

Neutral Citation Number: [2017] EWCA Civ 427

Case No: C1/2016/1419

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT PLANNING COURT
MR C.M.G. OCKELTON (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
[2016] EWHC 480 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2017

Before:

Lord Justice Lindblom
and
Lord Justice Irwin

Between:

| | |
|---|--------------------------------|
| R. (on the application of Graham Williams) | <u>Appellant</u> |
| - and - | |
| Powys County Council | <u>Respondent</u> |
| - and - | |
| Colin Bagley | <u>Interested Party</u> |

Mr Richard Harwood Q.C. (instructed by **Harrison Grant Solicitors**) for the **Appellant**
Ms Clare Parry (instructed by **Powys County Council Legal Services**) for the **Respondent**
Mr James Corbet Burcher (instructed by **Margraves Solicitors**) for the **Interested Party**

Hearing date: 9 March 2017

**Judgment Approved by the court for handing down (subject to
editorial corrections)**

Lord Justice Lindblom:

Introduction

1. Did a local planning authority, when granting planning permission for a wind turbine, fall into error by failing to consult the Welsh Ministers upon the likely effects of that development on the settings of two scheduled monuments? And did it err in failing to consider the likely effects on the setting of a grade II* listed church? The judge in the court below saw no such error. We must decide whether he was right.
2. By a claim for judicial review the appellant, Mr Graham Williams, challenged the decision of the first respondent, Powys County Council, on 21 May 2015, to grant planning permission for the erection of a wind turbine on the farm of the interested party, Mr Colin Bagley, at Upper Pengarth, Llandeilo Graban. The site is in the Radnor Hills, about 10 kilometres to the south-east of Builth Wells. Mr Bagley was the applicant for planning permission, Mr Williams a local resident who had objected to the proposal. Mr Williams' claim for judicial review was issued on 2 July 2015. It was dismissed by Mr C.M.G. Ockelton, Vice President of the Upper Tribunal (Immigration and Asylum Chamber), sitting as a deputy judge of the High Court, on 11 March 2016. I granted permission to appeal on 15 August 2016.
3. The wind turbine was erected in July and August 2016. It stands on the side of a hill called "The Garth", on a site of 0.2 hectares. It is 30.1 metres in height to the hub, 41.8 metres to the blade tip. The electricity it produces is used by Mr Bagley on his farm, the excess transmitted to the grid. On the other side of the hill, about 1.5 kilometres from the wind turbine, is Llanbedr Church, a grade II* listed building. There are also several scheduled monuments in the surrounding area, the nearest two being Llandeilo Graban Motte (also known as Castle Mound), which is 1.4 kilometres to the south-west, and Llanbedr Hill Platform House, 1.9 kilometres to the north-east.

The issues in the appeal

4. Mr Williams has permission to appeal on two grounds. The issue in the first is whether, contrary to the judge's conclusion, the county council failed to comply with the requirement under the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 ("the Development Management Procedure Order 2012") to consult the Welsh Ministers on applications for planning permission for "[development] likely to affect the site of a scheduled monument", because that requirement applied to development likely to affect the setting of, or "otherwise have a visual impact on the site of", a scheduled monument. The issue in the second ground is whether the county council erred in failing to perform the duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") – to have special regard to the desirability of preserving the setting of a listed building. And if it did, is it "highly likely" that the outcome would not otherwise have been "substantially different"?
5. In a respondent's notice the county council maintains that if we were to conclude on the first ground of appeal that the Welsh Ministers ought to have been consulted, it is highly likely that the decision would now be the same – in particular, because under the provisions for consultation in the Development Management Procedure Order 2012, as now amended, the need to consult would not arise.

The Planning, Design & Access Statement

6. In December 2013 the county council had granted planning permission for a wind turbine on the same site. Mr Williams successfully challenged that decision – on grounds different from

those with which we are concerned here – and the planning permission was quashed, by consent, on 2 April 2014. The application for planning permission with which these proceedings are concerned was submitted to the county council on 9 September 2014.

7. In the Planning, Design & Access Statement, prepared by Urban Wind, which accompanied the application, the section dealing with “Cultural Heritage Constraints” said this:

“In order to ensure that potential impact upon Cultural Heritage elements in the local area are [sic] limited to an acceptable level the original development was specifically sited so as to ensure that it is not set within a clear visual context of the following: –

- World Heritage Sites
- Scheduled Ancient Monuments
- Listed Buildings
- Conservation Areas

Prior to progressing this submission, a desktop review of all previously submitted information and a further assessment of the sensitivity of any nearby designations has been undertaken using online resources and Local Planning Authority data.

Using Cadw it was possible to ascertain that there are a number of scheduled ancient monuments and a Grade II [sic] Listed Building within 2km of the site. There are no conservation areas or Grade I Listed Buildings within the locale.

Whilst the ZTV [i.e. zone of theoretical visibility] production associated with the subject proposal highlights that all the identified historical assets listed below may be afforded views of the blade tip and at times the nacelle of the proposed turbine potential impacts are likely to be minor at most. It should be noted that ZTV maps tend to over-estimate the extent of visibility and does not take account of natural or built features.

Due to the level of screening, the undulating topography, the distance that the majority of listed assets are located from the proposed turbine location, and in light of the limited scale of the turbine itself, the effect on views and setting of the listed structures and monuments is considered to be slight. No further mitigation is therefore considered to be necessary.

We would also take this opportunity to reiterate that the LPA have previously agreed with this analysis in issuing their initial consent. Given that the principle of the proposal remains the same we would expect a similar verdict in the consideration of this application.”

Following that text, Figure 12 listed four “Cultural Heritage Assets”. We are not concerned with the first, which was Llewetrog Field Boundary. As for the second, the scheduled monument known as Llandeilo Graban Motte (or Castle Mound), the “Orientation” was given as “1.4km to SSW of site”, the “Receptor Sensitivity” was said to be “Low”, the “Magnitude of Change” was assessed as “Slight”, and the “Effect” as “Minor”. For the third, the scheduled monument known as “Llanbedr Hill Platform House”, the “Orientation” was given as “1.9km to NE of site”, the “Receptor Sensitivity” was said to be “Low”, the “Magnitude of Change” was assessed as “Negligible” and the “Effect” as “Minor/Negligible”. And for the fourth, “Llanbedr Church” – the grade II* listed Church of St Peter at Llanbedr, wrongly described here as a grade II listed building – the “Orientation” was given as “1.5km to E of site”, the “Receptor Sensitivity” was said to be “Low/Medium”, the “Magnitude of Change” assessed as “Negligible”, and the “Effect” as “Minor/Negligible”.

