

Striking the balance – conserving the past and securing the future

By Reuben Taylor

Introduction

1. In this paper I shall be examining whether the policy in the draft PPS: Planning for the Historic Environment will result in any changes to the approach to be taken in a planning decisions involving potential impacts upon “heritage assets” and asking whether the draft PPS gets the balance right between protecting those assets and yet allowing modern development to come forward.

The White Paper (2007)

2. The Government’s White Paper “Heritage Protection for the 21st Century (March 2007)” set the agenda for significant change in the way in which we address “heritage assets” in England and Wales.
3. The White Paper explained:

“...there is the potential, and the appetite, for much more significant reform. Reform that simplifies the system, streamlines and rationalises regulation, and reduces the burdens on users and on local authorities, while continuing to provide appropriate levels of protection.”¹
4. It also identified that the need to identify ways to reduce uncertainty and ensure early consideration of heritage issues through a greater role for pre-application discussion.
5. What the White Paper did not do was signify that there was to be any change in the approach to protection of heritage assets within the planning process other than in relation to World Heritage Sites where a lacuna in existing policy was recognized².
6. Interestingly, the White Paper did not identify any need for the Government to produce new national planning guidance; rather it saw English Heritage as the body to publish
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¹ White Paper: Chapter 1.3 para 4

² White Paper; Chapter 1.3 para 52 et seq.

this³. Somewhere along the line however the penny dropped that if the goals of the White Paper were to be achieved PPG15, now some 15 years old, and PPG16 now some 19 years old, would need to be reviewed and replaced.

The Consultation Paper

8. The draft PPS: Planning for the Historic Environment raises a number of issues. I shall be focusing upon:
 - (1) The Policy Objectives
 - (2) Assessment and the Evidence Base;
 - (3) Pre-application discussions;
 - (4) Preserving Setting; and
 - (5) Enabling Development.

9. To a jobbing planner, the publication of a new PPS is always a time of unease. There is for many a sense of trepidation as the mandarins in Whitehall churn out another policy paper that reveals yet again the degree to which they are divorced from a real understanding of the practical issues that developers and local authorities face within the planning system on a daily basis. There are some wonderful examples of this in the draft PPS.

10. A personal favourite is in the second paragraph of the introduction. We are told in lofty tones that "people are not averse to change in principle". Has anyone in Whitehall actually been to a planning inquiry? There are millions of people in this country who are averse to change in principle. They write in and object to development in their thousands. They turn up to planning inquiries to boo and hiss. They elect local authority members on platforms of development constraint. As a result there are plenty of local politicians who are averse to change in principle if it means they will be re-elected.

11. I am being flippant but the consequences for policy and its effectiveness are significant if these sorts of practical realities are not recognized. For example, it is a central theme of the new policy that new development can and must be integrated with the old. Indeed, the draft PPS emphasizes in several places that the presence of a heritage asset is a potential benefit to the design of new development and indeed should serve as the

³ White Paper: Chapter 1.4 para 9: EH new guidance on the outcomes local authorities should be seeking from their historic environment services

inspiration for it. The reality is that the juxtaposition of old and new is highly controversial. Proposals that mix old with new are not widely embraced; just ask Prince Charles. Yet, the impression given by the PPS is that the population is simply clamouring for precisely such a mix and juxtaposition.

The Objectives

12. In paragraph 5 of the draft PPS the Government sets out its objectives: “the historic environment, and heritage assets in particular, should be conserved, enhanced and enjoyed for the quality of life they bring to this and future generations.” So far so uncontroversial.

13. However there are some subtleties to the language used in other objectives that bear closer scrutiny. For example, it is an objective:

“to conserve and, where appropriate, enhance England’s heritage assets **in a manner appropriate to their significance**” (emphasis added)

14. This could be read as suggesting that there are different degrees of protection depending on the significance of the asset. Such an interpretation would appear to be supported by reference later in the draft at paragraph HE9.8 of the draft which indicates that:

“Local Planning Authorities should not accept **material** harm to or removal of significance in relation to a heritage asset...” (emphasis added)

15. Thus, what may constitute material harm (i.e. what will not conserve) may be different depending upon the significance of the asset. Or to look at it another way, the extent to which a new development may harm a heritage asset without giving rise to a policy objection will vary depending upon the significance of that asset. Thus, there may be scope for doing more harm to a less significant asset than to a more significant one without being contrary to the new policy.

16. Indeed, this approach seems to be supported by paragraph 10.2 of the draft PPS which states that material loss of heritage assets of the highest significance should be wholly exceptional. No such guidance is given in respect of assets of lesser significance. Again, we see a distinction being drawn in terms of approach based upon the significance of an asset.

