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# Current issues in heritage law and practice

Harriet Townsend and Emma Dring

# What we will cover



## Emma Dring

- Tall buildings and heritage impact
- Harm
- Optimum viable use



## Harriet Townsend

- Climate change, renewable energy and the historic environment
- Coronavirus implications
- *Dill v SSHCLG* [2020] UKSC 20



# Tall buildings and heritage impact



# 1. Historic England consultation



- Current edition of HEAN 4 published 2015
- Consultation on revised version closes **28 May 2020**



# What will change?



1. Updated references to latest version of NPPF and current policies.
2. Greater emphasis on the importance of good design.
3. Further advice on defining 'tall' buildings, with a case study example.



4. Stronger emphasis on the importance of plan-led development
5. Acknowledges new technologies and tools for considering proposals: 3D modelling, 'views studies', virtual reality headsets used on-site.

## 2. Chiswick Curve





# Inspector's report



- Less than substantial harm to heritage assets including 4 CAs and a WHS (Kew Gardens).
- Outweighed by benefits of new housing and workspace, and design.
- Recommended approval

*“the Chiswick Curve is a quite brilliant response to the difficult problems presented by the immediate context of the site.”*

# Secretary of State decision



- Chiswick Curve not a “*brilliant response*” to its immediate context, in fact it would dominate the area due to its scale and massing.
- No weight to design as a benefit in the balance.
- Economic benefits would also arise from an alternative scheme with less heritage impact (e.g. the Citadel).
- Benefits do not outweigh less than substantial harm. Permission refused.

# High Court challenge: *Starbones Ltd v SSHCLG* [2020] EWHC 526



- Did SoS ignore relative (i.e. greater) heritage impacts of alternatives, including the Citadel?
- No. Inspector's assessment of relative impacts was more nuanced than C suggested. SoS was aware that the Citadel would also cause heritage harm.
- SoS reasons were sufficient. No need to balance the benefits of the Citadel against heritage harm - not a principal controversial issue.

# What does the case tell us?



1. Design of tall buildings can be a make or break factor in the NPPF 196 balance - but can be very subjective.
2. Difficult to succeed on a reasons challenge.
3. Where heritage impact is in play, it is often necessary to consider alternative schemes.
4. But this only goes so far. No need to assess them to the same extent as the appeal scheme.

⋮⋮⋮ What is the 'optimum viable use' of a  
••• heritage asset?



# General need to consider alternative schemes in heritage cases



- Statutory duty in s. 66/72 “*implies the need for suitably rigorous assessment of potential alternatives*”: *Forge Field Society v Sevenoaks* [2015] JPL 22
- Applies where there would be direct or setting impact.
- Could involve consideration of alternative sites for development, or alternative uses of the same site.

# Optimum Viable Use - NPPF para 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.

# 1. What is the “OVU”?



“... If there is only one viable use, that use is the optimum viable use. If there is a range of alternative economically viable uses, **the optimum viable use is the one likely to cause the least harm to the significance of the asset**, not just through necessary initial changes, but also as a result of subsequent wear and tear and likely future changes. The optimum viable use may not necessarily be the most economically viable one ....”

PPG: para 15 of Historic Environment section

## 2. How does the OVU feature in decision making?



- It is a form of ‘public benefit’: delivering the OVU is a factor which might outweigh less than substantial harm.
- Also, there is “*a compelling basis for refusing permission*” for a proposal which does not represent the OVU: *Gibson [2012] EWHC 1472*

### 3. When is it 'appropriate' to take OVU into account?



- If the asset is 'capable of having a use', the OVU should be identified and taken into account.
- Not relevant for heritage assets with no or very limited economic use e.g. some monuments.
- Not relevant for composite heritage assets such as WHSs and CAs, as no single use. But may be relevant for individual assets within the designated area.



## 4. How much detail is needed about possible alternative schemes?





*Fulham Town Hall, April 2017: 3140593 & 3140594*

- Council put forward a “*carefully developed illustrative scheme*” for hotel conversion. Less harmful, but not viable.
- Appeal scheme viable, but damaged important parts of the fabric of the building.
- Viability appraisal based on notional office/storage use. No detailed scheme, but viable and would need fewer alterations than appeal scheme or hotel use = OVU



## *R (JH & FW Green Ltd) v South Downs NPA* [2018] EWHC 604

- Conversion of Georgian house to a hotel.
- Alleged failure to consider whether single residential use was the OUV.
- Judge: there is a “*need for alternative proposals to be demonstrably **substantial rather than speculative** before they can realistically be considered as candidates to be the optimum viable use.*”







## *City & Country (Bramshill) Ltd v SSHCLG* [2019] EWHC 3437

- Inspector: Nothing put forward to persuade her that an alternative approach could not be taken, so “*no compelling evidence before me that [the appeal scheme] represents the [OVU]*”
- High Court: “*I do not consider that a decision maker is only entitled to have regard to [alternatives] in cases where a specific alternative development has been put forward in some detail or even in outline.*”



## 5. What does 'viability' mean in this context?



Standard approach:

- Viability = **value** generated by a development is more than the **cost** of developing it.
- General assumption that viable with developer return of 15-20% of GDV.