The planning officer's reports to committee

8. The application was considered by the county council's Planning, Taxi Licensing and Rights of Way Committee: first on 9 April 2015, and then, after further ecological information had emerged, on 21 May 2015.
9. In her report to the committee for its meeting on 9 April 2015, the county council's planning officer, Ms Gemma Bufton, recommended "conditional approval".
10. The officer recorded that "No response ..." to consultation had been received from "PCC – Built Heritage". Clwyd-Powys Archaeological Trust ("CPAT") had responded "to confirm that there are no archaeological implications for the proposed single turbine development at this location". The consultees to which the officer referred did not include the Welsh Government's historic environment service, Cadw. 45 letters of objection had been received. In her summary of those objections the officer did not refer to any concerns about the likely effects of the development on heritage assets.
11. In a lengthy list of relevant national and development plan policies she included Planning Policy Wales (2014), Policy ENV14 – Listed Buildings, and Policy ENV17 – Ancient Monuments and Archaeological Sites of the Powys Unitary Development Plan (2010) ("the UDP"), Welsh Office Circular 60/96 – Planning and the Historic Environment: Archaeology, and Welsh Office Circular 61/96 – Planning and the Historic Environment, Historic Buildings and Conservation Areas.
12. As for the "Principle of Development", the officer's advice, in the light of the policies in Planning Policy Wales and the UDP which "promote proposals for renewable energy developments where appropriate", was that "the proposed development is broadly supported by both national and local planning policy and guidance and therefore is considered to be fundamentally acceptable in principle".
13. Under the heading "Cultural Heritage", she said this:

"The desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application. Where nationally important archaeological remains and their setting are likely to be affected by proposed development, there should be a presumption in favour of their physical preservation in situ.

The site of development is located within approximately 2km of two Scheduled Ancient Monuments (SAMs), the closest being Castle Mound (RD071) which is located approximately 1.4km from the proposed turbine site (south) and Llanbedr Hill Platform House (RD181) which is located approximately 1.9km of the proposed turbine (north). Photomontages accompanying the application indicate that despite the noted distance, intervening topography and vegetation, the proposed turbine will be clearly visible from the identified SAMs.

UDP policy ENV17 states that developments which would unacceptably adversely affect the site or setting of a Scheduled Ancient Monument will not be permitted. Given the noted distance, intervening topography and vegetation, it is considered that the proposed turbine would not have unacceptably adversely impact [sic] on the aforementioned Scheduled Ancient Monuments."

14. At the committee meeting on 9 April 2015 Mr Williams and Mr Bagley both addressed the members, Mr Williams contending that wind turbines were harming tourism. The committee

resolved that planning permission be granted. When the application came back to the committee on 21 May 2015, the officer presented the members with updates to her report, in which she said nothing more about the likely effects of the development on “Cultural Heritage”, and again recommended approval. She appended a letter of objection to the previous proposal, dated 13 May 2014, from Mr Dainis Ozols, in which he had expressed concern about – among other things – “[damage] to heritage assets and their setting”, contending that “[the] construction of such a tall, industrial structure will permanently deface a landscape that has remained largely unchanged since the Norman Conquest ...”. The committee again resolved that planning permission be granted. The minutes record no discussion at either meeting on the likely effects of the development on heritage assets.

Correspondence after the grant of planning permission

15. In a letter to the county council dated 2 June 2015 the solicitors then acting for Mr Williams said he was “considering a Judicial Review challenge” to the county council’s decision. They pointed out that there was no reference to the listed Llanbedr Church in the planning officer’s report to committee, and asserted that the officer had misunderstood the provisions of section 66(1) requiring a local planning authority to have “special regard to the desirability of preserving the [listed] building or its setting ...”. They complained that the decision to grant planning permission was flawed by a failure to consult Cadw on the possible effects of the development on scheduled monuments, and also that the “wrong test” had been “applied by the officer in her report with regard to the impact on SAMs and listed buildings”. In response, in a letter dated 8 June 2015, the county council’s Principal Solicitor, Mr Colin Edwards, acknowledged that Cadw had not been consulted. He added that CPAT had been consulted and had said there would be “no significant visual impact upon RD181” – Llanbedr Hill Platform House, the nearest scheduled monument to the application site. He also attached to his letter two “wireline diagrams”, which showed, he said, that the wind turbine “is not visible from the Grade II* listed church (Llanbedr Church)”. These diagrams had been provided to the county council by Urban Wind on 4 June 2014.
16. In an e-mail to the county council’s planning officer on 27 July 2015, Mr Mark Walters, the Development Control Archaeologist for CPAT, explained that “for this small-medium sized turbine we searched the Historic Environment Record for all sites within 1km of the turbine which numbered 20 in all”, and that this “search looked at designated as well as non-designated sites and included listed buildings, scheduled monuments, registered historic landscapes, registered parks and gardens and battlefields”. There were, he said, “no significant visual effects upon the Llan Bach Howey (Grade II) or Llanbedr Church (Grade II*) listed buildings which are screened by the intervening hill slopes of The Garth and the woodland on its south and east sides”, and he confirmed that “[given] the low overall impact on cultural heritage [CPAT has] no objections to this proposal”.
17. In correspondence not put before the judge, Mr Edwards sought Cadw’s understanding of the requirements for consultation of the Welsh Ministers under the Development Management Procedure Order 2012. On 27 July 2015 in an e-mail to Ms Suzanne Whiting, a Casework Manager at Cadw, he observed that CPAT, when consulted on the application, had said the proposal had “no archaeological implications”, and asked Ms Whiting to confirm that in the circumstances “[Cadw] would neither expect nor require to be consulted”. Ms Whiting’s response, on 30 July 2015, apparently in the light of what she had been told by Cadw’s Senior Archaeological Planning Officer, was this:

“ ...

In practice, the requirement to consult the Welsh Ministers is routinely interpreted by local planning authorities and Cadw to include development likely to affect the setting of a scheduled monument. This is supported by national policy and guidance

which explains that the desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application whether that monument is scheduled or not. Furthermore, it explains that where nationally important archaeological remains, whether scheduled or not, and their settings are likely to be affected by proposed development, there should be a presumption in favour of their physical preservation in situ. Paragraph 17 of Circular 60/96, Planning and the Historic Environment: Archaeology, elaborates by explaining that this means a presumption against proposals which would involve significant alteration or cause damage, or which would have a significant impact on the setting of visible remains.

We note that the applicant's agent has identified that the proposed development would have an impact on the settings of two scheduled monuments and, as such, we would have expected the local planning authority to consult Cadw.

...”

Cadw maintained that position in subsequent e-mail exchanges on the same day, despite being told what CPAT's Development Control Archaeologist had said in his e-mail of 27 July 2015, and despite Mr Edwards pointing out that “the regulations ... governing referral to [Cadw] ... do not refer to “setting” but rather the “site” ... of SAMs”. They did not say what their response might have been if they had been consulted, or even that they would have responded.

18. In a memorandum dated 30 July 2015, prepared in the light of Mr Williams' claim for judicial review, the county council's Built Heritage Officer, Ms Debra Lewis, considered the likely effect of the wind turbine on the setting of the grade II* listed Church of St Peter at Llanbedr. She said:

“ ...

The rural location of the church and the churchyard contribute greatly to the setting of the church, and the proximity of the proposed wind turbine to this listed building is noted, as is the fact that a turbine in such close proximity has the theoretical potential to affect the setting of this grade II* building, and to have a detrimental effect on the visitors to the graveyard.

However, I acknowledge the location of the church and the churchyard nestled under Coed y Garth and the escarpment to the east of the woodland. The difference in heights between the site of the proposed turbine and the listed church is illustrated by Viewpoint 8 – Llanbedr Hill, which does not contain the church however Coed y Garth is on the photograph.

Viewpoint 2 is taken [from] the footpath on the top of The Garth and also illustrates clearly the difference in the height of the top of The Garth and the location of the turbine, and that the hub and the entire length of a blade would be visible from that point.

