservation area is a material consideration. More is required by section 277(8) than by section 29.

E (v) A proper approach to carrying out the statutory duty under section 29 is embodied in paragraph 15 of the Planning Policy Guidance Notes dated January 1988 and issued jointly by the Department of the Environment and the Welsh Office (Circular 1/88); in essence it is that there is always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development will cause demonstrable harm to interests of acknowledged F importance. Section 277(8) requires a more demanding approach to attaining positive preservation or enhancement. The linking of the words "preserve" and "enhance," in an Act requiring positive action to realise the special importance of conservation areas, requires that they be construed together and that the appropriate word be applied to any proposed development to ensure the overall positive preservation or G enhancement of the conservation area. The conservation area concept was introduced in the Civic Amenities Act 1967 and was recognised by the then Minister of Housing and Local Government (see *The Architects' Journal*, 18 January 1967, p. 125) as introducing a system of much more positive preservation. If a positive construction were not correct, the decision-maker would have to use a less demanding "harm-avoidance" test as the upper bound of his discretion to refuse consent. This would, H in effect, be the test appropriate to section 29. The legislative intention would be undermined.

(vi) "Preserve" must be considered purposively and in the context of the statute, including its interrelationship with "enhance," and not

merely accorded an ordinary freestanding dictionary definition. It should be confined to proposals that do no more than, e.g., retain an existing building. The meaning of "preserve" in this context does import a requirement on an applicant to show that a development proposal makes a positive contribution to the preservation of the area, without making any change whatsoever unless it is an enhancing change. There is a rebuttable presumption against any change in a conservation area unless it enhances. A development proposal with a neutral position does not enhance, and therefore does not produce a positive bias in favour of the proposal. Nevertheless it would have to be given the weight of being desirable under section 277(1) and hence of an advantage that it would not get under section 29. It would thus get an additional boost under the conservation legislation that was not the intention of the legislature. "Preservation" in section 77 of the Planning (Listed Buildings and Conservation Areas) Act 1990 can in its context only have a positive meaning. Something that is neutral cannot make a contribution towards preservation. [Reference was made to *The Bath Society v. Secretary of State for the Environment* [1991] 1 W.L.R. 1303.]

(vii) On the facts, the inspector did not apply Mann L.J.'s test of "keep safe from harm" and did not in any case clearly reach a position that he stated or showed to be one of neutrality. His findings suggest that he did accept that some harm would occur.

John Laws and *Ian Ashford-Thom* for the Secretary of State. The decision of the deputy judge was wrong and the decision of the Court of Appeal was right for the reasons given in their judgments.

No special definition is assigned by the Act of 1971 to "preserve," which must, therefore, be taken to bear its ordinary meaning: see *Oxford English Dictionary*, 2nd ed. (1989), vol. XII, p. 404. If Parliament had intended that "preserve" should bear some other or more restrictive meaning it would have included that meaning in the definition section of the Act or employed some other more appropriate word. The statutory provisions support the ordinary interpretation of "preserve." Preservation areas are areas whose character and appearance are to be protected: see sections 277(1), 277B. Thus, the Act attributes value to the character and appearance of the conservation area as it is and may be said to create a presumption against harmful changes, but not a presumption against any change. The council's argument collapses the meaning of "preserve" into "enhance." If "preserve" means "positively improve," what is that but enhancement? The Act is careful to use both terms: see section 277(8) and section 277B(1). That suggests that Parliament must have meant different things by the two verbs. If the council is right, it will follow that, absent some special feature in its favour, the development must be refused even though there is no damage of any kind to the conservation area.

It does not follow, because the Act imposes duties or powers on local planning authorities and the Secretary of State to take *positive* steps to identify conservation areas (section 277(1)(2)(4)) and a duty on local planning authorities to formulate proposals for the preservation and enhancement of such areas (section 277B), that the meaning of "preserve" in section 277 is thereby narrowed down to the positive,

A restrictive meaning advocated by the council. As to whether the provisions in section 277(8) of the Act of 1971 add anything to section 29, section 29 only enjoins the local planning authority to have regard to material considerations, whereas section 277(8) requires special attention to be paid to preservation or enhancement, putting it higher than merely *Wednesbury*-relevant considerations on the scale.

Paragraph 15 of the 1988 Planning Policy Guidance Notes (Circular B 1/88), being government policy, as opposed to a statute, is susceptible to change. The Civic Amenities Act 1967 and the published message of the then Minister of Housing and Local Government do not assist the council's case. In any event, in construing the words of a statute a contribution by a Minister in a journal is inadmissible or of no weight.