17. This would reveal a marked departure from the policy approach in planning that has been applied through PPG15. In PPG15 there is no concept of “material harm”. The Courts have interpreted the policy of requiring that heritage assets should be preserved or enhanced as meaning that no harm should be caused⁴. That concept was not subject to considerations of degrees of harm based upon the significance of the heritage assets under consideration. If a development caused any harm of no matter what degree it was contrary to policy.
18. The draft PPS however refers to material harm; by implication there must be some degree of harm that can be countenanced that would not be material i.e. immaterial harm. Thus, the new policy would seem to allow some degree of harm to be caused without giving rise to a policy objection.
19. The implications of such an approach may be radical. It may bring in a greater degree of flexibility for the developer and make it easier to obtain planning permission for new development alongside heritage assets of lesser significance. On the other hand, that greater degree of flexibility is likely to bring with it greater scope for argument as to firstly, the significance of the heritage asset, and secondly, the degree to which any harm caused by a proposed development may be “material” or not. Greater scope for argument seems to me to be unlikely to deliver the greater certainty for developers sought by the White Paper.
20. A further difficulty with this apparent change of approach relates to the relationship of it to the statutory duties upon LPAs when determining applications for planning permission that impinge upon heritage assets. For example, the draft PPS is promulgated against the background of the duty upon LPAs under s66 of Listed Buildings and Conservations Areas 1990 to have special regard to the desirability of preserving the building, its setting or any features of architectural or historic interest which it possesses. See also s72 in relation to conservations areas which has similar wording.
21. It seems to me that there may be real difficulties in reconciling the approach of “material harm” related to the significance of the asset with the various statutory duties that require regard to be paid to preserving or enhancing. The statutory duties of course do not link

⁴ see *South Lakeland v SSE* [1992] 2 AC 141 at 146-7

the degree of preservation required to the significance of the asset. They do not recognise the concept of “immaterial harm”.

22. A further area where the wording of the objectives provides scope for debate relates to the approach to the enhancement of heritage assets. To date the decision in the *South Lakeland* case rather neutered the importance of enhancement in the context of a policy of preserve or enhance; as long as no harm was caused the test was met. There was thus never any obligation to enhance.
23. The draft PPS contains words that may change all that; the objective is defined as being “to conserve, and where appropriate enhance England’s heritage assets”. Thus, there may be circumstances where for a development to conserve a heritage asset is not sufficient in policy terms and that what that development must achieve is enhancement of the heritage asset. The difficulty is that the draft PPS is totally silent as to what those circumstances might be.
24. The absence of any guidance here is bound to cause problems. Again, it is not difficult to envisage the controversial development where the developer aims for a baseline of conserving a heritage asset but objectors and the local authority contend that enhancement is appropriate. In order to determine who is right it would be helpful to have some Government policy indicating the sorts of factors to which regard should be had. The absence of such guidance is recipe for uncertainty and delay, which is the very opposite of what the draft PPS seeks to achieve.

Assessment and the Evidence Base

25. A key element to the draft PPS policy is the emphasis upon prior assessment of heritage assets and the retention of an evidence base to assist developers in formulating their schemes and local planning authorities in their decision making. The evidence required is to be “proportionate” (whatever that means) but importantly it is to be sufficient “to inform adequately” the relevant planning process⁵.
26. This requirement is not without teeth. LPA’s are told in the draft PPS not to validate applications for planning permission where the extent of the impact of the proposed

⁵ Draft PPS para HE1.1

development on the significance of any heritage assets affected cannot be fully understood from the application and supporting documents⁶.

27. This is highly likely to give rise to practical difficulties in my view. Consider a situation where a dispute has arisen in pre-application discussions as to whether the significance of a heritage asset has been fully appraised or whether there is dispute as to whether the impacts of a development upon such an asset have been fully appraised; a dispute driven by a highly controversial development locally. It is not beyond the capabilities of objectors/Members to bring pressure to bear such that an application for the scheme would not even be validated. In those circumstances, the developer could not even make his application for planning permission.
28. If a developer cannot actually make an application for planning permission, he cannot appeal for non-determination. The only avenue for redress would be an application for Judicial Review in the High Court. The High Court will apply traditional *Wednesbury* principles to the decision not to validate. It will ask itself whether the decision taken by the LPA that the significance or impact could not be fully understood was an irrational one. That is a very high hurdle for a developer to get over. It is very difficult to prove in Court that an impact has been fully assessed given the nature of the judgments that are involved in the assessment of impact upon heritage assets. The Courts have a natural tendency not to want to get involved in such often subjective issues. High Court Judges do not make site visits after all! If the developer fails in his Judicial Review his development will be dead in the water because he has no ability to apply for planning permission for it.
29. I also have concerns as to whether the notion of a detailed evidence base is actually achievable without a massive injection of public funds into the planning system. The draft PPS indicates that local authorities are to ensure that they maintain a "historic environment record". That is defined as:

"Historic environment records are information services that seek to provide access to comprehensive and dynamic resources relating to the historic environment of a defined geographic area for public benefit and use. Typically, they comprise databases linked to a geographic information system (GIS), and associated reference material, together with a dedicated staffing resource."