Considering the evidence submitted with the application and visiting the site, I would not consider that the turbine would be visible from St Peters or the Churchyard. I would not consider that the setting of [sic] the short term views of the Church would be affected.

As a result of the topography, it is not possible to afford a view of both ... the church and turbine in the same view and as such I would not consider that the medium range views of the Church are affected by the turbine.

Longer range views such as from The Begwyns would enable the church and the proposed turbine to be viewed together, and the rural character of the church in its landscape is duly noted. I would refer to Viewpoint 11 which illustrates the location of the turbine in the landscape. Given the distance, topography and vegetation between the proposed turbine and the church, and the trees surrounding the churchyard[,] I would not consider that the long range setting of the listed building would be affected by the proposal.

...”

As for the suggestion that the development might affect the settings of scheduled monuments, she did not disagree with the findings of CPAT.

Did the Development Management Procedure Order 2012 require the county council to consult the Welsh Ministers?

19. At the time of the county council’s grant of planning permission for Mr Bagley’s development, and so far as is relevant here, article 14 of the Development Management Procedure Order 2012, “Consultations before the grant of permission”, provided:

“(1) Before granting planning permission for development which, in their opinion, falls within a category set out in the Table in Schedule 4, a local planning authority must consult the authority, body or person mentioned in relation to that category ...”.

Article 14(4) provided that where a local planning authority was required to consult any person or body before granting planning permission, it must give notice of the application to the consultee and must not determine the application until 14 days after either it or the applicant had given such notice to the consultee, whichever was the earlier. Article 14(5) stated that “[the] local planning authority must in determining the application take into account any representations received from a consultee”. The “Description of Development” for the category of development in paragraph (k) in the table in Schedule 4 was this:

“Development likely to affect the site of a scheduled monument”.

The “Consultee” was stated to be “The Welsh Ministers”. The requirement to consult the Welsh Ministers would be discharged by consultation with Cadw. The interpretation provisions in Schedule 4 confirmed that, in the table, “scheduled monument” had the same meaning as in section 1(11) of the Ancient Monuments and Archaeological Areas Act 1979.

20. Section 1(11) of the 1979 Act defines a “scheduled monument” as “any monument which is for the time being included in the Schedule”. Under section 2, “Control of works affecting scheduled monuments”, it is an offence to carry out works to which the section applies “unless the works are authorised under this Part of this Act or by development consent” (subsection (1)). The section applies to “(a) any works resulting in the demolition or destruction of or any damage to a scheduled monument”, “(b) any works for the purpose of removing or repairing a scheduled monument or any part of it or of making any alterations or additions thereto”, and “(c) any flooding or tipping operations on land in, on or under which there is a scheduled monument” (subsection (2)).

21. Section 61 of the 1979 Act, “Interpretation”, provides:

“ ...

(7) “Monument” means ...

(a) any building, structure or work, whether above or below the surface of the

- land ... ;
- (b) any site comprising the remains of any such building, structure or work ... ;
- ...
- (d) any site in Wales (other than one falling within paragraph (b) or (c) above) comprising any thing, or group of things, that evidences previous human activity;
- ...

(9) For the purposes of this Act, the site of a monument includes not only the land in or on which it is situated but also any land comprising or adjoining it which appears to the Secretary of State or the Commission or a local authority, in the exercise in relation to that monument of any of their functions under this Act, to be essential for the monument's support and preservation.

(10) References in this Act to a monument include references –

- (a) to the site of the monument in question; ...

...

(11) References in this Act to the site of a monument –

- (a) are references to the monument itself where it consists of a site; and
- (b) in any other case include references to the monument itself.

... .”

22. As amended by the Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016, with effect from 16 March 2016, Schedule 4 to the Development Management Procedure Order 2012 no longer contains a category of development described as “Development likely to affect the site of a scheduled monument”. Instead, it contains in its paragraph (1) a category for which the “Description of Development” is this:

- “(i) Development which has a direct physical impact on a scheduled monument.
- (ii) Development likely to be visible from a scheduled monument and which meets one of the following criteria –
 - a) it is within a distance of 0.5 kilometres from any point of the perimeter of a scheduled monument;
 - b) it is within a distance of 1 kilometre from the perimeter of a scheduled monument and is 15 metres or more in height, or has an area of 0.2 hectares or more;
 - c) it is within a distance of 2 kilometres from the perimeter of a scheduled monument and is 50 metres or more in height, or has an area of 0.5 hectares or more;
 - d) it is within a distance of 3 kilometres from the perimeter of a scheduled monument and is 75 metres or more in height, or has an area of 1 hectare or more, or
 - e) it is within a distance of 5 kilometres from the perimeter of a scheduled monument and is 100 metres or more in height, or has an area of 1 hectare or more.
- (iii) Development likely to affect the site of a registered historic park or garden or its setting;
- (iv) Development within a registered historic landscape that requires an Environmental Impact Assessment; or
- (v) Development likely to have an impact on the outstanding value of a World Heritage Site”.

23. In Chapter 6 of Planning Policy Wales, Edition 7, published by the Welsh Government in July

2014 and current at the time of the county council's decision, paragraphs 6.5.1 and 6.5.6 stated, under the heading "Archaeological Remains":

"6.5.1 The desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application, whether that monument is scheduled or unscheduled. Where nationally important archaeological remains, whether scheduled or not, and their settings are likely to be affected by proposed development, there should be a presumption in favour of their physical preservation in situ. ...

...

6.5.6 Local planning authorities are required to consult the Welsh Government on any development proposal that is likely to affect the site of a scheduled ancient monument. Scheduled monument consent must be sought from the Welsh Government for any proposed works to a scheduled ancient monument."

24. Paragraph 6.5.9 of the current edition of Planning Policy Wales – Edition 9, published in November 2016 – states:

"6.5.9 Local planning authorities are required to consult the Welsh Ministers on any development proposal that is likely to affect the site of a scheduled monument, or where development is likely to be visible from a scheduled monument and meets certain criteria. [Here there is a footnote – footnote 23 – which refers to article 14 of, and paragraph (1)(i) and (ii) of the amended table in Schedule 4 to, the Development Management Procedure Order 2012.] The local planning authority should inform applicants of the need to obtain scheduled monument consent for any works they propose which would have a direct impact upon the designated area."

25. Welsh Office Circular 60/96, "Planning and the Historic Environment: Archaeology" states in paragraph 10, under the heading "Planning Applications", that "[the] desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application whether that monument is scheduled or unscheduled" (see *R. (on the application of Plant) v Pembrokeshire County Council* [2014] EWHC 1040 (Admin)). Paragraph 15, under the heading "... Consultations by Planning Authorities", states:

"15. ... Planning authorities should be fully informed about the nature and importance of the archaeological site and its setting. They should therefore seek archaeological advice. In the case of a development proposal that is likely to affect the site of a scheduled ancient monument, local planning authorities are required to consult the Secretary of State (Cadw)."

and in paragraph 17, under the heading "... Preservation of Archaeological Remains in- situ":

"17. Where nationally important archaeological remains, whether scheduled or not, and their settings, are affected by proposed development there should be a presumption in favour of their physical preservation in situ i.e., a presumption against proposals which would involve significant alteration or cause damage, or which would have a significant impact on the setting of visible remains."

