

Planning decision-making involving heritage



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Heritage concepts: significance

- Critical concept – this is the thing that is actually protected!
- NPPF glossary:

“The value of a heritage asset to this and future generations because of its heritage interest. The interest may be archaeological, architectural, artistic or historic. Significance derives not only from a heritage asset’s physical presence, but also from its setting.”

Heritage concepts: significance

- Need to consider:
 - Nature of significance: what is the asset sensitive to?
 - Extent of significance: how adaptable is the asset? How viable is its retention or reuse?
 - Level of significance
 - Cumulative impacts?

Heritage concepts: setting

- Protection of certain assets extends to setting as well as physical fabric
- NPPF definition:

“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.”

Heritage concepts: setting

- Historic England PN3: the Setting of Heritage Assets
 - Setting related to, but not the same as:
 - Curtilage
 - Area character
 - Area context
 - Landscape

Heritage concepts: setting

- Setting often visual and connected to views ... but non-visual aspects can be part of a setting as well.
- Smells can harm a setting! *R (Palmer) v Herefordshire CC* [2017] 1 WLR 411

Heritage concepts: harm

- Three categories of harm:
 - Substantial
 - Less than substantial
 - None
- No other categories of harm - in particular, no such thing as de minimis in this context: minimal harm counts as less than substantial:
 - *R (James Hall & Co Ltd) v Bradford MDC* [2019] EWHC 2899 (Admin)

Heritage concepts: harm

- Category determines the applicable policy test for development control
- Both the level of harm and the approach adopted to assessing that level are matters of fact and planning judgment:
City & Country Bramshill Ltd v SSHCLG [2021] EWCA Civ 320
- Extent of harm within the broad categories is relevant to weight

Heritage concepts: “substantial” harm

- Harm is substantial where the proposal “*would have such a serious impact on the significance of the asset that its significance was either vitiated altogether or very much reduced*”
 - *Bedford BC v SSCLG* [2013] EWHC 2847 (Admin) per Jay J at para 25.

Statutory obligations

- Planning (Listed Buildings and Conservation Areas) Act 1990
- S. 66: requires special regard to the desirability of preserving Listed Buildings or their settings or any features of special architectural or historic interest which they possess
- S. 72: requires special attention to be paid to the desirability of preserving or enhancing the character or appearance of conservation areas
- In practice, reflected in the relevant NPPF tests:
Mordue v SSCLG [2016] 1 WLR 2682

The development plan

- Invariably contains heritage policies
- Will almost always reflect the statutory duties and the NPPF
- Tip: even where statute, DP and NPPF all posit the same test, worth mentioning all three in the report to committee

The NPPF

- Section 16
- Overarching policy objective: para 184:

These assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance, so that they can be enjoyed for their contribution to the quality of life of existing and future generations

The NPPF

- Two classes of heritage asset for NPPF purposes:
 - Designated assets: A World Heritage Site, Scheduled Monument, Listed Building, Protected Wreck Site, Registered Park and Garden, Registered Battlefield or Conservation Area
 - Non-designated assets: everything else!

The NPPF

- Starting point: para 190 - what's the significance of the asset? For the LPA to identify and assess ... but applicant must provide info on significance (para 189)
- Para 192 – must take account of:
 - the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
 - the positive contribution that conservation of heritage assets can make to sustainable communities including their economic vitality; and
 - the desirability of new development making a positive contribution to local character and distinctiveness.

The NPPF

- Para 193 – must give great weight to conservation of designated heritage assets, irrespective of classification of harm
- Para 194: substantial harm to Grade II Listed assets should be exceptional. Substantial harm to Grade I or II* assets should be wholly exceptional
- Para 195: where harm substantial, PP should be refused unless harm necessary to achieve substantial public benefits that outweigh the harm, or a 4 part test for re-using otherwise unusable assets is met
- Para 196: where harm less than substantial, weigh harm against the public benefits – not a flat balance though

The NPPF

- Para 197: for non-designated assets, straightforward balance between benefits and harms
- Para 200: look favourably on proposals that preserve elements of setting that make positive contributions to an asset's significance.
- Para 201: in CAs, apply the para 195/196 balances, as appropriate, where there is the loss of an element that makes a positive contribution to the CA's significance

Conducting the balancing exercise

- No prescribed method
- *City & Country Bramshill* per Lindblom LJ (para 76):

Identifying and assessing any "benefits" to weigh against harm to a heritage asset are also matters for the decision-maker. ... What amounts to a relevant "public benefit" in a particular case is, again, a matter for the decision-maker. So is the weight to be given to such benefits as material considerations.

Conducting the balancing exercise

- *City & Country Bramshill* per Lindblom LJ (para 78):

Cases will vary. There might, for example, be benefits to the heritage asset itself exceeding any adverse effects to it, so that there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with.

Evidencing the balance

- In general, where a paragraph from NPPF section 16 is mentioned, the inference is that the whole of the section is properly taken into account:
Mordue
- Good practice to mention all factors and policies though – even post-*Mordue*, heritage is a key area of challenge, and better to be safe than sorry

Evidencing the balance: cautionary tales

- *R (Wyeth-Price) v Guildford BC* [2020] EWHC 3355 (Admin)
 - Report to committee failed to advise members on how to carry out the heritage balance, and failed to mention NPPF paras 193 or 194
- *R (Liverpool Open and Green Spaces Community Interest Co) v Liverpool CC* [2021] P&CR 10
 - RtC unlawful where failed to report objections from the LPA heritage conservation team

Thank you for listening

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