

## **CORE DOCUMENT 9.5.1**

# **Appendices to Heritage Proof of Evidence**

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On behalf of Ringers Road Properties Ltd

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London Borough of Bromley Ref: DC/21/05585/FULL1

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## **APPENDIX 1: OVERVIEW OF LEGISLATION AND POLICY**

## Legislation

1.1 Legislation relating to listed buildings and conservation areas is contained in the Planning (Listed Buildings and Conservation Areas) Act 1990 (the Act). Section 72(1) of the Act sets out the statutory duty in relation to any buildings or other land in a conservation area:

*"In the exercise, with respect to any buildings or other land in a conservation area, of any [functions under or by virtue of] any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."*

1.2 It is a well-established concept in case law that, for the purposes of the 1990 Act, 'preserving' means doing no harm. The Court of Appeal's decision in *Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council* [2014] (EWCA Civ 137) established that, having 'special regard' to the desirability of preserving the setting of a listed building under s.66, involves more than merely giving weight to those matters in the planning balance. There is a strong statutory presumption against granting planning permission for any development which would fail to preserve a listed building or its setting. In cases where a proposed development would harm a listed building or its setting, the Barnwell decision has established that the duty in s.66 of the Act requires these must be given "*considerable importance and weight*".

1.3 The key legal principles (as I understand it), established in case law, are:

- i. 'Preserving' for the purposes of the s.66 and s.72 duties means 'to do no harm'<sup>1</sup>.
- ii. The desirability of preserving the setting of a listed building, or the character or appearance of a conservation area must be given 'considerable importance and weight'<sup>2</sup>.
- iii. The effect of NPPF paragraphs 205-208 is to impose, by policy, a duty regarding the setting of a conservation area that is materially identical to the

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<sup>1</sup> *South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141 per Lord Bridge at p.146E-G in particular (obiter but highly persuasive).

<sup>2</sup> *Bath Society v Secretary of State* [1991] 1 WLR 1303, at 1319 per Glidewell LJ and *East Northamptonshire DC v SSCLG* [2014 EWCA Civ 137] (Barnwell Manor), at [22-29] per Sullivan LJ.

statutory duty pursuant to s.66(1) regarding the setting of a listed building (and s.72 in relation to the character and appearance of a conservation area)<sup>3</sup>.

- iv. NPPF paragraph 208 appears as part of a 'fasciculus' of paragraphs, which lay down an approach corresponding with the s.66(1) duty (and similarly the s.72 duty)<sup>4</sup>.
- v. If harm would be caused, then the case must be made for permitting the development in question, and the sequential test in paragraphs 206-208 of the NPPF sets out how that is to be done. If that is done with clarity, then approval following paragraph 208 is justified. No further step or process of justification is necessary<sup>5</sup>.
- vi. In cases where there may be both harm and benefits, in heritage terms, great weight has to be given to the conservation and enhancement of a listed building, and its setting, and the preservation and enhancement of a conservation area. It is, however, possible to find that the benefits to the same heritage assets may be far more significant than the harm<sup>6</sup>.
- vii. An impact is not to be equated with harm; there can be an impact which is neutral (or indeed positive)<sup>7</sup>.

### **The National Planning Policy Framework:**

- 1.4 Section 16 of the revised (December 2023) National Planning Policy Framework (the NPPF) deals with conserving and enhancing the historic environment, in paragraphs 195 to 214. Paragraph 195 of the NPPF states that heritage assets are an irreplaceable resource, and should be conserved in a manner appropriate to their significance.
- 1.5 According to paragraph 200, applicants should describe the significance of any heritage assets affected, including any contribution made by their setting. The level

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<sup>3</sup> *Jones v Mordue* [2015] EWCA Civ. 1243 per Sales LJ [at 28].

<sup>4</sup> *Jones v Mordue* [at 28] per Sales LJ.

<sup>5</sup> *R (Pugh) v Secretary of State for Communities and Local Government* [2015] EWHC 3 (Admin) as per Gilbert J [at 53].

<sup>6</sup> *R (Safe Rottingdean Ltd) v Brighton and Hove CC* [2019] EWHC 2632 (Admin) as per Sir Duncan Ouseley [at 99].

<sup>7</sup> *Pagham Parish Council v Arun District Council* [2019] EWHC 1721 (Admin) (04 July 2019), as per Andrews, J DBE [at 38].

of detail should be proportionate to the assets' importance and no more than is sufficient to understand the potential impact of the proposal on their significance.