26. There is no relevant statutory definition of the "setting" of a scheduled monument. In "Conservation Principles for the sustainable management of the historic environment in Wales", a document published by Cadw in March 2011, contains this definition of the "Setting" of an "historic asset":

"The surroundings in which an historic asset is experienced, its local context,

embracing present and past relationships to the adjacent landscape.”

An “historic asset” is defined as an “identifiable component of the historic environment”, which “may consist or be a combination of an archaeological site, an historic building, or a parcel of historic landscape”. In terms similar to the definition of “Setting” in the Cadw document, the definition of the “Setting of a heritage asset” in national planning policy for England in the National Planning Policy Framework (“the NPPF”) is this:

“The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.”

27. The county council did not consult the Welsh Ministers – or Cadw – before determining Mr Bagley’s application for planning permission. As the judge said (in paragraph 26 of his judgment), the only question here is “whether in the circumstances of this case it had an obligation to do so”. That question, as he acknowledged, “depends solely on the true interpretation of the legislative provisions”. Did the requirement to consult on “[development] likely to affect the site of a scheduled monument” apply only to development likely to have some direct physical effect on the monument? Or did it apply also to development likely to have other effects relevant to a decision on an application for planning permission, namely visual effects – in particular, effects on the setting of the monument?
28. The judge understood the concept of the “site” of a scheduled monument in section 61 of the 1979 Act as having to do with “the protection of the monument itself” – not with its “importance or appreciation” but, as subsection (9) makes clear, its “support and preservation” (paragraph 38 of the judgment). Although, in Wales, development directly affecting scheduled monuments fell within the control of the Welsh Ministers, he observed that “the scheme of statutory control does not extend to all works that may affect the monument, particularly where the possible effect is an unintended one”. And, he said, “[the] requirement of consultation fills a noticeable gap even if the phrase in the Table is given a narrow meaning” (paragraph 40). He observed that “[the] the purpose of the creation of the notion of a monument and its site is preservation, not amenity; and it follows that action will ‘affect the site of a scheduled monument’ if it goes to its preservation but not if it affects only its amenity” (paragraph 41). Thus “[for] the purposes of the [Development Management Procedure Order 2012,] a development will affect the site of a scheduled monument if and only if it has an impact on the monument or its site in the [section] 61(9) sense, that either is direct or will prevent any land comprised within the monument by [section] 61(9) from continuing to provide necessary protection”. It followed that “[impacts] on amenity, including visual amenity, are not for the purposes of the [Development Management Procedure Order 2012] effects on the site of the monument” (paragraph 42). In this case, it had not been said that the effect of the development on any scheduled monument would be “other than visual”, and “[there] was accordingly no duty under the [Development Management Procedure Order 2012] to consult [Cadw] ...” (paragraph 43).
29. On behalf of Mr Williams, Mr Richard Harwood Q.C. attacked that analysis. He made four main submissions. First, the effect of development on the setting of a scheduled monument is a relevant consideration in a planning decision. The provisions of the Development Management Procedure Order 2012 for consultation on development likely to affect the site of a scheduled monument ought to be interpreted in that light. They relate to the making of a decision on an application for planning permission, not a decision under the 1979 Act. And in any event the provisions for the protection of scheduled monuments in the 1979 Act are concerned not merely with their physical preservation, but also with “public access and amenity”. Secondly, the reference to the “site of a scheduled monument” in paragraph (k) in the table in Schedule 4 was, in effect, a reference to the monument itself. Development likely to affect the setting of the monument, and hence the monument itself, would qualify as development likely to affect

the “site of a scheduled monument”. Under article 14 the Welsh Ministers therefore had to be consulted on proposals for development likely to affect the monument’s setting. Not all of the categories of development in the table in Schedule 4 related to effects on the application site itself. A similar approach is adopted in “other environmental legislation”. Thirdly, the judge was wrong to conclude that the statutory requirement to consult the Welsh Ministers, even if narrowly construed, would fill a “noticeable gap”. Many works to a scheduled monument would require scheduled monument consent but not planning permission. The schemes on which Cadw could most usefully be consulted were those for “off-site” development that would affect the setting of a scheduled monument. And fourthly, Mr Harwood submitted, the new paragraph (l) in the table in Schedule 4 did not introduce, for the first time, a requirement to consult the Welsh Ministers on development likely to affect the setting of a scheduled monument. It simply provides a graduated series of sub-categories of development within the setting of a monument, each of which requires consultation according to the specified distance, height and area.

30. I cannot accept those submissions. In my view, as was submitted by Ms Clare Parry for the county council and Mr James Corbet Burcher for Mr Bagley, the judge’s construction of the relevant provisions of the Development Management Procedure Order 2012 was correct, essentially for the reasons he gave. That construction emerges from a straightforward application of the principles of statutory interpretation to the words of paragraph (k) in the table in Schedule 4. It is also consistent with their statutory context. Like the judge, I see no need to look to other statutory schemes in seeking their meaning.
31. On a straightforward reading of the words of paragraph (k), leaving aside their statutory context, I would not accept the interpretation for which Mr Harwood contends. The concept in paragraph (k) – development “likely to affect the site of a scheduled monument” – would not naturally be understood as meaning development “likely to affect the site or the setting of a scheduled monument”. In the ordinary use of language, the “site” of a scheduled monument and its “setting” are not the same thing. The word “site” is apt to describe the area of land on which the monument is physically located: the physical entity comprised in the monument and the ground on which it stands. It would not normally equate to the “setting” of the monument, which encompasses the surroundings within which the monument may be experienced by the eye. And development “likely to affect the site” of a monument would not normally be understood as including development likely to affect its setting – in the sense of having some visible impact upon the monument’s surroundings but without any physical effect on the monument itself or the area of ground on which it stands.
32. Nor can I see any justification for reading into paragraph (k) an additional phrase – “or setting” – so that it would state: “Development likely to affect the site or setting of a scheduled monument”. This enlargement of the words used by the draftsman is not necessary to make sense of this provision, whose meaning seems perfectly clear as it is. On the contrary, it would only distort the true meaning. If the intention had been to require the Welsh Ministers to be consulted on development likely to affect the setting of a scheduled monument, this could have been done in express terms. And it was not.
33. The relevant statutory context only reinforces the literal interpretation. The statutory scheme is entirely coherent. The concept of a “scheduled monument” in paragraph (k) was the same as in section 1(11) of the 1979 Act. And the provisions for consultation in article 14 and Schedule 4 were aligned with the substantive provisions for conservation in the 1979 Act. This remains so after the amendments which removed paragraph (k) in the table in Schedule 4 and replaced it with the new paragraph (l).
34. The definition of a “scheduled monument” in section 1(11) does not go beyond the monument itself. It does not include the monument’s setting. The same may also be said of the definition of a “monument” in section 61(7). This too is confined to the monument itself and its “site”. The provisions in section 61(9), (10) and (11) confirm that the “site” of a monument is not

necessarily the same thing as the monument itself. And subsection (9), in particular, makes plain that the “site” of the monument” is not the same thing as its setting. It extends beyond the “land in or on which [the monument itself] is situated”, but not to embrace the surroundings of the monument in which it is experienced. In my view, the concept of “the site of a monument” as a relatively small area of land around the monument, essential for its physical “support and preservation”, puts beyond doubt the meaning of the concept of “the site of a scheduled monument” in paragraph (k). Neither expression means the setting of the scheduled monument, as opposed to its site. And again, if Parliament had intended to include the setting of a scheduled monument as well as its site within this part of the statutory scheme, it would have done so. It did that in respect of listed buildings, in sections 66 and 67 of the Listed Buildings Act, which refer specifically to development that would affect the “setting” of a listed building – though it is to be noted that, in Wales, there is no statutory requirement on local planning authorities to consult the Welsh Ministers or Cadw on proposals for such development.