*Fulham Town Hall case:*

- Appellant argued for standard approach.
- Council argued that viability in context of OVU = any positive land value, sufficient return to release land, sustainable in the long term.



- No conclusion reached. Council's proposed alternative was not viable either way, the other alternatives were viable on standard approach.
- Inspector uneasy about two different meanings: *“would imply a degree of verbal infelicity on the part of those who drafted the policy”*
- However they could be considered separately, especially as no doubt about willingness of buyer and seller, and *“no need to incentivise these parties to make the land available”*



# “Less than substantial harm” – is there a scale?



- Shimbles [2018] EWHC 195: Two categories of harm in NPPF “adequate to enable the weighted balancing exercise to be carried out”, further subdivision would lead to “over-refinement”.
- In practice experts and decision makers often do place less than substantial harm on a scale
- PPG para 18: “Within each category of harm ... the extent of the harm may vary and should be clearly articulated.” (July 2019 amends)

# What if there is no public benefit at all?



- Will be a rare case. “Public benefit” is a broad concept.
- PPG July 2019 amends:
  - *“could be anything that delivers economic, social or environmental objectives”*
  - Need not be *“visible or accessible to the public”*
- If there really is NO public benefit, expectation would be to refuse permission: statutory duty, *“clear and convincing justification”*.



# Harm by development in the setting of heritage assets



*Catesby Estates Ltd v Steer* [2018] EWCA Civ 1697

1. Concept of “setting” recognized by statute, but not defined. There is no precise definition
2. Implicit that it must be capable of being affected in some discernible way by development.
3. Necessary for decision maker to understand what the setting is (even if it can’t be precisely delineated) and whether development will be in it, or in some way related to it.



4. Identifying the extent of the setting is a matter of fact and planning judgment for the decision-maker. Concentrate on the *"surroundings in which the heritage asset is experienced"*
5. Focus will usually be on visual and physical factors, but others may be relevant e.g. odour, historic relationships between places.
6. The effect a development will have on the setting is a matter of judgement for the decision maker.

**Climate change and**

**::: renewable energy:  
··· implications for the historic  
environment**



# Climate Change targets and progress



- CCC: Annual Report 2019: “must do better”:-
  - 1 of 25 policy actions delivered in 2018
  - 7 of 24 indicators on track in 2018;AND
  - For net zero in 2050, emissions reduction must be 50% more per annum than required for the former 2050 target.
- CCC: “Reaching Net Zero in the UK” 15-5-20:-
  - “Major infrastructure decisions need to be made in the near future and quickly implemented”
  - We need “extensive electrification ... supported by a major expansion of renewable ... power generation.”





# To consider



- What is the national planning policy context for delivering the growth in renewable energy generation we know is necessary?

and

- Does it ensure the historic environment receives the “right” degree of protection?



# National Planning Policy - Wales



- Large scale renewables:
  - PPW 5.9 + TAN 8 (renewable energy)
  - PPW 6.1 + TAN 24 (historic environment);  
Summary: Strategic Search Areas, plan-led approach.
- Welsh Gov decision making often pro-development.
  - Cadw – the Welsh Gov’s Hist Env Service – no guidance on major renewables.
  - Hist Env Wales Act 2016 s.38 Advisory Panel for the Welsh Historic Environment (not in force)

# National Planning Policy - England



- NPPF 151 and 154 (**fn49**) – local community backing needed for onshore wind.
- NPPF Ch16 184-202 (historic environment)
- PPG 5-007, 013, and 019
  - Gt care to conserve heritage assets
  - Onshore wind and solar have potential for substantial harm
- NSIPs: EN1 & EN3 – repeat general heritage policy [2016 – onshore wind removed from NSIP regime]

# Implications for delivery



- Reliance on onshore renewables (esp wind in England) to respond to the climate emergency may be unwise:-
  - In England, reliance on community support appears naively optimistic;
  - The development plan process is slow;
  - Nowhere is there objective guidance on how to strike the balance between the public benefit of renewable energy and any residual harm caused to the significance of heritage assets
- Delays in securing consent and the economic effect of the coronavirus have to increase the challenges.

