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Bramshill: the Court of Appeal speaks on heritage

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The section 66 test

Section 66(1) of the Listed Buildings Act provides:

"66. (1) In considering whether to grant planning permission ... for development which affects a listed building or its setting, the local planning authority or ... 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."

NPPF, paragraph 190

“Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (including by development affecting the setting of a heritage asset) taking account of the available evidence and any necessary expertise. They should take this into account when considering the impact of a proposal on a heritage asset, to avoid or minimise any conflict between the heritage asset’s conservation and any aspect of the proposal.”

NPPF, paragraph 193

“When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation (and the more important the asset the greater the weight should be). This is irrespective of whether any potential harm amounts to substantial harm, total loss or less than substantial harm to its significance.”

NPPF, paragraph 194

“Any harm to, or loss of, the significance of a designated heritage asset (from its alteration or destruction, or from development within its setting), should require clear and convincing justification.

Substantial harm to or loss of:

- a) grade II listed buildings, or grade II registered parks or gardens, should be exceptional;
- b) assets of the highest significance, notably scheduled monuments, protected wreck sites, registered battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.”

NPPF, paragraph 195

“Where proposed development will lead to substantial harm to (or total loss of significance of) a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that:

- (1) the substantial harm or total loss is necessary to achieve substantial public benefits that outweigh that harm or loss, **or**
- (2) all of the following apply:
 - a) the nature of the heritage asset prevents all reasonable uses of the site; and
 - b) no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
 - c) conservation by grant-funding or some form of not for profit, charitable or public ownership is demonstrably not possible; and
 - d) the harm or loss is outweighed by the benefit of bringing the site back into use

NPPF, paragraph 196

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

Case law principles

- ***Barnwell Manor (2014)*** - a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight"
- ***South Lakeland District Council (1992)*** - the "general duty" in section 66(1) "applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance".
- ***Jones v Mordue (1995)*** - Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty.

Rule of 6 (heritage principles)

- (1) Heritage assessment is a rigorous step by step process; this is not a standard “planning balance”
- (2) Each asset is protected individually – it must be assessed individually as well (though in practice considerations will overlap)
- (3) Forming a view on significance is an essential threshold step to any robust heritage analysis
- (4) A finding of harm needs to be made in relation to each asset; the magnitude of the harm should be clearly expressed
- (5) If harm found, work through paragraph 195/196 as appropriate
(you’re allowed to balance in 196)
- (6) Sit back and relax (see Jones v Mordue)

Palmer

“I would accept ... that where proposed development would affect a listed building or its setting in different ways, some positive and some negative, the decision maker may legitimately conclude that although each of the effects has an impact, taken together there is no overall adverse effect on the listed building or its setting. That is what the officers concluded in this case.” (Palmer, Lewison LJ)

The Inspector in *Bramshill* on Palmer

“In my assessment the judgement does not necessarily bring me to a conclusion that an internal heritage balance should be carried out in the manner that the appellant advocates. The case clearly involved a wholly different context and set of circumstances and the conclusions relating to harm were based on avoidance through mitigation measures rather than any assessment of whether the benefits of the development outweighed any harm. However, the judgement clearly does reinforce that a balancing exercise needs to be carried out but it does not direct the decision maker to only one method by which that should be done...” (Inspector in Bramshill, para 125 of decision letter)

The Inspector in *Bramshill* on Palmer

“The cases before me are complex with multiple works involved. Some of the benefits to the assets are not proposed with the individual developments themselves but are put forward as a part of other developments subject to separate decisions. In this context, I have adopted a straightforward application of paragraphs 190 and 193-196 of the [NPPF].” (Inspector in Bramshill, paragraph 127 of decision letter)

Palmer – what did the Court of Appeal say?

- Section 66(1) does not require a decision-maker to undertake a “net” or “internal” balance of heritage-related benefits and harm as a self-contained exercise preceding the engagement of para 195/196 of the NPPF.
- The separate balancing exercise may have been an exercise the inspector could have chosen to undertake when performing the section 66(1) duty and complying with the corresponding policies of the NPPF, but it was not required as a matter of law.
- There is no one approach, suitable for every proposal affecting a "designated heritage asset" or its setting. The approach to be taken will be a matter of planning judgment on the facts of the case, heeding the statutory scheme and basic principles of the case law