As to section 77 of the Act of 1990, that applies to an act that costs C money; it does not follow that, if the act does not harm the area, there will be a breach of the statutory policy.

The council's submissions are inconsistent with the reality of planning applications. The submissions do not deal with the type of application in which material considerations may have to be balanced against each other, as may occur where, for example, there is a need for a particular development in the public interest such as a school or a hospital. D Furthermore, if the council's submission regarding the restrictive interpretation of "preserve" were accepted, section 277 would contain no provision for applications for planning permission for wholly innocuous development. This would have the effect of dislocating the decision-making process from the reality of such applications.

The decision of the Court of Appeal in the present case is reconcilable E with its decision in *The Bath Society v. Secretary of State for the Environment* [1991] 1 W.L.R. 1303. [Reference was also made to *Steinberg v. Secretary of State for the Environment*, 58 P. & C.R. 453.]

The inspector did apply the correct test for the reasons given in the judgments below. If, however, the council's submissions as to the interpretation of "preserve" are well-founded, the inspector's decision should nevertheless be upheld on the following basis. Section 277(8) F does not instruct the decision-maker to depart from the general presumption in favour of development in paragraph 15 of the Planning Policy Guidance Notes (Circular 1/88). If, therefore, the decision-maker, having paid special attention to the factors in section 277(8), concludes that, whilst a proposal would not preserve or enhance the character or appearance of the area, it would not result in any harm, the decision-G maker is entitled to fall back on the general presumption and grant permission. As to the facts, all three members of the Court of Appeal were right about the inspector's decision letter.

The second respondents were not represented.

Macleod Q.C. in reply. "Preservation" can mean restoration, maintenance, refurbishment, etc., and the effect of those words may only be to preserve the life of the building without enhancing it: it may, H indeed, be aesthetically adverse.

The distinction in section 277(1) and 277B between "or" and "and" is of no assistance to the Secretary of State: in section 277B the local planning authority is in a position to put forward a multiplicity of

proposals directed to both; the developer, however, is likely to be putting forward only one proposal. Although a particular development can be classified as itself neutral and not causing harm, it is the fact that a building development causes change. The policy is to introduce development that will be enhancement. "Desirable" needs to be emphasised. To interpret "preserve" as something neutral would be contrary to the policy of the Act.

Their Lordships took time for consideration.

30 January 1992. LORD BRIDGE OF HARWICH. My Lords, local planning authorities have a duty under section 277(1) of the Town and Country Planning Act 1971 to

> "determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance . . ."

and to designate such areas as conservation areas. The Secretary of State has a concurrent power of designation after consultation with a local planning authority. Section 277(8) provides:

> "Where any area is for the time being designated as a conservation area, special attention shall be paid to the desirability of preserving or enhancing its character or appearance in the exercise, with respect to any buildings or other land in that area, of any powers under this Act, Part I of the Historic Buildings and Ancient Monuments Act 1953 or the Local Authorities (Historic Buildings) Act 1962."

These were the provisions in force at the material time. They have since been replaced by provisions in the Planning (Listed Buildings and Conservation Areas) Act 1990 to substantially the same effect.

There is no dispute that the intention of section 277(8) is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria. The issue raised in this appeal is as to the scope of the objective itself. What does the "desirability of preserving or enhancing [the] character or appearance" of a conservation area involve? Does it, as the appellant council contends, erect a barrier against *any* building development which does not either enhance or "positively preserve" the character or appearance of the area? Or does it, as the Secretary of State contends, only inhibit development which will in some degree affect the character or appearance

A of the area adversely? This is the issue of principle which your Lordships must resolve.

The second respondents, the Carlisle Diocesan Parsonages Board, applied for outline planning permission to build a new vicarage within the curtilage of the existing vicarage in the village of Cartmel in Cumbria. The Cartmel Conservation Area includes the whole of the village. The South Lakeland District Council, as local planning B authority, refused permission on the ground, inter alia, that:

> "The proposal would be seriously detrimental to the history, architecture and visual character of this part of the Cartmel Conservation Area."

The parsonages board appealed to the Secretary of State, who C appointed an inspector to determine the appeal.

The inspector considered written representations from the parties and inspected the site. By his decision letter dated 13 July 1989 he allowed the appeal and granted planning permission subject to conditions. The council applied to quash his decision pursuant to section 245 of the Town and Country Planning Act 1971. Mr. Lionel Read Q.C., sitting as a deputy high court judge, allowed the application, but his decision was D in turn reversed by the Court of Appeal (Butler-Sloss and Mann L.JJ. and Sir Christopher Slade) [1991] 1 W.L.R. 1322. The council now appeals by leave of your Lordships' House.