# Historic England Consultation



- Draft Advice Note “Commercial renewable Energy development and the historic environment”. Consultation to 28 May 2020.

## **What is its scope and purpose?**

- It does not cover small scale domestic projects
- An overview of historic environment issues.
- Chapters on offshore wind, solar, biomass and energy from waste – not onshore wind (although it is within scope of Note) – “explore specific issues” linked with those technologies.

# Adds little to the NPPF



- “32.....Determining the balance between harm and benefits is done on a case by case basis, taking account of a range of factors and relevant policy and guidance (including other relevant advice in this advice note).
- “33. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset (NPPF, paragraph 197).”

# Contains some useful tips?




Or are they simply standard practice, adding nothing to existing good practice advice?

Notes the importance of

- visualisations,
- focal length,
- pre-application engagement,
- enabling design to take account of heritage assets







# **Coronavirus: miscellaneous issues for the heritage sector**

# Issue 1



- Consultation/publicity –
  - SI 2020 / 505 intro amendments to Regs in England from 14-5-20
  - greater reliance on website is permitted where it is not reasonably practicable to post a notice or publish in a local newspaper
  - Affects apps for LBC, those affecting LBs & CAs, apps by LPAs to demolish, EIA Apps,
  - PPG amended [15-035 – 15-052] – nb guidance

# Issue 2



- Survey work / site visits -
  - The looser lockdown (from 13 May 2020) makes this easier, but as before the main questions are
    - i. Can the info I need be obtained from my desk? If so don't go. If not
    - ii. Can the visit be undertaken safely? If so go. If not
    - iii. Don't go – but document this and keep under review.
  - Current restrictions due to end 26-9-20

# Issue 3



- You want an application determined / appeal considered / advice provided and the public authority is slow or refuses to visit the site –
  - See the Government's Planning update on 13 May 2020 – expecting the planning system to operate flexibly so as to function as near normally as possible.
  - This includes digital meetings, and greater use of delegated powers.
  - Determination periods have not been extended.

⋮⋮⋮ *Dill v SSHCLG* [2020] UKSC 20

# Who decides what is a listed building?



27 dinosaurs listed Grade I



Henry Moore reclining figure listed Grade II



# Listed Buildings etc Act 1990 s.1



- "In this Act 'listed building' means **a building which is for the time being included in a list** compiled or approved by the Secretary of State under this section;

and for the purposes of this Act -

a) any object or structure fixed to the building;

b) **any object or structure within the curtilage of the building** which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948,

shall ... be treated as part of the building."

# Building or urn? Or both?



Supreme Court tells you *almost* all you need to know about what makes a thing (“an item”) a building :-

- Appellant can question the List in listed building enforcement notice appeal – Inspector to decide.
- the Skerrits criteria are relevant to the decision (a judgment) whether an item is a building.
- SoS should clarify guidance.

# Building or curtilage structure?



## SC notes

- The “disturbing lack of clarity about the criteria which have been adopted by the relevant authorities .... In determining whether free-standing items such as these are regarded as qualifying for listing protection” – under either limb of s1 [para 28]
- The “critical distinction” between the two limbs of s1 is “blurred” in the 2018 DCMS guidance on principles of selection.

# Curtilage structure?



SC guidance on whether curtilage structure forms part of listed building [paras 38-44]:-

- Consider how (and how permanently) the “item” is attached to the land; and the object of that attachment.
- No rule that must be fixed – could be held in place by its own weight.
- If neither physically attached nor directly related to the design of the lb or its setting – not a curtilage structure.

# Listed Building?



- SC guidance on the definition of building for s1 [paras 45-56]:-
  - Use the three part test of size, permanence, and degree of physical attachment adopted by CA in *Skerritts*.
  - A “need for something akin to a building operation” [para 53].
  - Historic interest found not merely in the object but in its erection in a particular place [para 54].

# Concluding thoughts



- Consultation on Historic England's draft Advice Note on major renewable energy ends today. It does not extend or alter planning policy which remains somewhat opaque both in England and Wales (though for different reasons) – but nor can it. It is technical advice and not policy.
- The Coronavirus makes things more difficult – but generally speaking not impossible.
- The question “what is a listed building” has a highly readable and authoritative answer in the Supreme Court's judgment in *Dill*.





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