- 1.6 According to paragraph 205, which applies specifically to designated heritage assets, great weight should be given to a heritage asset's conservation (the more important the asset, the greater the weight should be). This reflects the provisions of the 1990 Act in that it applies irrespective of whether it involves total loss, substantial harm, or less than substantial harm to significance.
- 1.7 Paragraph 206 states that any harm to, or loss of, the significance of a designated heritage asset should require clear and convincing justification. It then deals with substantial harm to, or total loss of significance of, different types of designated heritage assets. Paragraph 207 continues on the subject of substantial harm.
- 1.8 Paragraph 208, on the other hand, deals with less than substantial harm. Harm in this category should be weighed against the public benefits of the proposal. The National Planning Practice Guidance (NPPG) describes public benefits as "*anything that delivers economic, social or environmental progress*".

### **The Development Plan**

- 1.9 The Development Plan is the **London Plan** (2021) and the **Bromley Local Plan** (2019).
- 1.10 **The London Plan:** Policy HC1, entitled "*Heritage conservation and growth*" is the most relevant of the policies in Chapter 7. Parts A and B of the policy deals with strategic considerations/requirements and these are not relevant to determining planning applications.
- 1.11 Part C deals with development proposals affecting heritage assets, and their settings. This part of Policy HC1 requires development proposals to conserve the significance of heritage assets, by being sympathetic to the assets' significance and appreciation within their surroundings. The policy also requires the cumulative impacts of incremental change from development on heritage assets and their settings to be actively managed. Development proposals should avoid harm and identify enhancement opportunities by integrating heritage considerations early in the design process.

1.12 **Bromley Local Plan:** Policy 38 relates to statutory listed buildings. Since it is no part of the Council's case that there would be harm to a statutory listed building, I do not consider this policy further (but I reserve the right to respond to allegations of harm to statutory listed buildings, should that be made).

1.13 There are three separate policies in the Bromley Local Plan that relate to conservation areas: Policy 41, entitled "*Conservation Areas*"; Policy 42, entitled "*Development Adjacent To a Conservation Area*"; and Policy 43, entitled "*Trees in Conservation Areas*".

1.14 I can see from the wording of Policy 41 that it relates to development "*within a conservation area*" or demolition "*in a conservation area*". This policy is clearly not relevant to this case, where the appeal site lies outside of the conservation area. Neither does the appeal proposal affect trees in a conservation area, so Policy 43 is also not relevant. I quote Policy 42, the only relevant policy in the Bromley Local Plan, in full below:

***Policy 42***

***Development Adjacent To a Conservation Area***

*A development proposal adjacent to a conservation area will be expected to preserve or enhance its setting and not detract from views into or out of the area.*

1.15 Like the policy itself, the supporting text at paragraph 5.1.7 of the Bromley Local Plan is also short:

*"A Conservation Area is a designated heritage asset and therefore its setting is a consideration in the determination of planning applications that occur outside its designated boundaries."*

**APPENDIX 2:**

AN OUTLINE OF MY BROAD APPROACH TO SEETING ASSESSMENT

## 2.0 AN OUTLINE OF MY BROAD APPROACH TO ASSESSMENT

2.1 The heritage matters before this Inquiry concern the settings of the Bromley Town Centre Conservation Area. My assessment in relation to the setting of the conservation area follows the basic, stepped approach propagated in Historic England's *Historic Environment Good Practice Advice in Planning Note 3: The Setting of Heritage Assets* (GPA 3) (**CD 8.22**), albeit slightly adapted. The stepped GPA 3 approach is set out below, with my commentary in brackets:

**Step 1:** Identify which heritage assets and their settings are likely to be affected (this has already been done in the consideration of the appeal proposal during determination, and in the Council's reasons for refusal and SoC).

**Step 2:** Summarise the significance of the heritage asset (this is the first component of Step 2; the 'summary' varies in detail, according to the heritage asset in question and the likely effect on it) and assess the contribution of the setting to the significance of the heritage asset (the latter part focuses on the appeal site as part of the setting of the conservation area, although the conservation area has a setting extending in 360 degrees around it, only a small part of which takes in the appeal site).

**Step 3:** Assess the likely potential effects of the appeal proposal on significance (this is done in two stages; I first consider the change that the appeal proposal would bring about, and then I consider how that change would affect the significance of the asset). It is important to note that this is not an assessment of change to the setting of the conservation area, but change to the significance of the conservation area.

**Step 4:** Explore the potential ways to avoid or minimise harm (the appeal proposal includes mitigation by design, whereby the submitted scheme reflects ways in which harm has been reduced, e.g. the stepped form of the buildings, the use of materials and elevational design/articulation).

**Step 5:** Make and document the decision and monitor outcomes (this is not relevant to my role at the Inquiry).

2.2 The Inspector will be familiar with GPA 3 and setting assessments; I do not set that out in full detail. However, there are a few points or principles that I draw attention to below, as relevant to how I approach setting assessments.



