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Developing greenfield sites outside settlement boundaries

Dr. Ashley Bowes, Jonathan Clay, and Rowan Clapp

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Developing Greenfield Sites

Designated Heritage Assets

Dr. Ashley Bowes



Overview



- Key questions to ask
- Key sources of advice and guidance
- Consequences for the planning balance



Key Questions to Ask

Key questions



- What is the significance of the asset?
- Is the development in the setting?
- How does the setting contribute to that significance?
- How will the development effect the ability to understand or appreciate significance?



Key Sources of Advice and Guidance

Key sources – Significance



- Heritage interest, comprises: archeological, architectural, artistic or historic (NPPF and PPG)
- Sources of significance:
 - List description
 - Conservation Area Appraisal
 - Often an incomplete picture and a proportionate description required by developer looking at other sources (e.g. historic maps)

Key sources – Setting



- Surroundings in which experienced – may be positive or negative
- A visual connection likely to give rise to a setting relationship
- But a visual or physical connection is not a prerequisite for land to fall within setting: **Steer** [2018] EWCA Civ 1697

Setting can be important!



Key sources – Contribution



- HE Good Practice Advice notes GPA2 & 3
- Contribution often the critical question (GPA3, step 2):
 - Physical surroundings
 - Intangible associations and patterns of use
 - Noises/smells
 - Views (from as well as to)

Key sources – Effects



- Substantial or less than substantial?
- Substantial a very high hurdle for a setting case
- Less than substantial harm a wide category
- So some gradation can be helpful for decision makers



Consequences

Consequences



- Any level of harm to a designated heritage asset should carry “great weight” (NPPF, para.193)
- Any harm should therefore require clear and convincing justification (NPPF, para.194)
- Encapsulate (and extend) the statutory duties at ss.66 and 72 Planning (Listed Buildings and Conservation Areas) Act 1990

When is there harm?



- No requirement to undertake a heritage balance to determine whether there is net ‘harm’
Bramshill [2021] EWCA Civ 320 @ 71
- However, it was open to an inspector to adopt that approach
- Bell Foundry (3245430 & 3245432) (12 May 2021) DL,22 “perfectly legitimate”

When is there harm?



- Even negligible amount of harm is still harm engaging the policy consequences in the NPPF: Hall [2019] EWHC 2899 (Admin) @ 34

Consequences



- Must undertake either para.195-196 NPPF balance
- Affording “great weight” to the harm
- Tells you whether the “tilted balance” at para.11(d)(ii) NPPF available
- Where a scheme fails para.195-196 – powerful material consideration

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Developing Greenfield Sites
Landscape and Visual Impact

Jonathan Clay



Overview



- LVIA what is it?
- Landscape Value
- Use of LCAs
- National Policy -Valued Landscapes
- Visual Impact
- Assessment: GLAVIA 3 and Box 5.1

Landscape and visual impact assessment



- GLAVIA (3rd ed) Landscape Institute guidelines provide non mandatory best practice for considering the significance of change to landscape and/visual environment resulting from development.
- Two assessments:
 - 1. Impact on landscape as a resource (“landscape effects”)
 - 2. Impact on views of landscape (“visual effects”)

Assessing significance of effects



- Susceptibility x Value =Sensitivity
 - Scale x Duration x Reversibility=Magnitude
 - Sensitivity x Magnitude =Significance
-
- GLAVIA 3rd Ed Fig 3.5

Landscape Character Assessment “LCA”



- What is the study area?
- Establish the baseline using the LCA
- Identify elements and features
- Identify key characteristics
- Consider “value” attached to landscape
- Identify landscape “receptors”
- What is interaction between development proposal and landscape receptors
- See GLAVIA 3 fig. 5.1

Landscape Value and Valued Landscape



- Landscape Policy Hierarchy
- NPPF 171:

“Plans should: distinguish between the *hierarchy* of international, national and locally *designated* sites; allocate land with the *least environmental or amenity value*, where consistent with other policies in this Framework⁵³; take a strategic approach to maintaining and enhancing networks of habitats and green infrastructure; and plan for the enhancement of natural capital at a catchment or landscape scale across local authority boundaries.”

International importance



- **World Heritage** sites must have values that are outstanding and universal. World Heritage Site status means that places are of international importance for the conservation of our cultural and national heritage.
- **European Landscape Convention** also known as the **Florence Convention**, promotes the protection, management and planning of European landscapes and organizes European cooperation on landscape issues.

National designations



- **(1)National Parks**

National Parks and Access to the Countryside Act 1949

The provisions of this Part of this Act shall have effect for the purpose—

(a)of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and

(b)of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.

National designations



s5(2)The said areas are those extensive tracts of country in England . . . as to which it appears to Natural England that by reason of—

(a)their natural beauty, and

(b)the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population, it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.

International and National Designations



(2) AONB Countryside and Rights of Way Act 2000 s.86

“In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty.”