35. The literal interpretation of paragraph (k) is not at odds with other provisions in Schedule 4 in which the verb “affect” has been used in describing a category of development to which the consultation requirements apply. Where this is done, the meaning of the word depends on its particular context: development “likely to affect land in the area of another local planning authority” (paragraph (a)), development “in or likely to affect a site of special scientific interest” (paragraph (q)(i)), development “likely to affect” an inland waterway or another watercourse within the category, as defined (previously paragraph (w), now paragraph (v)). Those provisions do not suggest the need to depart from a literal interpretation of paragraph (k).
36. The new paragraph (l) is in quite different terms from the provision in paragraph (k), which it has replaced. Where it concerns scheduled monuments, it identifies two categories of proposals on which the Welsh Ministers are to be consulted, neither of them defined with the use of the words “likely to affect”. The first is development which has a “direct physical impact” on a scheduled monument (paragraph (l)(i)). The second, entirely new, is development “likely to be visible from” a scheduled monument, which also meets one of the specified criteria of distance, height and area (paragraph (l)(ii)). I do not accept that the drafting of these provisions goes against the literal interpretation of the previous paragraph (k). Indeed, I think that interpretation gains some support in the provision relating to registered historic parks and gardens (paragraph (l)(iii)). That provision does use the words “likely to affect”. It distinguishes between development likely to affect “the site” of a registered historic park or garden and development likely to affect “its setting”. If “site” had meant both “site” and “setting”, there would have been no need to do that.
37. I see nothing in the contention that paragraph (k), if interpreted to exclude a requirement to consult the Welsh Ministers on proposals for development likely to affect the setting of a scheduled monument, would have been largely devoid of purpose, because the requirement for scheduled monument consent under section 2 of the 1979 Act is so broad. It is not necessary to consider how wide is the “noticeable gap” to which the judge referred. As Mr Harwood conceded, there is obvious benefit in the Welsh Ministers having the opportunity to comment on relevant applications for planning permission even if the development will also require scheduled monument consent.
38. The fact that national planning policy in Wales – and also policy ENV17 of the UDP – has emphasized the importance of preserving both scheduled monuments and their settings as a material consideration in decisions on applications for planning permission does not bear on the exercise of construing the statutory provisions for consultation. And, as one would expect, national planning policy reflects those statutory provisions. The first sentence of paragraph 6.5.6 of Planning Policy Wales, Edition 7, and the third sentence of paragraph 15 of Welsh Office Circular 60/96 paraphrase the previous paragraph (k) of the table in Schedule 4 of the Development Management Procedure Order 2012. The first sentence of paragraph 6.5.9 of Planning Policy Wales, Edition 7, with its footnote, simply draws attention to the provisions of

the new paragraph (l)(i) and (ii).

39. Finally, I do not accept that the county council's correspondence with Cadw in July 2015 indicates that the literal interpretation of paragraph (k) is wrong. The fact, if it is a fact, that local planning authorities "routinely" took the requirement to consult the Welsh Ministers as including proposals for development likely to affect the setting of a scheduled monument, and that Cadw "would have expected" to be consulted on this proposal, does not mean that authorities were obliged to consult Cadw under paragraph (k) – though, of course, there was nothing to prevent them from doing so. As Mr Harwood accepted in his supplementary skeleton argument (at paragraph 11), Cadw's e-mails are "not ... an authoritative interpretation of the legislation ...". And to be fair to Cadw, they did not suggest that themselves.
40. In my view, therefore, this ground of appeal must fail.
41. I should add that under the new paragraph (l), had it been in force at the time of the decision under challenge, the Welsh Ministers would not have had to be consulted on Mr Bagley's application for planning permission, and they would not now have to be consulted if the matter were remitted for re-determination – because the proposal is, as a matter of fact, outside the scope of the criteria in paragraph (l)(ii) b) and c).

Did the county council fail to perform the duty under section 66(1) of the Listed Buildings Act?

42. At the time of the county council's decision, section 66(1) of the Listed Buildings Act, headed "General duty as respects listed buildings in exercise of planning functions", provided:
- “(1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”
- There is no statutory definition of "setting" for these purposes. However, the definition in the Cadw guidance is also relevant here (see paragraph 26 above).
43. The requirements of the section 66(1) duty have been the subject of much authority, some of it recent authority in this court (see in particular, the judgment of Sullivan L.J., with whom Maurice Kay and Rafferty L.J.J. agreed, in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 45, at paragraphs 16 to 29; and the judgment of Sales L.J., with whom Stephen Richards and Floyd L.J.J. agreed, in *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, at paragraphs 26 to 29).
44. In *East Northamptonshire District Council* the local planning authority had refused the developer's application for planning permission to erect wind turbines in a location where they would harm the setting of listed buildings. An inspector allowed the developer's appeal. His decision was upheld in the High Court. This court dismissed the subsequent appeal. It endorsed the judge's conclusion that section 66(1) requires the decision-maker to give "the desirability of preserving the building or its setting" not merely careful consideration in deciding whether there would be harm to the building or its setting, but "considerable importance and weight" when balancing the advantages of the proposed development against any such harm (see paragraphs 22 to 24 and 29 of Sullivan L.J.'s judgment). Sullivan L.J. observed that the inspector appeared "to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission" (paragraph 29). The inspector had referred to the duty, but, said Sullivan L.J., "at no stage in the decision letter did he expressly acknowledge

the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings”. This was a “fatal flaw” in his decision.