- 2.3 **The experiential nature of setting:** The NPPF defines setting as the surroundings in which a heritage asset is experienced. This experiential aspect of setting goes beyond what may (or may not) be visible at a particular point, as part of an overall kinetic experience of the heritage asset in the round. This tends to go well beyond what may be seen in a particular view at a particular point (and all the more so in cases such as this, where there are no static vantage points of prospects that would be affected).
- 2.4 That is important, as in this case, where the views of the appeal site are part of a broader townscape. A viewpoint or photo is unlikely to capture the experience on the ground in 360 degrees. Focussing on a photo or a visualisation from a representative viewpoint therefore may distort the actual experience, which may be wider and broader, and of which the appeal site/scheme may proportionally be a smaller or more peripheral component.
- 2.5 **Representative visualisations:** A visualisation from a particular viewpoint will in almost all cases be representative of a wider experience. An exception would be a specific designed or intended vantage place or point, although there are none that I have identified in relation to the heritage assets and/or the appeal proposal in this case. However, even where there is a vantage place or point, caution must be exercised. The vantage point may be large enough to allow different points for different views, or it might allow views in different – sometimes opposing – directions. A visualisation from a representative location will not, in such cases, adequately capture the experience when standing on the ground, or moving through the townscape.
- 2.6 Although visualisations are useful, they are tools. Like all tools, they have limitations. There is always a risk that they could be misapplied, in my experience often inadvertently rather than intentionally.
- 2.7 A limitation of representative visualisations that I often come across is that a fixation develops about what may or may not be seen in a particular visualisation from a particular viewpoint. This tends to have the unfortunate and very often misleading consequence that the degree of change seen in the visualisation is then directly equated with the degree of harm to the significance of the heritage asset. For example, a very noticeable/prominent change seen in a visualisation may be equated with a high degree of harm to the significance of the heritage asset. In most cases, however, the significance of the heritage asset will be far more

complex, and take in much more, than what can be seen from/in a particular view, or area within the heritage asset (or its setting), or in a sequence of views in a particular direction.

2.8 There might also be other relevant factors to consider, such as the sensitivity of the setting (or particular part of the heritage asset's setting). GPA 3 describes sensitivity at paragraph 17 as "*the capacity of the setting to accommodate change without harm to the heritage asset's significance*". In other words, it is not simply a question of the degree of change that a development would bring about; it is also necessary to understand whether that part of the setting of the heritage asset is particularly sensitive to the change, or not, in the way it is experienced.

2.9 **The role of setting (and of representative visualisations in illustrating components of setting):** As is stated at paragraph 9 of GPA 3, setting is not itself a heritage asset, nor a heritage designation. The same can be said of representative visualisations, albeit it must be acknowledged that a representative visualisation will only ever show a component of the setting of the heritage asset, and not the experience in 360 degrees of that component of the overall setting. The importance of setting (or of a particular view, or series of views) lies in what it contributes to the significance of the heritage asset, or to the ability to appreciate that significance. When calibrating the effect as a consequence of a change to a view on the significance of a heritage asset, it is always necessary to:

- i. consider the extent to which the particular change in question would erode the contribution of that specific part of the heritage asset's setting to the asset's overall significance;
- ii. put that into context by considering the contribution of its entire setting to the asset's overall significance, and place the parts of its affected setting in that broader context; and
- iii. take into account the overall setting as a contributing part of the whole significance of the heritage asset in its totality.

2.10 The setting of the asset extends in all directions around it. Different parts of its setting will normally contribute in different ways to its significance. Some part (or parts) of a setting may be more sensitive than others, and contribute much more to the asset's significance than others. Some parts may not contribute to the asset's significance at all, or they may detract. It is rare indeed for only one part of the setting of a heritage asset to contain or encapsulate a great deal of its

significance. That tends to be all the more so with larger and more complex heritage assets, such as conservation areas, which can cover extensive and complex or multifaceted areas<sup>8</sup>.

2.11 **Visibility, change and harm to significance:** Neither the visibility of a proposed development, nor a change to the setting of a heritage asset, necessarily means there is harm to its significance. Case law<sup>9</sup> has made it clear that an “*impact is not to be equated with harm: there can be an impact which is neutral (or indeed positive)*”. A considerable visual change or highly prominent addition to the setting of a heritage asset may not result in any harm to its significance at all. Paragraph 18 of GPA 3 recognises that conserving or enhancing heritage assets by taking their settings into account need not prevent change.