Landscape Value and Valued Landscapes



- Box 5.1 of GLAVIA 3
- 8 factors:
 - Landscape quality (condition);
 - Scenic quality;
 - Rarity and representativeness,
 - Conservation interest,
 - Recreation value,
 - Perceptual aspects;
 - Associations

Landscape Value and Valued Landscapes



- Is Box 5.1 of GLAVIA 3 still a valid approach?
- Endorsed in Planning Court under the old [2012] NPPF:
- see CEG Land [2018] EWHC 1799 Reviewing Stroud
- Ouseley J: (1) A site's role in the wider landscape does not depend on "demonstrable physical attributes" of a particular site – "It would be bizarre if the way in which the red line was drawn, defining the site on whatever basis was appropriate, and which need have nothing to do with landscape issues, crucially affected landscape evaluation. It would be equally bizarre to adopt a wholly artificial approach to landscape evaluation where, in most cases, a development site is but part of a wider landscape".
- (2) Stroud decided that the concept of "valued landscapes" in [109] of the [2012] Framework is not confined to landscapes which have a particular designation;

Valued Landscapes 1



- NPPF para 170(a)

“Planning policies and decisions should contribute to and enhance the natural and local environment by:

a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);...

Valued landscapes 2



- Change in policy? Requirement for designation in Local Plan if not nationally designated?
- APP/Z1510/W/18/3197293 Flitch Way appeal decision:

“....the revised NPPF has clarified the position ... valued landscapes should be protected in a manner commensurate with their statutory status or identified quality in a development plan.... A straightforward reading of para 170(a) does not lead to the view that there are other categories of valued landscape (which are not statutorily designated or identified in a development plan). As the appeal site does not meet the requirements of para 170(a) I find that it is not a valued landscape.”

Valued Landscapes 3



Redrow Homes APP/Q4245/W/19/3243720:

“39. Undoubtedly this is an attractive area of countryside that is generally representative of the Settled Sandlands landscape type. Local people clearly hold it in high regard. However, I cannot agree that it is sufficiently intact or visually apparent to be of regional importance. I do not consider that it is a valued landscape within the terms of para 170 of the Framework”

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Developing Greenfield Sites

Planning Balance

Rowan Clapp

The presumption in favour of sustainable development



- **Para 7 NPPF:** “the purpose of the planning system is to contribute to the achievement of sustainable development.”
- **Para 11 NPPF:** Plans and decisions should apply a presumption in favour of sustainable development. For decision-taking this means ‘where **there are no relevant development plan policies** or the policies which are most important for determining the application **are out of date** (incl. where 5yhls is not demonstrated / HDT indicates delivery substantially below requirement for 3 years), granting permission UNLESS:
- **Para 11(d)(i)** - the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
- **Para 11(d)(ii)** - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole

But note para 11(c) NPPF



- Before turning to the operation of the tilted balance, para 11(c) offers the opportunity for the approval of a development (by operation of the presumption in favour of sustainable development) if a development proposal accords with an up to date development plan. Such proposals should be approved “without delay.”

Is there a breach of the development plan?



- Conflict with some or several policies does not automatically result in the development breaching the development plan (R(Corbett) v Cornwall Council [2020] EWCA Civ 508).
- S.38(6) PCPA 2004 requires authorities to make planning determinations in accordance with the DP unless mat cons indicate otherwise. They can't discharge this duty unless consider whether dev accords with DP **as a whole**.
- DPs include broad policy statements – some policies will pull in diff directions. Matter of planning judgment to determine whether proposal accords **as a whole** bearing in mind importance of relevant policies and extent of breach (see R v Rochdale MBC ex parte Mile [2000] EWHC 650 (Admin) at [48]-[51]) and Edinburgh City Council v Secretary of State for Scotland [1997] 1 W.L.R. 1447 at p.1459D-F))

Is there a breach of the development plan (2)



- Interpreting policy depends on sensible reading of language in context of each policy, and policies read together. An LPA's exercise of judgment in this will only be challengeable where irrational or perverse (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13)
- SO, even where policies point in different directions, they must be read together and the key question is whether the proposal accords with the development plan as a whole.

Application in Corbett



Breach -> Presumption against (para 12 NPPF) -> is tilted balance engaged? -> Are there any relevant DP policies



- First part of 11(d) - are there "no **relevant** development plan policies"?
- See Newman v SOSHCLG & Aylesbury Vale District Council [2021] EWCA Civ 15 at [37]-[39]) "that describes the situation where there is no policy in the development plan that is relevant to the decision whether the application should be granted or refused."
- "relevance" means "the policy or policies must have a real role to play in the determination of the application, but there is no requirement that it or they should be enough in themselves to enable the decision maker to grant or refuse that application. 'Relevant' does not mean and cannot mean, 'determinative'" and "the first trigger cannot be activated if there is a relevant policy in the local plan."
- **NOT** the case that mundane policies of general application will be 'relevant' in the sense necessary to avoid the tilted balance [41].

OR, are the most important policies out of date?



- Which of the relevant policies in the local plan are most important? Do they accord with current national policy? Note: a “policy is not out of date simply because it is in a time expired plan” (Newman at [43]) and it is **NOT** necessarily the case that if one important policy is out of date then the tilted balance is engaged.

Are the most important policies out of date?



