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HERITAGE PLANNING UNDER THE SPOTLIGHT AGAIN – BUT WILL THERE BE ANY CHANGE?

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SUMMARY

The recent Government announcement to review how heritage planning applications are considered and defended has cast a shadow of uncertainty over the heritage planning regime. In this blog we summarise the main principles of the approach to decision making on heritage planning applications as it currently stands and as clarified by recent case law.

Development proposals that affect heritage assets can be both emotive and controversial and generate strong opposition making them susceptible to legal challenge.

As with all planning decisions, heritage planning applications must be determined in accordance with the statutory development plan unless material considerations indicate otherwise. However, heritage applications engage additional statutory tests along with the relevant national and local planning policy 'heritage tests'. This added layer of complexity, and in particular how this overlays the policies for the assessment of harm and benefits, are frequently the drivers for planning appeals and judicial reviews.

Since the publication of the NPPF in 2012, a growing body of case law has informed and supported the robustness of these policies and confirmed consistency with the statutory tests, but application by decision makers remains susceptible to challenge due to perceived ambiguities in approach and in particular the role of planning judgment.

Review of heritage planning

However, could this all change? Hot on the heels of a high profile decision to approve the redevelopment of the Grade II-listed Whitechapel Bell Foundry in London, the Secretary of State announced – by tweet – his intention to '*commission a review of how the Planning Inspectorate and planning policy considers and defends heritage*'.

Whilst the scope and implications of this review remain to be seen, Jenrick's announcement casts a new shadow of uncertainty over the heritage planning regime which is likely to affect developers who are considering bringing forward schemes involving heritage assets. This is despite the increased clarity on how applications should be dealt with that has arisen through the courts.

We summarise below the main principles of approach to decision making on heritage planning applications as recently clarified by the Court of Appeal in *Bramshill v SoSHCLG* [2021], amongst other recent cases.

Section 66(1) duty

If a proposed development affects a heritage asset or its setting, the decision maker must discharge its statutory duty under s66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 ("Listed Building Act") to "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". Section 72(1) further imposes an equivalent duty in relation to developments affecting the character and appearance of conservation areas.

To discharge these duties, the harm of a proposed development must be balanced against any likely public benefits or other material considerations weighing in favour of a proposal. The courts have considered the nature of these duties and confirmed there is no single, correct approach that must be applied to this balancing exercise. However, it was accepted in *Jones v Mordue* [2015] that if the approach in paragraphs 193 to 196 of the NPPF is followed (see below) the section 66(1) duty is likely to be properly performed.

NPPF heritage tests

Part 16 of the NPPF sets out the national planning policies on conserving and enhancing the historic environment. Where relevant, these policies will be material considerations to an application's determination.

The application of NPPF policies at paragraphs 190 and 193-196 has received detailed examination by the courts. These policies introduce a requirement for the decision maker to identify and assess the significance of potentially affected heritage assets (paragraph 190). They must consider whether the impacts of the proposed development on the heritage assets will lead to "substantial" or "less than substantial" harm to their significance (paragraph 194) with consideration to be given to the balance between the conservation of heritage assets and the public benefits of development (paragraphs 195/196).

The NPPF is unhelpfully silent on the specific application of the test and the criteria for determining harm, but *Bramshill* (alongside the other key recent cases starting with *Barnwell Manor*) makes it clear that these are all tests of planning judgement which will depend on the facts of the case.

From these judgments, it is possible to draw out the following principles which, if followed, could mitigate the risk of judicial review:

1. **Great weight to be given to conservation of heritage assets**
   The NPPF requires that "great weight" should be given to the "conservation" of the "designated heritage asset", and that "the more important the asset the greater the weight should be" (NPPF paragraph 193). However, the weight that the decision-maker must give to the desirability of preserving the building or its setting is not uniform. It will depend on, among other things, the extent of the assessed harm and the heritage value of the asset in question. Establishing and presenting a clear understanding of heritage significance (or lack thereof) as part of any application will form a critical baseline that can help guide appropriate weighting.

2. **Heritage assessment must be rigorous, but there is no single approach**
   All the policy tests in NPPF paragraphs 190, 193-196 must be engaged in all cases. Importantly, Sir Keith Lindblom in *Bramshill* confirmed there is no requirement to first establish the 'net' or 'internal' heritage balance in the application of paragraph 193 (as had been considered in *Palmer)*, and then only if 'overall harm' emerges from this balancing exercise, must the other public benefits of the development be weighed under paragraphs 195 and 196. Lindblom held that this approach is not stipulated or implied in section 66(1), or suggested in the relevant case law and does not precede a wider assessment of the kind envisaged in paragraphs 195/196 of the NPPF. It is therefore possible to take a sequential approach (which is a matter of planning judgment on the facts of the case) and it is unlikely to '*make a difference to the ultimate outcome*'. Developers cannot therefore expect to rely on heritage benefits driving a 'no harm' conclusion, but proper balancing of harm vs benefits should still achieve the same outcome.

3. **What amounts to substantial harm/less than substantial harm depends on the circumstances**
   Whether a proposal will cause "harm" to a heritage asset and, if so, whether it will be "substantial" or "less than substantial" in the context of NPPF paragraphs 195 and 196 will always depend on the circumstances. However, the recent High Court decision in *Kinsey v LB Lewisham [2021]* highlights the importance of officer reports ensuring full disclosure of the evidence and information used to determine harm, and the need to classify more clearly the level of harm within the spectrum of "less than substantial" as recommended in the PPG.

4. **Public benefits are for the decision maker to decide but are not limited to those directly related to heritage**
   The concept of public benefits is broad and in the context of heritage assessment is not restricted to heritage benefits. Developers should seek to make clear all public benefits of their proposals so that the decision maker is able to consider these in the round when carrying out any heritage balancing exercise, though clarification of heritage benefits remains important as there is scope for greater weight to be applied to these.

Conclusion

It is clear that despite the expanding body of court decisions that have helped clarify the decision making process for heritage-related planning applications, their emotive nature continues to cause anxiety and uncertainty for many decision makers and the government. While heritage planning is often seen as complicated, there is a clear process which, when rigorously followed, should direct towards a reasonably predictable, and defendable, outcome. What is less predictable, is the direction the government may take as part of the upcoming review and how this will feed into the wider planning reforms envisaged in the Planning white paper. For now, it remains a matter of keeping calm and carrying on.

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