There is no doubt that the inspector had the provisions of section 277(8) clearly in mind. He directed himself in terms that the first issue he had to consider was:

E > "what effect the proposal would have on the character and appearance of the Cartmel Conservation Area, having regard to the desirability of preserving or enhancing that character."

He described the existing vicarage as "a substantial late 19th century house set well back from the road in grounds containing several fine mature trees." The paragraphs of the decision letter setting out the F reasoning which led the inspector to his conclusion read as follows:

> "6. The vicarage in my opinion should be regarded as being within the confines of the village. Whilst the proposed development would not fall within the generally accepted definition of infilling, I do not consider that it would be contrary to the important objectives of the settlement policy, designed to protect the countryside from G unnecessary development. *Providing that the proposed house did not cause harm to the character of the conservation area, I consider that it would accord with policy A3 of the plan.* As regards policy C5, in my opinion the local authority are fully justified in protecting the open areas within the village, which make a significant contribution to its character. I do not consider however that the mature domestic curtilage of the vicarage, which is to a large extent H screened from public vantage points by trees and shrubs along the east and west boundaries, and by the stone wall along the frontage to Priest Lane, should be seen in the same light as the nearby open pasture land.

"7. I would accept that the proposed house would be visible from Priest Lane, over the existing wall in front of the site and also when approaching from the east. I consider however that because of the wall and the existing trees and shrubs on the site, that would be retained, the impact of a new house would not be great. In my opinion the effect on the character and appearance of this part of the conservation area would be small. I am also satisfied that the grounds of the vicarage are sufficiently large to accommodate a new house without serious detriment to the setting of the existing building and without affecting the larger trees within the garden that make a particularly significant contribution to the area.

"8. I very much appreciate the concern of the council and the local people, to preserve and enhance the special quality of Cartmel, and I would agree that they should be strongly supported. I am of the opinion however that providing great care was exercised in the detailed design of the proposed house, having regard to the precise siting, the materials, the massing, the roof pitch, and the details of features such as the eaves and windows, *the proposed vicarage could be accommodated without damaging consequences to the appearance of the village*. Whilst there might have been no new building of significance in this part of Cartmel for over 100 years, *that is not a reason to prevent development now, if no harm would result.*

"9. I have had regard to the potential precedent that could be established were this appeal allowed. In the context of the village, I am satisfied that the physical characteristics of the site make this a special case and I do not consider that a permission for your client's proposal would make it difficult for the council to refuse applications elsewhere that might have more damaging consequences to the character of what is undoubtedly a most important conservation area."

I have added emphasis to the passages in these paragraphs which seem to me to make clear the inspector's opinion that the development, subject to the appropriate control of the detailed design, etc., of the proposed house, would not adversely affect the character or the appearance of the conservation area. This disposes of a subsidiary point as to whether, assuming this to be the right test, the inspector applied it correctly. It was suggested that the inspector's statement in paragraph 7 that "the effect on the character and appearance of this part of the conservation area would be small" and the reference in paragraph 9 to "more damaging consequences" cast doubt on this. On this point I fully share the views expressed by Mann L.J. in his judgment [1991] 1 W.L.R. 1322, 1328–1329. Read fairly and as a whole the sense of the inspector's reasoning is perfectly clear. Excessively legalistic textual criticism of planning decision letters is something the courts should strongly discourage.

The statement of principle on which the deputy judge relied in reaching his conclusion that the inspector had not complied with the duty imposed on him by section 277(8) was expressed in a passage from

an earlier judgment of his own in *Steinberg v. Secretary of State for the Environment* (1988) 58 P. & C.R. 453, 457, in the following terms:

> "There is, in my judgment, a world of difference between the issue which the inspector defined for himself—whether the proposed development would 'harm' the character of the conservation area—and the need to pay special attention to the desirability of preserving or enhancing the character or appearance of the conservation area. In short, harm is one thing; preservation or enhancement is another. No doubt the inspector has demonstrated his concern that the character of the conservation area should not be harmed. That, in my judgment, is not the same as paying special attention to the desirability of preserving or enhancing that character as well as its appearance. The concept of avoiding harm is essentially negative. The underlying purpose of section 277(8) seems to me to be essentially positive."

