



Heritage Law update

Policy Paper Number 1
March 2013

This briefing note identifies the principal changes to the Heritage Protection Regime since May 2010 and lists those proposals which are intended to be implemented shortly. Readers seeking a comprehensive review of the current system are referred to the English Heritage 'Guide to Heritage Protection in England' which is a helpful on-line source. This note relates specifically to the situation in England.

There has been a plethora of proposals to modify the Heritage Protection Regime since the year 2000. Proposals contained in the Heritage Protection Reform Bill (draft 2008) did not become law, however the government has decided to promote some legislative changes in the Enterprise and Regulatory Reform Bill (2012) and some other policy changes. The Reform Bill identifies four intended changes to the current legislation:

- (i) The extent of a listed building's special interest is to be legally defined;**
- (ii) Developers will be able to seek a certificate of immunity from listing at any time;**
- (iii) Statutory Partnership Agreements between owners of listed buildings and local authorities; and**
- (iv) Removal of the requirement for conservation area consent when demolishing unlisted buildings.**

The Penfold Review (2010) also contained some proposals for improving the Listed Building consent regime which were published for consultation some while ago. The Department for Culture, Media and Sport has now responded to the consultation

with a further series of heritage and planning related amendments to the Enterprise and Regulatory Reform bill. These include:

- (v) A new system of national and local class consents granting LBC automatically for certain categories of work to buildings without need for an application; and**
- (vi) A new certificate of lawfulness for proposed works to listed buildings.**

It is understood however that the following will not now be included in the bill:

- *A proposal for a system of prior notification leading to deemed consent. This will be set aside for the time being.*
- *The suggestion of using accredited agents may be introduced outside of non-statutory powers; and*
- *Reforming enforcement powers for buildings at risk will be subject to further consideration by DCMS to establish whether statutory or non-statutory powers are the most appropriate.*

It should be noted that the Demolition Directive (1995) has been found by the courts to be inconsistent with the European Environmental Assessment directive as a result of the decision in *Save Britain's Heritage v SSCLG 2011*; changes to procedures have now been implemented.

Policy Changes

A number of policy changes have also taken place, the implications of which are yet to be fully tested. In particular the National Planning Policy Framework (NPPF), published in March 2012 has now been adopted.

The central theme of the NPPF is the presumption in favour of sustainable development. This is elaborated in 12, core land use planning principles. Whilst matters relevant to the historic environment are found throughout the document, section 12 paragraphs 126-141 (conserving and enhancing the historic environment) now replaces Planning Policy Statement 5.

The NPPF continues to advocate a significance-led approach to decision taking. The objective remains to conserve heritage assets for the quality of life they bring to future genera-

tions. This requires a balanced judgment when dealing with development proposals with designated heritage assets given great weight in the decision process.

The English Heritage Practice Guide which accompanied PPS5 remains operative, but is expected to be updated and rewritten to ensure compliance with the NPPF (see comments below in respect of the Taylor review).

Other recent English Heritage guidance which remains relevant for the time being includes:

- Enabling Development (2008);
- Setting of Heritage Assets (2011);
- Seeing the History in the View (2011); and
- Stopping the Rot (2012).

The Taylor Review

The Department for Communities and Local Government (DCLG) advised last year that Lord Taylor would be leading a review of national guidance now replaced by the NPPF. Lord Taylor reported in December 2012. The principal conclusion of the Taylor review is that the existing system of guidance is no longer fit for purpose and requires a radical and immediate overhaul. The implications for the heritage protection regime are important and the details of the various heritage specific recommendations can be found on the web site below.

Readers should note the conclusion that the Historic Environment Practice Guide (2010), which is a companion to Planning Policy Statement 5, is now considered to be out of date. In this regard Lord Taylor notes that English Heritage is working with

the Historic Environment Forum on new guidance to underpin the NPPF. Importantly Lord Taylor recommends that the existing guidance should only be withdrawn once the replacement guidance has been issued by the sector, to ensure that the NPPF is fully supported.

It is expected that Heritage Interests will be fully consulted before the guidance is formally adopted and the HTF will be consulting members as part of this process.

Lord Taylor also recommends the immediate cancellation of various heritage related guidance documents (Annex A to his report) which are now out of date and the retention of other guidance (Annex C) pending redrafting.

The Taylor recommendations are likely to be the subject of a two stage consultation process with a new web based suite of guidance in place by July 2013, however this is yet to be confirmed by government.

Local Plans, Neighbourhood Development Plans and the Localism Act 2011

Changes to the planning system have featured prominently in the coalition government's agenda. The planning system has been criticised for hampering and constraining growth and the changes now being brought forward are intended to simplify the process and make it more development responsive. The importance of the development plan and the way it underpins the application and decision process continues to be recognised however.