- See Dove J in Wavendon Properties v SOSHCLG and another [2019] EWHC 1524 (Admin) (approved in Newman at 44 infra):
- “He rightly rejected that argument, pointing out that the first step in the exercise is to identify the policies that are the most important for determining the application; the second is to examine each of those policies to see if it is out-of-date; and the **third is to stand back and assess whether, taken overall, those policies could be concluded to be out-of-date for the purposes of the decision.**”

Should DP policies necessarily be disregarded when applying the tilted balance (para 11(d)(ii) NPPF)?



- No - “decision makers are not legally bound to disregard policies of the development plan when applying the ‘tilted balance’ under paragraph 11(d)(ii). The reasoning in the two judgments given in the Supreme Court in Hopkins Homes Ltd did not doubt that development plan policies were potentially relevant to the application of the policy for the ‘tilted balance’ in paragraph 14 of the NPPF issued in 2012. Both Lord Carnwath and Lord Gill appear to have accepted that the exercise of assessing a proposal’s compliance, or otherwise, with the ‘policies in this Framework’ could properly embrace consideration of related policies in the development plan, and sometimes this would make good sense because of the relationship between the two” (Gladman v SoSHCLG) [2021] EWCA Civ 104

Consideration of DP within tilted balance



- “Restricting the scope of paragraph 11d)ii to shut out the relevant policies of the development plan, as if they were automatically alien to the assessment it requires, would seem incompatible with the status and role of the NPPF.” (Gladman [53]).
- BUT “Whether and how policies of the plan are taken into account in the application of the policy comprising paragraph 11(d)(ii) will be a matter for the decision maker’s planning judgment in the circumstances of the case in hand” [61].

Weight attached to policies



- Out of date policies for the supply of housing are not irrelevant, nor do the provisions of the tilted balance within the NPPF “prescribe how much weight should be given to such policies in the decision. Weight is as ever a matter for the decision maker” (Suffolk Coastal DC v Hopkins Homes Ltd [2016] EWCA Civ 168 at [46])
- Weight “will vary according to the circumstances, including, for example the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy [...] it will always be for the decision maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing land that are out of date. This is not a matter of law; it is a matter of planning judgment” Suffolk Coastal DC v Hopkins Homes Ltd [2016] EWCA Civ 168 at [46].

Weight attached to policies



- See also Hallam Land v SoSCLG [2018] EWCA Civ 1808 at [44] – “the weight to be given to a policy ultimately depends not on its status but on its effect – whether it enables the requisite five year supply to be realised or acts contrary to that objective. Policies in a local plan are liable to carry less weight in the making of a decision on a proposal for housing development if – and because- their effect is to prevent a five year supply of housing land”
- “But in a case where the local planning authority is unable to demonstrate five years’ supply of housing land, the policy leaves to the decision-maker’s planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth” at [47].

Protecting the countryside ‘for its own sake’?



- Telford v Wrekin BC v SoSCLG [2016] EWHC 3073: “the NPPF does not include a blanket protection of the countryside for its own sake, such as existed in earlier national guidance (e.g. Planning Policy Guidance 7), and regard must also be had to the other core planning principles favouring sustainable development” [47].

‘Broken policies’



- Gladman Developments Ltd v Daventry DC & Anor [2019] EWCA Civ 1146 at [44]: “the Council granted planning permission in these other cases in an entirely conventional way, being persuaded on the particular facts that it would be appropriate to treat material considerations as sufficiently strong to outweigh policy HS24 in those specific cases. Having done so, there is no reason why the Council should not bring the contribution from those sites into account to show that it has the requisite five year supply of sites for housing when examining whether planning permission should be granted on Gladman’s application for the site in the present case. The fact that the Council is able to show that with current saved housing policies in place it has the requisite five year supply tends to show that there is no compelling pressure by reason of unmet housing need which requires those policies to be overridden in the present case; or – to use Mr Kimblin’s metaphor – it tends positively to indicate that the current policies are not “broken” as things stand at the moment, since they can be applied in this case without jeopardising the five year housing supply objective.”

‘Broken policies’ – one for the future?



- More recent decision in in Gladman Developments v SoSHCLG [2019] EWHC 127 per Dove J at [35]: “insofar as [the inspector] was drawn to the reasoning in paragraphs 41-46 of Sales LJ’s judgment as providing some kind of support for his conclusions, as I have already observed [...] **Sales LJ observations were obiter**”
- Rather, “it appears to me that in paragraph 44 of his judgment all that Sales LJ was suggesting was that the fact that the council had granted planning permission for some of the sites in the five year housing land supply on sites in breach of policy HS24 **would not in and of itself justify a conclusion that that policy was out of date. That was an issue which would require again, careful evaluation against the background of the terms of the policy, the available evidence as to its performance and scrutiny of its consistency with the Framework. That will be a case-sensitive exercise**”

Evidence benefits!



- Demonstrate achievable delivery.
- Show net benefit to biodiversity (para 170(d) NPPF) using DEFRA calculator.
- Identify affordable housing/open space needs of LA and show how they will be met/contributed to by the development.





Any Questions?

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