45. The section 66(1) duty is often reflected in development plan policy. That was so here. Policy ENV14 of the UDP states that “[proposals] for development unacceptably adversely affecting a listed building or its setting will be refused” and sets out specific considerations to be taken into account “[in] considering proposals for development affecting a listed building and its setting”, including “1. The desirability of preserving the listed building and its setting”, “2. The importance of the building, its intrinsic architectural and historic interest and rarity”, “4. The building’s contribution to the local scene and its role as part of an architectural composition”, and “7. The need for proposals to be compatible with the character of the building and its surroundings and to be of high quality design, using materials in keeping with the existing building”. Paragraph 4.5.21 states that “[when] considering proposals for development the presumption will be in favour of the preservation of listed buildings and their settings and permission will only be granted where a strong case can be made for doing so”.
46. Welsh Office Circular 61/96 also emphasizes, in paragraph 11, under the heading “The Setting of Listed Buildings”, the importance of the section 66(1) duty, stating that the setting of a listed building “is often an essential part of [the] building’s character ...”. Planning Policy Wales, Edition 7, stated, in paragraph 6.5.9, that “[where] a development proposal affects a listed building or its setting, the primary material consideration is the statutory requirement to have special regard to the desirability of preserving the building, or its setting, or any features of special architectural or historical interest which it possesses”.
47. As the judge acknowledged, neither the officer’s reports to committee nor the county council’s decision notice indicated that the county council had in fact performed the duty in section 66(1). And, as he accepted, if it could be shown that the duty ought to have been performed but was not, an error of law would have been demonstrated (paragraph 18 of the judgment). He also accepted that the section 66(1) duty “arises from the existence of the listed building, not from what anybody says about it”. So the absence of any objection about the effect of the development on the setting of the grade II* listed church at Llanbedr was not in itself decisive (paragraph 19). It might, however, be relevant – in three ways. First, after a lengthy process such as had occurred in this case, it might be more reasonable to conclude that if there had been “a point to be raised” it would have been. Secondly, the decision-maker might then be better able to defend a challenge, “on the ground that the alleged harm is insignificant”. And thirdly, it might be more likely that a “post-decision confirmation” is “genuinely an explanation of a decision lawfully taken, and not an attempt to conceal a material deficiency in the decision-making process” (paragraph 20).
48. The judge did not accept that the existence of a view in which one could see both the church and the turbine was in itself enough to engage the section 66(1) duty (paragraph 21). It would have to be shown that “the part of the view containing the turbine was to be regarded as the setting of the [listed] building” (see the judgment of Hickinbottom J., as he then was, in *R. (on the application of Miller) v North Yorkshire County Council* [2009] EWHC 2172 (Admin), at paragraph 89, citing *Revival Properties Ltd. v Secretary of State for the Environment* [1996] J.P.L. B86) (ibid.).
49. The judge observed that although there had been “no express process of assessment and balance under [section] 66(1)” when the decision to grant planning permission was made, there had at that stage been “no suggestion of damage to the setting of the church”. And “[despite] the silence of its own Built Heritage Officer, [the county council] was entitled to conclude that it had sufficient material to conclude in the exercise of its planning judgment that the issue was not one that arose from the proposal, and that being so it had no need to refer any further to the matter”. Nothing in the material produced after the decision supported a different conclusion. The “evidence of intervisibility” between the church and the turbine was, said the judge, “not

persuasive”. The view from “The Begwyns” did “not show that [section] 66(1) ought to have been taken into account”. There were, he said, “no significant visual effects on the church and its setting is not affected” (paragraph 22). He found “the post-decision statements by the [county council’s] Built Heritage Officer and by CPAT ... entirely consistent with the way that matters unfolded and with the evidence both at the time of the decision and even subsequently”. And in his view it was “clear that ... the decision would have been the same with or without the asserted error” (paragraph 25).

50. Mr Harwood said it was now common ground, and the judge had accepted, that the church and the wind turbine would both be “visible in a view from [The Begwyns], a well-known beauty spot about 2km from the church” (paragraph 9 of the judgment). The duty under section 66(1) did not depend on a possible effect on the setting of the listed building being brought to the county council’s attention as a material consideration (see the judgment of Lewis J. in *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), at paragraphs 55 to 59). But in this case the Planning, Design & Access Statement had, in fact, done that. It effectively acknowledged that the proposed development would, or might, have some effect on the setting of the listed church. In these circumstances the county council had to consider whether there would be such an effect, and, if so, whether it would be harmful – in which case it would have had to make its decision consistently with the approach confirmed by this court in *East Northamptonshire District Council*. But there was nothing to show that it did this. It was only after the decision was made, and the claim for judicial review had been launched, that this question was considered. The court should always be wary of an assessment produced only after proceedings have been begun (see the judgment of Pill L.J. in *R. (on the application of Carlton-Conway) v Harrow London Borough Council* [2002] EWCA Civ 927, at paragraphs 12 to 17, and 26 to 28).
51. Ms Parry and Mr Corbet Burcher defended the judge’s conclusions. They stressed the fact – confirmed, they said, by the ZTV produced before the county council’s committee considered the proposal, and also by the wireframe (or “wireline”) images produced after planning permission was granted – that the wind turbine was not going to be visible from the listed church. In the Planning, Design & Access Statement it had been suggested that the blade tip of the turbine might be seen from the church – a suggestion disproved even by the ZTV produced at the same time. And there was no mention of longer range views from “The Begwyns” or “The Roundabout” – locations to the south in which both the turbine and the listed building might both be seen. In the circumstances it was not necessary for the county council to perform the section 66(1) duty – or irrational not to do so. In the light of the ZTV – which ignored intervening buildings and vegetation – the description of the “Effect” on the listed building in Figure 12 of the Planning, Design & Access Statement as “Minor/Negligible” should be read as meaning no impact. Even when planning permission was granted, it was plain that there would be no harm to the setting of the listed building. And now, with the wind turbine in place, it is plain that there has been no such harm. The judge was right to conclude that there was no need for the county council to refer to the section 66(1) duty in the course of making its decision, and that even if it had performed the duty, its decision could not have been different. Mr Corbet Burcher described the judge’s approach as both “pragmatic” and “clearly correct in law, rooted in the existing authorities” (paragraph 26 of his skeleton argument).
52. In my view, there is force in Mr Harwood’s submissions on this issue.
53. As the case law shows, the circumstances in which the section 66(1) duty has to be performed where the setting of a listed building is concerned will vary considerably, and with a number of factors. What are those factors? Typically, I think, they will include the nature, scale and siting of the development proposed, its proximity and likely visual relationship to the listed building, the architectural and historic characteristics of the listed building itself, local topography, and the presence of other features – both natural and man-made – in the surrounding landscape or townscape. There may be other considerations too. Ultimately, the question of whether the section 66(1) duty is engaged will always depend on the particular facts and circumstances of

the case in hand.

54. Even in cases in which the courts have had to consider decisions of local planning authorities or inspectors to grant planning permission for the erection of wind turbines within the settings of listed buildings, the circumstances have varied widely (see, for example, *Mordue, Howell v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1189, *R. (on the application of Higham) v Cornwall Council* [2015] EWHC 2191 (Admin), *East Northamptonshire District Council, R. (on the application of Friends of Hethel Ltd.) v South Norfolk District Council* [2010] EWCA Civ 894, and *Miller*).

55. In *Friends of Hethel Ltd.*, Sullivan L.J. (with whom Sedley and Lloyd L.J.J. agreed) observed (in paragraph 32 of his judgment) that “the question whether a proposed development affects, or would affect the setting of a listed building is very much a matter of planning judgment for the local planning authority ...”. In a somewhat different context – the setting of an ancient monument – Hickinbottom J. said in *Miller* (at paragraph 89 of his judgment):

“89. There is no definition of “setting” in this context, but it was common ground before me that it is a matter of judgment to be determined in visual terms, with regard being had to (i) the view from the monument towards the development (ii) the view from the development towards the monument and (iii) any other relevant view which includes both the monument and the development (an approach adopted in [*Revival Properties*]). In other words, the setting of a monument has to be considered “in-the-round”.”

56. The setting of a listed building is not a concept that lends itself to an exact definition, applicable in every case. This is apparent, I think, from the deliberately broad definitions of the setting of an historic – or heritage – asset in Cadw’s document and in the NPPF (see paragraphs 26 and 42 above). I would not wish to lay down some universal principle for ascertaining the extent of the setting of a listed building. And in my view it would be impossible to do so. Clearly, however, if a proposed development is to affect the setting of a listed building there must be a distinct visual relationship of some kind between the two – a visual relationship which is more than remote or ephemeral, and which in some way bears on one’s experience of the listed building in its surrounding landscape or townscape. This will often require the site of the proposed development and the listed building to be reasonably close to each other, but that will not be so in every case. Physical proximity is not always essential. This case illustrates the possible relevance of mutual visibility – or “intervisibility”, as the judge described it – and also of more distant views from places in which the listed building and the proposed development can be seen together – “co-visibility”, as it was described in submissions before us. But this does not mean that the mere possibility of seeing both listed building and development at the same time establishes that the development will affect the setting of the listed building.