I am none the wiser either!

⁶ Draft PPS para HE8.3

30. Happily further guidance is given in paragraph HE1.2 which indicates that the records, should be used to assess the extent, significance and condition of known heritage assets and the contribution that they may make to future development in the area.
31. So it seems LPAs are to assess the extent significance and condition of known heritage assets in their areas. To a large extent this has already been done in relation to listed buildings but I am sure we are all aware of the limitations of list descriptions in terms of appraising significance. In relation to conservation areas, my experience is that notwithstanding the exhortation in PPG15 the need for clear justification of designation⁷, there is a widely varying difference in the quality of the appraisal documentation kept by local authorities. Whilst the lack of an appropriate assessment/justification was a matter to which the Secretary of State would have regard in PPG15⁸ that policy is not repeated in the draft PPS. The assumption appears to be that all LPAs will by now have modern assessments to justify designation. That is not however realistic.
32. If the basis of the designation of a conservation area by the LPA is not properly justified it is unclear what a developer must do to ensure that its significance is assessed appropriately in order to satisfy the tests for validation of his application for planning permission. Is the developer to undertake the conservation area appraisal himself?
33. It is clear, that this task of collating the historic environment record will impose additional burden upon the public purse at a time when even essential services are likely to be cut. As a result, I doubt that the theoretically positive step of providing a publicly accessible local database will prove to be successful in practice.

Pre-Application Discussions

34. The draft PPS is very keen on "early engagement" in relation to applications for planning permission that are likely to impinge upon heritage assets. It envisages agreement being reached between developer and LPA as to the nature and extent of the significance of the heritage asset concerned.

⁷ PPG15 para 4.4

⁸ PPG15 para 4.5

35. No doubt if such pre-application discussion comes about it may be helpful in guiding development and reducing conflict. However, again there are practical difficulties that mean that this is unlikely. There are many local authorities who simply do not have the resources to be able to engage in a meaningful way in detailed pre-application discussion as to the significance of a heritage asset. They either lack the human resources (i.e. they are understaffed) or they lack staff with the necessary expertise. LPAs are told to engage suitable experts to assist them⁹, but if they do this at all, it is highly unlikely to occur at the pre-application stage.
36. In an ideal world, I am sure that all planning applications could be resolved by early engagement in pre-application discussions but the reality is that many developers will not be able to schedule meaningful pre-application discussions because there is insufficient man power for these to take place. If they do get a meeting it will be with a young planner with little experience, quite probably from overseas on a short term contract and who has little or no personal stake in the outcome of the discussions. If those issues can be grappled with then I am sure that pre-applications discussions will have a helpful role to play.

Preserving the Setting

37. It has long been accepted that development outside the setting of a heritage asset can have a material impact upon the setting of such an asset. Indeed, there is guidance that the effect of this should be considered in PPG15¹⁰ with the example given: "a proposed high or bulky building might also affect the setting of a listed building some distance away."
38. The draft PPS however makes no express reference to this point. It confines itself to providing guidance in relation to development within the setting of a heritage asset¹¹. This raises an interesting question: is the failure to address the implications of development outside of the setting a deliberate change of policy such that the impact of a development outside of the setting of a heritage asset should have little weight in the planning balance? If it is, the promoters of tall buildings everywhere will rejoice as this would represent a significant relaxation of what has proved to be a significant constraint

⁹ Draft PPS para HE9.3

¹⁰ PPG15 para 2.17

¹¹ Draft PPS para HE9.1, 9.7 and 11.1-2.

on tall buildings to date. ON the other hand it may simply be an unintended omission. Without guidance on the point from with the draft PPS however those engaging with such issues and there are many of us are left in a difficult and uncertain position.

Enabling Development

39. The draft PPS finally provides national guidance on the concept of enabling development i.e. development that is contrary to the development but which would secure the future conservation of a heritage asset. Up until now there has been no national guidance on this. The approach adopted very much reflects the approach adopted in the English Heritage document "Policy and Guidance on Enabling Development and the Conservation of Significant Places" June 2001 and 2008 editions.
40. The PPS sets out a number of factors that will be relevant when striking the planning balance required in determining enabling development applications. This is to be welcomed as it is likely to assist significantly in the decision making process.

Conclusion

41. As to whether the draft PPS gets the balance right between protecting heritage assets and yet allowing modern development to come forward, there are real questions in that regard. It is at the very least unclear whether the Government intends in the PPS to provide greater flexibility in relation to development in proximity to heritage assets of lesser significance. If it is, then it remains to be seen whether that flexibility will operate successfully as a matter of law and as a matter of practice.
42. I started out by examining the Government's own goals for the draft PPS. One of the main objectives the Government sets itself was to reduce uncertainty. What is clear to me is that this objective has not been achieved in the draft. There are significant new uncertainties introduced.

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