

## APPENDIX 1 – LEGISLATION AND PLANNING POLICY

### Legislative Background

1. Legislation relating to the Historic Environment is primarily set out in the Planning (Listed Buildings and Conservation Areas) Act 1990 which provides statutory protection for Listed Buildings and Conservation Areas.

2. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 states:

*“In considering whether to grant planning permission [or permission in principle] for development which affects a listed building or its setting, the local planning authority or, as the case may be, 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.”*

3. For present purposes, one of the meanings of preservation, as it is meant in section 66(1) of the Act, is to keep safe from harm.<sup>1</sup> There is a strong presumption against the grant of permission for development that would harm the significance of a listed building, though the presumption can be overcome in certain circumstances.

4. In the 2014 Court of Appeal judgement in relation to the Barnwell Manor case<sup>2</sup>, Sullivan LJ held that:

*“Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given “considerable importance and weight” when the decision-maker carries out the balancing exercise.”*

### National Planning Policy Framework (2021)

5. The National Planning Policy Framework (NPPF) was updated in July 2021 and replaced the former NPPF (February 2019). It constitutes the

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<sup>1</sup> South Lakeland v Secretary of State for the Environment [1992] 2 AC 141.

<sup>2</sup> East Northamptonshire District Council v SSCLG (2015) EWCA Civ 137, Core Document H3, page 10, paragraph 24

Government's current national guidance and policy regarding development in the historic environment. It is a material consideration and includes a succinct policy framework for local planning authorities and decision takers. It relates to planning law by stating that applications are to be determined in accordance with the local plans unless material considerations indicate otherwise.

6. Paragraph 194 states that in determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, including any contribution made by their setting. The level 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.
7. As a minimum, Paragraph 194 states the relevant historic environment record should be consulted and that the relevant heritage assets should be assessed using appropriate expertise where necessary. In this case, issue has been raised with regards to the level of the information provided by the Appellants, specifically in relation to the assessment of the Appeal Scheme on the historic environment. There is no indication, for example, that the historic environment record was consulted in the process of the planning application.
8. Paragraph 195 states that 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 assessment into account when considering the impact of a proposal on a heritage asset, to avoid or minimise conflict between the heritage asset's conservation and any aspect of the proposal.
9. Paragraph 197 states that, in determining planning applications, local authorities should take account of the desirability of sustaining and

enhancing the significance of heritage assets by putting them to viable uses consistent with their conservation, in addition to the desirability of new development making a positive contribution to local character and distinctiveness.

10. Paragraphs 199 and 200 state that 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. 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.
11. 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. In this instance no clear and convincing justification for the harm to the heritage assets was provided by the Appellants.
12. Paragraphs 199 and 200 also discuss how substantial harm to different assets should be considered. For the avoidance of doubt, substantial harm is not alleged to any of the assets in this case.
13. Paragraph 201 deals with circumstances where a proposed development would lead to substantial harm to or total loss of significance of a designated heritage asset. Substantial harm is not alleged in this case.
14. Paragraph 202 deals with circumstances where a development proposal would lead to less than substantial harm to the significance of a designated heritage asset, confirming that this harm should be weighed against public benefits of the proposal, including, where appropriate, securing its optimum viable use.
15. Paragraph 203 deals with circumstances where a development proposal would affect the significance of a non-designated heritage asset, requiring a balanced judgement, having regard to the scale of any harm or loss and

the significance of the heritage asset.

#### National Planning Guidance

16. The then Department for Communities and Local Government (now the Department for Levelling Up, Housing and Communities) launched the planning practice web-based resource in March 2014, accompanied by a ministerial statement which confirmed that several earlier planning practice guidance documents were cancelled.
17. This also introduced the national Planning Practice Guidance (PPG) which comprised a full and consolidated review of planning practice guidance documents to be read alongside the NPPF.
18. The PPG has a section on the subject of 'Conserving and enhancing the historic environment' which at paragraph 007 (ID: 18a-007-20190723 revision date 23.07.2019) confirms that consideration of 'significance' in decision taking. It states:

*"Heritage assets may be affected by direct physical change or by change in their setting. Being able to properly assess the nature, extent and importance of the significance of a heritage asset, and the contribution of its setting, is very important to understanding the potential impact and acceptability of development proposals."*

#### Local Planning Policy

19. Applications for planning permission are to be determined in accordance with Local planning policy unless material considerations indicate otherwise.
20. Of principal relevance to built heritage is Policy CS14 (Protection or Enhancement of Heritage Assets) of the Hertsmere Local Plan (Core Strategy) 2013, which states:

*'All development proposals must conserve or enhance the historic environment of the Borough in order to maintain and where possible improve local environmental quality. Development proposals should be sensitively designed to a high quality and not cause harm to identified, protected sites, buildings or locations of heritage or archaeological value including Conservation Areas, Listed Buildings, Historic Parks and Gardens, Scheduled Ancient Monuments or their setting, and identified and as*

*yet unidentified Archaeological Remains. The Council will take account of available historic environment characterisation work, including Conservation Area appraisals and archaeological assessments, when making decisions affecting heritage assets and their settings.*

#### Other Policy and Guidance

21. My evidence has given due consideration to Historic England guidance on setting as set out in Historic Environment Good Practice Advice in Planning, Note 3, The Setting of Heritage Assets.<sup>3</sup>
22. When assessing the impact of proposals on designated heritage assets, it is not only a question of whether there would be a direct physical impact on that asset, but instead whether change within its ‘setting’ would lead to a loss of ‘significance’. This is as a consequence of indirect impacts.
23. In simple terms, setting is defined as ‘the surroundings in which a heritage asset is experienced’. The Historic England Good Practice Advice guidance on setting establishes that it has a ‘twin role’ in both contributing to significance and allowing heritage significance to be appreciated. It therefore must be recognised that ‘setting’ is not a heritage asset in itself. Its importance relates to the contribution it makes to the significance of the designated heritage asset and the extent to which it allows that significance to be appreciated.
24. As such, when assessing the impact of proposals on designated heritage assets beyond the boundary of a development site, it is not a question of whether setting would be affected, but rather a question of whether change within an asset’s ‘setting’ would lead to a loss of ‘significance’ or the ability to appreciate ‘significance’ based on the above ‘heritage interest’ as defined in the NPPF.
25. Set within this context, where the objective is to determine the impact of proposals on designated heritage assets beyond the boundary of a development site, it is necessary to first define the significance of the asset

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<sup>3</sup> <https://historicengland.org.uk/images-books/publications/gpa3-setting-of-heritage-assets/heag180-gpa3-setting-heritage-assets/>

in question - and the contribution made to that significance or the ability to appreciate that significance by its 'setting', in order to establish whether there would be a loss, and therefore harm. The guidance identifies that change within a heritage asset's setting need not necessarily cause harm to that asset - it can be positive, negative or neutral.

26. On a practical level, the Historic England guidance recommends a staged approach to assessing setting in relation to development management which is based on a five- step procedure, i.e.:

1. Identify which heritage assets and their settings are affected.
2. Assess the degree to which these setting make a contribution to the significance of the heritage asset(s) or allow significance to be appreciated.
3. Assess the effects of the proposed development, whether beneficial or harmful, on that significance or on the ability to appreciate it.
4. Explore ways to maximise enhancement and avoid or minimise harm; and
5. Make and document the decision and monitor outcomes.

27. As far as Step 2 is concerned, the guidance makes the following observations:

*‘The second stage of any analysis is to assess whether the setting of an affected heritage asset makes a contribution to its significance and the extent and/or nature of that contribution; both setting, and views which form part of the way a setting is experienced, may be assessed additionally for the degree to which they allow significance to be appreciated. ... this assessment should first address the key attributes of the heritage asset itself and then consider:*

*The physical surroundings of the asset, including its relationship with other heritage assets; the asset’s intangible associations with its surroundings, and patterns of use.’*

28. Thereafter, the guidance notes that ‘...this assessment of the contribution to significance made by setting will provide the baseline for establishing

the effects of a proposed development on significance, as set out in ‘Step 3’ below.’ Having established the baseline, the following guidance is provided in respect of an assessment of the effect upon ‘setting’; i.e.:

*‘In general, the assessment should address the key attributes of the proposed development in terms of its. location and siting; form and appearance; wider effects; and permanence.’*

29. Appeal decisions, e.g. Javelin Park, Gloucestershire (Ref 12/0008/STMAJW)<sup>4</sup>, have clarified the interpretation of existing guidance, establishing that the ability to see a proposed development, either from the heritage asset itself or from within its setting, should not be equated with harm to the significance of the asset.
30. The key issue is whether and to what extent the proposed development would affect the contribution that setting makes to the significance of the heritage assets.
31. Other relevant recent case law relating to the concept of the setting of heritage assets is to be found in the case known as Catesby Estates<sup>5</sup>, which in essence confirms that the setting of heritage assets is not confined to visual matters or views.
32. Abstract and historical considerations are part of setting, and while it is reasonable to consider the extent of setting there is usually no fixed boundary to it.

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<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/412072/15-01-16\\_DL\\_IR\\_Javelin\\_Park\\_2200210.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/412072/15-01-16_DL_IR_Javelin_Park_2200210.pdf)

<sup>5</sup> Catesby Estates Limited v Steer [2018] EWCA Civ. 1697.