57. An illuminating discussion of this question is to be found in Charles Mynors’ “Listed Buildings, Conservation Areas and Monuments” (fourth edition), in sections 13.5.8, 13.5.9 and 14.6.1. I would draw attention, in particular, to these observations in section 14.6.1, which seem pertinent in a case such as this:

“The extent of the “setting” of a listed building ... may mean something wider than just its curtilage, or just the land that can be seen from it. 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 a 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.”

58. There will, of course, be cases where it is quite obvious that there is no listed building whose setting is going to be affected by the proposed development, others in which it is no less obvious that the setting of a listed building will be affected, and others again where there is doubt or dispute (see, for example, *R. v South Herefordshire District Council, ex parte Felton* [1989] 3 P.L.R. 81 and [1991] J.P.L. 633, *R. v Bolsover District Council, ex parte Paterson* [2001] J.P.L. 211, *Ryan v Secretary of State* [2001] EWHC Admin 722, and *British Telecommunications Plc v Gloucester City Council* [2002] J.P.L. 993). Sometimes a consultee or an objector may have raised a concern about the effect the development will have on the setting of a listed building but the decision-maker can properly take the view that there will be no such effect, or at least no harm. On other occasions, no such concern may have been raised, but the section 66(1) duty will be engaged nevertheless. As the judge in this case recognized, the fact that the possible effect of the proposed development on the setting of a listed building has not been identified as an issue in responses to consultation, or in representations made by third parties, does not of itself relieve a local planning authority of the duty. There will also be cases where only the developer himself identifies the possibility of some change to the setting of a listed building but contends either that the change would not be harmful or that the harm would be insignificant or acceptable. Depending on the circumstances, this too may be enough to engage the section 66(1) duty, and, if it does, the decision-maker will err in law in failing to perform that duty.
59. Was the county council's decision in this case flawed in that way? I think it was. In my view the section 66(1) duty ought to have been performed, and was not.
60. The particular circumstances here may be unusual, I accept. There were, it is true, no objections on the grounds of likely harm to the setting of the grade II* listed church by the erection of a wind turbine, some 42 metres in height to the blade tip, on the application site. An objection had been made to the previous proposal, partly on such grounds and in quite general terms, not specifically alleging harm to the setting of the listed building or to any other particular feature of the historic environment. None of the consultees who might have been expected to assess the potential effects of the wind turbine on the setting of the listed building had done so. The county council's Built Heritage Officer had not responded to consultation (see paragraphs 8 to 14 above). But the relevance of the effect the development might have on the setting of the listed church had been recognized on behalf of Mr Bagley, as applicant for planning permission, in the Planning, Design & Access Statement (see paragraph 7 above). It was squarely raised as a matter worthy of consideration in the section of that document dealing with "Cultural Heritage Constraints", together with the likely effect of the development on the "views and setting" of the scheduled monuments within a distance of 2 kilometres of the site.
61. The salient conclusion in the text of the Planning, Design & Access Statement was that "the effect on views and setting of the listed structures and monuments is considered to be slight", and that "[no] further mitigation" – meaning, presumably, no "mitigation" beyond the careful siting of the proposed turbine – was "considered to be necessary". That conclusion had been formed with the benefit of the "ZTV production". The four considerations on which it depended were said to be: first, "the level of screening", second, "the undulating topography", third, "the distance that the majority of listed assets are located from the proposed turbine location", and fourth "the limited scale of the turbine itself". It was a general conclusion, which did not distinguish between the "Cultural Heritage Assets" considered in the "ZTV production": the listed building and the two scheduled monuments. The results of the "ZTV production", recorded in Figure 12, showed a range of potential impacts, described in the language of the relevant methodology according to an analysis of "Receptor Sensitivity", "Magnitude of Change" and "Effect". The "Effect" on the listed Llanbedr Church – apparently on the understanding that it was listed merely at grade II, not at grade II*, and that its "Receptor Sensitivity" was "Low/Medium" – was stated to be "Minor/Negligible". As for the two scheduled monuments, the "Effect" on Llandeilo Graban Motte (or Castle Mound) was stated as "Minor", and that on Llanbedr Hill Platform "Minor/Negligible". No mention was

made of the duty in section 66(1) of the Listed Buildings Act, or relevant national or local policy.

62. In view of that assessment in the Planning, Design & Access Statement, and although no relevant concern had been expressed by consultees or in objections, the planning officer found it necessary to deal in her report with the possible effects of the proposed development on the settings of the two scheduled monuments (see paragraph 13 above). She did so on the basis that “[the] desirability of preserving an ancient monument and its setting is a material consideration in determining a planning application”, and that policy ENV17 of the UDP “states that developments which would unacceptably adversely affect the site or setting of a Scheduled Ancient Monument will not be permitted”. Her advice, reflecting the view expressed in CPAT’s consultation response and consistent with the conclusion in the Planning, Design & Access Statement, was that there would not be an unacceptable adverse effect on the setting of either of the scheduled monuments. The members had the benefit of that advice when they made their decision. And they clearly accepted it.
63. There was, however, no parallel consideration of the possible effect of the proposed development on the setting of the grade II* listed church, having regard to the statutory duty in section 66(1), the corresponding provisions of the development plan in policy ENV14 of the UDP, and national planning policy in Welsh Office Circular 61/96 and Planning Policy Wales – and no advice was provided to the committee on that question. The members therefore made their decision in the absence of any such advice – by contrast, for example, with the situation in *R. (on the application of Carnegie, on behalf of the Oaks Action Group) v Ealing London Borough Council* [2014] EWHC 3807 (Admin) (see the judgment of Patterson J., at paragraph 58), and *Miller* (see the judgment of Hickinbottom J., at paragraphs 93 to 100). Nor, it seems, was there any discussion of this matter on either occasion when the committee considered the proposal.
64. The officer said nothing in her report about the application of the section 66(1) duty to the proposed development. She mentioned policy ENV14 as one of the development plan policies relevant to the proposal, and Welsh Office Circular 61/96 as relevant national policy. But she did not apply those policies to the proposal before the committee, nor explain how they were relevant. The members were not advised how – or even whether – the section 66(1) duty should be discharged in this case. They were given no guidance on the conclusion they should reach if they followed the approach to the performance of that duty confirmed by the Court of Appeal in *East Northamptonshire District Council*. Nor did they have the benefit of any expert view from consultees on this question, such as emerged from CPAT and the county council’s Built Heritage Officer after planning permission had been granted and the claim for judicial review issued (see paragraphs 16 and 18 above).
65. In short, nowhere in the advice the members were given on this proposal was there any mention of the listed building, or of the effect the development might have on its setting, taking into account views in which both it and the proposed wind turbine would or might be visible – the concept of “co-visibility” – and not merely views from the listed building towards the turbine and from the turbine towards it – the concept of “intervisibility”. They were not invited to consider the impact of the development on the “surroundings in which [the listed building] was experienced ...” – to use the words of the definition of “Setting” in Cadw’s guidance document (see paragraph 26 above). The assessment set out under the heading “Cultural Heritage” in the officer’s report was confined to the possible effect of the development on the settings of scheduled monuments. And there is no evidence before the court that, in preparing her report, she had considered the possibility that the development might affect the setting of the listed building, or had discounted any such effect as immaterial, or that any of her colleagues had done so. Her own witness statement dated 4 August 2015 does not suggest that she, or they, had done that.
66. In my view, the lack of relevant advice from the officer and of any relevant discussion at either