The manner in which the planning system should interact with local peo-

ple and communities has received considerable prominence through the introduction of the Localism Act 2011 and in particular the emphasis on the neighbourhood planning regime. Readers will be aware that Listed Building and conservation area consent decisions do not have to be determined in accordance with the development plan but should be determined in accordance with the law and the relevant policies within the NPPF. However, the objectives of the development plan and its policies may be a material consideration in the decision itself. The particular policies and proposals within the development plan may therefore be of considerable importance when considering the protection and enhancement of heritage assets.

Local Plan policies must be strategic in nature to ensure that neighbourhood development plans align with them. Such policies should seek out opportunities to conserve and where appropriate enhance the significance of heritage assets and the contribution of their settings. Where a neighbourhood development plan is found in conformity with a local plan the policies within it take precedence over any other non strategic policies in the local plan. Hence considerable care is required in the formulation of such policies.

Those involved in commenting on the strategic policies to be included in a local plan or in the preparation of neighbourhood development plans, need to ensure that plan policies offer an accurate and consistent interpretation of the NPPF, as their application may be tested through the planning decisions process, especially where development proposals might be subject to objection due to their perceived impact on heritage assets. The English Heritage guidance note

'Local Development Plans and Heritage' is a useful reference point.

The preparation of Neighbourhood Development Plans is outside the scope of this short briefing note, however both the NPPF and the English heritage web site provide advice on the matters to be considered and should be consulted at length.

Other matters of interest

The Localism Act 2011 also contained provisions enabling community groups to bid for land or buildings when they might come up for sale. Although this is a general provision not directly related to heritage assets the opportunity to negotiate the acquisition of an important heritage asset that may also have a community utility should not be overlooked.

Recent Legal Cases

The courts have been active on several fronts recently and some interesting decisions are identified below:

Conservation areas:

Arndale Properties v Worcester CC (2005)JPL.

Unlawful to designate a conservation area if the true purpose is to protect a single building.

Chandler v Sec of State 2007.

The requirement for development to enhance rather than just preserve a conservation area must be clearly stated in the development plan.

Trillium v Tower Hamlets LBC 2011

The Local Planning Authority must

be told all of the relevant facts when considering designation.

Listed Building and Ancient Monuments

SAVE Britain's Heritage v Secretary of State 2011 PTSR1140 CA

The direction in Annex A to Circ 10/95 has been found to be unlawful, but demolition consent may be granted by the General Permitted Development Order 1995 Part 31 (as amended).

R Garner v Elmbridge BC 2011 EWHC 86 affirmed by 2012 JPL 119,CA

Setting of a listed building is important but impact may not be negative and may be outweighed by other considerations. (HBMC (English Heritage)v Secretary of State 2009 EWHC 2287 JPL 451).

R Gibson v Waverley BC 2012 EWHC 1472

The optimum viable use for a listed building must be considered.

Royal Bank of Scotland v Allen 2010 1 EGLR 13

Duty under the Equality Act 2010 sec 20. (Adjustments to buildings to facilitate access by disabled people).

Kensington and Chelsea RBC v Secretary of State 2012.

Development Plan and conservation area statement relevant but not determinative of the decision.

Wandsworth LBC v Rashid 2010 Env. LR22 (unauthorised works)

LPA must have a clear policy and

follow it.

Value Added Tax

Exemption withdrawn by Finance Act 2012 sch 26 para 3; with effect from 1st October 2012.

Proceeds of Crime Act 2002

R v Johnson 2012 EWCA Crim 580 2 Cr App R (S) 87

R v Rance 2012 EWCA Crim 2023

Demolition in a conservation area and fines resulting.

Principal references and useful web site addresses:

Department for Communities and Local Government (2012). National Planning Policy Framework. HMSO 2012

Harwood,R. Historic Environment Law, Planning, Listed buildings, Monuments, Conservation Areas and Objects. Institute of Art and Law 2012

Mynors,C.(2006) Listed Buildings, Conservation Areas and Monuments (Fourth Edition) Sweet and Maxwell Ltd

www.ancientmonumentsociety.org.uk

www.communities.gov.uk

www.dcms.gov.uk

www.english-heritage.org.uk

www.gardenhistorysociety.org

www.georgiangroup.org.uk

www.heritageinformation.org.uk

www.hlf.org.uk

www.ihbc.org.uk

www.spab.org.uk

www.c20society.demon.co.uk

www.victoriansociety.org.uk

The Taylor Review can be found at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/39821/taylor_review.pdf

Consultations and updates

It is apparent that the situation remains very fluid, indeed something new emerges almost every week. It is recommended that members keep in touch with the Historic Towns Forum web site historictownsforum.org which will be regularly updated concerning legislation, policy and case law as changes emerge. The site will also set out the proposed member consultation arrangements in respect of the new heritage guidance regime.