This passage and certain other passages from decisions of judges at first instance in which consideration was given to the effect of section 277(8) were extensively reviewed by Glidewell L.J. in *The Bath Society v. Secretary of State for the Environment* [1991] 1 W.L.R. 1303 in which he stated his own conclusions, at pp. 1318–1319, in paragraphs (i) to (vi). These do not directly address the issue raised in the present appeal. It is said, however, that support for Mr. Lionel Read's view of the "positive" approach required to be adopted in the application of section 277(8) is derived from Glidewell L.J.'s propositions (iv) and (vi) which read:

> "(iv) If, therefore, the decision-maker decides that the development will either enhance or preserve the character or appearance of the conservation area, this must be a major point in favour of allowing the development. . . . (vi) If, however, the decision-maker decides that the proposed development will neither preserve nor enhance the character or appearance of the conservation area, then it is almost inevitable that the development will have some detrimental, i.e. harmful, effect on that character or appearance."

More directly in point is the later passage where Glidewell L.J. said, at p. 1320:

> "[Counsel for the Secretary of State] argued that a conclusion that a proposed development would do no harm is equivalent to a conclusion that it will preserve. Even if that is correct (and adopting the approach of Mr. Lionel Read Q.C. in *Steinberg v. Secretary of State for the Environment* (1988) 58 P. & C.R. 453, 457, I doubt whether it is), this is not what, in my view, the inspector himself concluded."

The judgments in the Court of Appeal in the instant case properly undertook a full examination of the judgment of Glidewell L.J. in the *Bath* case, leading, I have no doubt correctly, to the conclusion that it did not afford a binding precedent which required the court to dismiss the appeal in this case. But, in so far as there is any divergence of

opinion to be found between the judgment of Glidewell L.J. in the *Bath* case and the judgments of the Court of Appeal in this, your Lordships are, of course, at liberty to choose between them. Accordingly, I can turn directly to the affirmative reasoning of the court in this case which is epitomised in the following passage from the judgment of Mann L.J. [1991] 1 W.L.R. 1322, 1326–1327:

> "In seeking to resolve the issue I start with the obvious. First, that which is desirable is the preservation or enhancement of the character or appearance of the conservation area. Second, the statute does not in terms require that a development must perform a preserving or enhancing function. Such a requirement would have been a stringent one which many an inoffensive proposal would have been inherently incapable of satisfying. I turn to the words. Neither 'preserving' nor 'enhancing' is used in any meaning other than its ordinary English meaning. The court is not here concerned with enhancement, but the ordinary meaning of 'preserve' as a transitive verb is 'to keep safe from harm or injury; to keep in safety, save, take care of, guard': *Oxford English Dictionary*, 2nd ed. (1989), vol. XII, p. 404. In my judgment character or appearance can be said to be preserved where they are not harmed. Cases may be envisaged where development would itself make a positive contribution to preservation of character or appearance. A work of reinstatement might be such. The parsonages board never advocated the new vicarage on that basis. It was not a basis which the inspector was invited to address but importantly he did not have to address it because the statute does not require him so to do. The statutorily desirable object of preserving the character or appearance of an area is achieved either by a positive contribution to preservation or by development which leaves character or appearance unharmed, that is to say, preserved."

My Lords, I have no hesitation in agreeing with this construction of section 277(8). It not only gives effect to the ordinary meaning of the statutory language; it also avoids imputing to the legislature a rigidity of planning policy for which it is difficult to see any rational justification. We may, I think, take judicial notice of the extensive areas, both urban and rural, which have been designated as conservation areas. It is entirely right that in any such area a much stricter control over development than elsewhere should be exercised with the object of preserving or, where possible, enhancing the qualities in the character or appearance of the area which underlie its designation as a conservation area under section 277. But where a particular development will not have any adverse effect on the character or appearance of the area and is otherwise unobjectionable on planning grounds, one may ask rhetorically what possible planning reason there can be for refusing to allow it. All building development must involve change and if the objective of section 277(8) were to inhibit any building development in a conservation area which was not either a development by way of reinstatement or restoration on the one hand ("positive preservation") or a development which positively enhanced the character or appearance

of the area on the other hand, it would surely have been expressed in very different language from that which the draftsman has used.

I would dismiss the appeal.

LORD TEMPLEMAN. My Lords, for the reasons set forth in the speech of my noble and learned friend, Lord Bridge of Harwich, I would dismiss this appeal.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives I, too, would dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives I, too, would dismiss the appeal.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives I, too, would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Winckworth & Pemberton for Solicitor, South Lakeland District Council, Kendal; Treasury Solicitor.

M. G.