committee meeting, was, in the particular circumstances of this case, enough to amount to an error of law. The section 66(1) duty was, I think, clearly engaged. The Planning, Design & Access Statement did not say there would be no effect on the setting of the grade II* listed church. It acknowledged that there would or could be such an effect – as also there would on the settings of scheduled monuments within a comparable distance of the application site – but said the effect would only be “slight”. Given the potential significance of an effect, even a less than substantial effect, on the setting of a listed building, as this court’s decisions in *East Northamptonshire District Council* and *Mordue* have confirmed, I think that the possible impact of the proposed wind turbine on the setting of the listed church was sufficiently put in issue by the Planning, Design & Access Statement to call for explicit treatment in the officer’s report. I do not think this can simply be inferred. This is not to require more than may reasonably be expected of a local planning authority in these circumstances if it is to comply with the duty in section 66(1). I have in mind the observations of Sales L.J. in *Mordue* (especially at paragraphs 27 and 28) – which are relevant here even though they were made in the specific context of criticisms of an inspector’s decision letter, not an officer’s report to committee.

67. The first question for the county council, inherent in section 66(1), was whether there would be an effect on the setting of the listed building, and, if so, what that effect would be. This, I think, was undoubtedly a case in which that question had to be confronted in the making of the decision, and a distinct conclusion reached. If it had been confronted, the answer might have been that there would be no effect, or no harmful effect, on the setting of the listed building. I accept that. But it is quite possible too that the opposite conclusion would have been reached, as it was in Planning, Design & Access Statement – that there would be some effect. It might also have been concluded, as a matter of planning judgment, that the effect would be a harmful one. The conclusion might then have been that, when the planning balance was struck, this harm was not such as to justify a refusal of planning permission even though “considerable importance and weight” was given to the desirability of preserving the setting of the listed building. I accept this too. But again, the opposite conclusion might have been reached. In any event, it seems to me that in this case, without that exercise having been gone through explicitly in the officer’s report so as to show that the section 66(1) duty had been heeded and performed, and also without some trace of its having been undertaken by the members in their consideration of the proposal, the court can only conclude that the county council’s decision-making was, in this particular and significant respect, deficient and therefore unlawful. The county council failed to discharge its duty under section 66(1) duty, and failed also to have regard to relevant development plan and national planning policy as material considerations.
68. The county council would of course have been lawfully entitled to conclude that there would be no harmful effect on the setting of the listed building, or that, even if harmful, the effect would not be significantly or decisively so. These are classically questions of fact and planning – or aesthetic – judgment for a decision-maker. And the court will not interfere with such an exercise of judgment except on public law grounds (see, for example, the first instance judgment in *R. (on the application of Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin), at paragraphs 49, 50 and 54). To that extent I can agree with the judge’s conclusions on this ground of Mr Williams’ claim (see paragraphs 45 to 47 above). Crucially however, in this case I think it was incumbent on the county council to apply its planning or aesthetic judgment, on the facts, to the relevant questions pertaining to the duty in section 66(1). If it did not do so, its decision would be flawed. Where I part company from the judge is that, in the absence of some clear indication that the county council’s committee did in fact undertake the necessary exercise of planning or aesthetic judgment in the course of making its decision, I cannot accept that it came to grips, as in my view it was obliged to do in this case, with the duty under section 66(1).
69. Finally here, I acknowledge that the previous proposal had not been found unacceptable for any likely effects on the historic environment, including any effect on the setting of the listed building. But the officer’s advice to the members in her report on this application for planning

permission was put forward as a free-standing and complete assessment of the new proposal on its own planning merits, and it should, in my view, have tackled the section 66(1) duty explicitly. The members, for their part, ought to have discharged that duty in determining the application for planning permission now before them. As I have said, I do not think they did so.

70. This ground of appeal is therefore, in my view, made good.

Discretion

71. Both Ms Parry and Mr Corbet Burcher submitted that, if we were to find an error of law on the ground relating to the duty in section 66(1), we ought nevertheless to withhold a remedy. The basis for this submission is that, in the light of the views expressed on behalf of CPAT by Mr Walters in his e-mail of 27 July 2015 and by the county council's Built Heritage Officer in her memorandum of 30 July 2015 (see paragraphs 16 and 18 above), and all the relevant material now before the court, including the ZTV assessment, the wireframe images and the photographs of the turbine in the surrounding landscape, the county council's decision on Mr Bagley's application for planning permission would have been highly likely to have been the same had those views and all that material been before the committee when it considered the proposal, and would be highly likely to be the same now if the application were considered afresh. But Ms Parry and Mr Corbet Burcher's argument on discretion went beyond section 31(2A) of the Supreme Court Act 1981. They contended that the court could not realistically envisage a different outcome on re-determination (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council* [2015] 1 W.L.R. 3710, at paragraphs 62 to 66, and the judgment of Sales L.J. in *R. (on the application of Gerber) v Wiltshire County Council* [2016] 1 W.L.R. 2593, at paragraphs 59, 60 and 66). Mr Corbet Burcher also submitted that substantial prejudice would be caused to Mr Bagley if the planning permission, which he had now implemented by erecting the wind turbine, were to be quashed – prejudice “considerably more acute”, said Mr Corbet Burcher, than in *R. (on the application of Holder) v Gedling Borough Council* [2014] EWCA Civ 599.

72. I do not accept those submissions. It seems to me that in this case the interests of a lawfully taken decision must prevail, as normally they should, and that the planning permission must therefore be quashed so that the county council can take the decision again, properly directing itself on the duty under section 66(1). Of course, it is quite possible that when this is done the outcome will be the same, and Mr Williams should not be surprised if it is. But in exercising its discretion in a case where the critical issue involves matters not merely of fact and planning judgment but of aesthetic judgment as well, in the performance of a duty imposed by statute, the court should be very careful to avoid trespassing into the domain of the decision-maker – here the county council as local planning authority. With this in mind, I do not think it is possible for us to conclude that the county council's decision in this case should be allowed to stand, even on the more generous basis of section 31(2A) of the 1981 Act.

73. I have a good deal of sympathy for Mr Bagley, because Mr Williams' complaint about the county council's consideration – or lack of consideration – of the effect of the development on the setting of the listed building emerged very late. However, just as this court was unmoved in somewhat different circumstances by the contention of substantial prejudice in *Holder* – another case in which planning permission had been unlawfully granted for a single wind turbine and the turbine had been put up after proceedings had been begun – Mr Corbet Burcher's submission to similar effect here does not persuade me that relief should be withheld. Even so, the county council should now lose no time in taking the decision again, ensuring when it does so that it performs the duty in section 66(1).

Conclusion

74. For the reasons I have given, I would allow this appeal.

Lord Justice Irwin

75. I agree.