2.12 Even where such a considerable or highly prominent addition is harmful, the degree of harm to the overall significance of the asset on the whole may well be of a low magnitude, despite the change being both harmful, and highly prominent in a particular view, sequence of views, or area. This is very well explained in a recent Secretary of State decision (APP/H5390/V/21/3277137), where the Inspector at 12.50 made the following observations about the general approach (i.e. nothing specific to that scheme):

*“In cases where the impact is on the setting of a designated heritage asset, it is only the significance that asset derives from its setting that is affected. All the significance embodied in the asset itself would remain intact. In such a case, unless the asset concerned derives a major proportion of its significance from its setting, then it is very difficult to see how an impact on its setting can advance a long way along the scale towards substantial harm to significance.”*

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<sup>8</sup> An example of how this approach is explained is from a relatively recent call-in inquiry (APP/G6100/V/19/3225884) where I gave heritage evidence. The Inspector, and the Secretary of State, agreed with my approach taken to harm to the setting of conservation areas. In essence, that means taking into account the significance of the conservation area as a whole, and taking into account the contribution of its entire setting, in 360 degrees, when assessing the impact of a single point block. As the Inspector noted at paragraph 399 of her report: *“It is important at this stage to address two points of principle. The first point is that the requirement is to consider the effect on the significance of the asset as a whole and not just a part of it. The use of views is a useful tool in the heritage analysis. However, it is not an end in itself and, in my opinion, the Council made the mistake of being overly reliant on the effect on views rather than considering the effect on significance of the asset overall. This is particularly relevant in relation to the particular conservation areas here because they are extensive and varied in character. This may mean that findings of harm will be more difficult to substantiate. Nevertheless, that is the approach that is required, and it must be followed [my emphasis].*

<sup>9</sup> *Pagham Parish Council v Arun District Council* [2019] EWHC 1721 (Admin) (04 July 2019), as per Andrews, J DBE at 38.

- 2.13 **Change over time:** As noted at paragraph 9 of GPA 3, the settings of heritage assets change over time. Understanding this history of change will help to determine how further development within the asset's setting is likely to affect the contribution made by its setting to its significance (this may have a bearing on the sensitivity of the setting of the heritage asset<sup>10</sup>). Settings that closely resemble the setting at the time the asset was constructed are likely to contribute particularly strongly to significance. However, settings which have changed may also enhance significance, e.g. where the townscape character has been shaped by cycles of change over the long term.
- 2.14 **Cumulative change:** As per paragraph 9 of GPA 3, where the significance of a heritage asset has been compromised in the past by unsympathetic development affecting its setting, consideration still needs to be given to whether additional change will further detract from, or can enhance, the significance of the asset.
- 2.15 I agree with that approach; my own approach is not to justify additional harmful development on the basis of existing harmful development. However, I highlight here that the baseline position must be taken into account, and the sensitivity of the setting (see the footnote below) may be relevant in such cases.
- 2.16 I also highlight that this part of GPA 3 refers to cases where the significance of a heritage asset has been compromised in the past by unsympathetic development. It is important to note that, in this case, the Inspector found that the development consented at 66-70 High Street would cause no harm to the significance of the Bromley Town Centre Conservation Area. It seems to me almost as though the Council still considers this to be harmful, e.g. as per paragraph 6.45 of the Council's Statement of Case.
- 2.17 **Views out from heritage assets:** Paragraph 16 of GPA 3 notes that views out from heritage assets that neither contribute to significance, nor allow an appreciation of their significance, are a matter of amenity rather than of setting.
- 2.18 **Night time effects:** I do not normally consider night time effects (paragraph 31 of GPA 3) in urban contexts. In most cases it is necessary to have light to appreciate significance of the heritage asset (unless it is itself illuminated at night),

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<sup>10</sup> Paragraph 17 at the bottom of page 7 and over onto page 8 of GPA 3 explains the sensitivity of setting as "... the capacity of the setting to accommodate change without harm to the heritage asset's significance".

and the heritage assets under consideration are not meaningfully appreciated in darkness. I can understand the relevance of a dark sky ambiance at sites that are truly isolated, but that does not apply in this case. For such an effect to occur, there would need to be a dark night sky that contributes to a sense of isolation, or absence of artificial lighting, combined with an absence of noise, which creates a true and historically important sense of isolation and/or tranquillity.

2.19 **The relevance of design quality:** As noted at paragraph 39 of GPA 3 (which deals with reducing the harm arising from development):

*"... good design may reduce or remove the harm, or provide enhancement. Here the design quality may be an important consideration in determining the balance of harm and benefit."*

2.20 This illustrates that good design may be capable of removing harm, and it can even provide enhancement, in place of harm. I read this as saying that there might be cases where, rather than causing harm, seeing a well-designed building in the setting of a heritage asset might be regarded as enhancing its setting.