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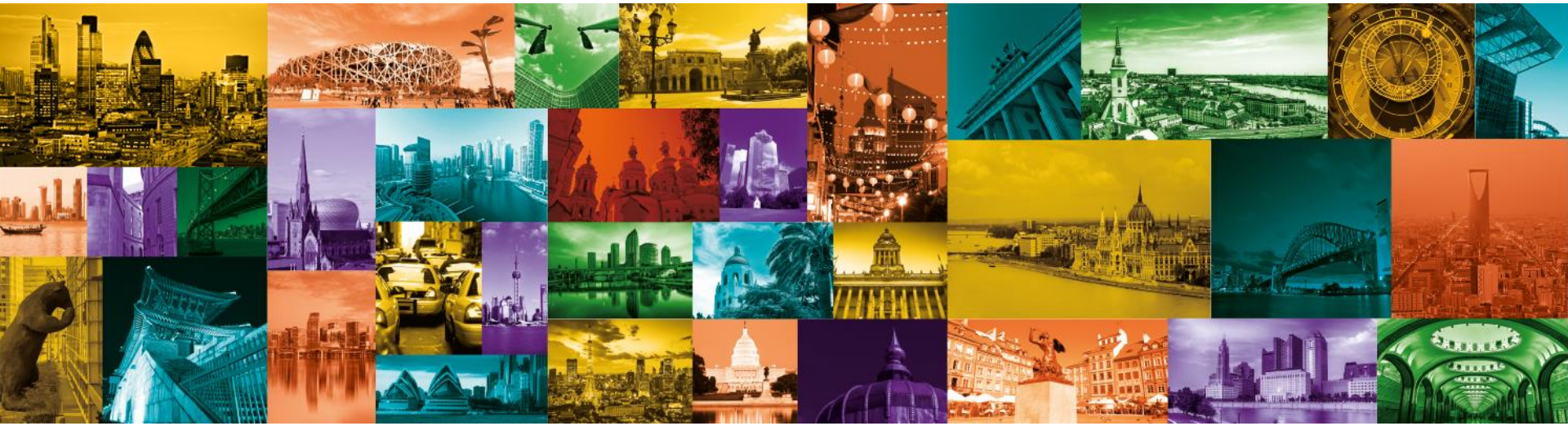
RTPI: Spring planning law update

Heritage, harm and how to balance



City & Country Bramshill Limited v Secretary of State (Court of Appeal, 9 March 2021)

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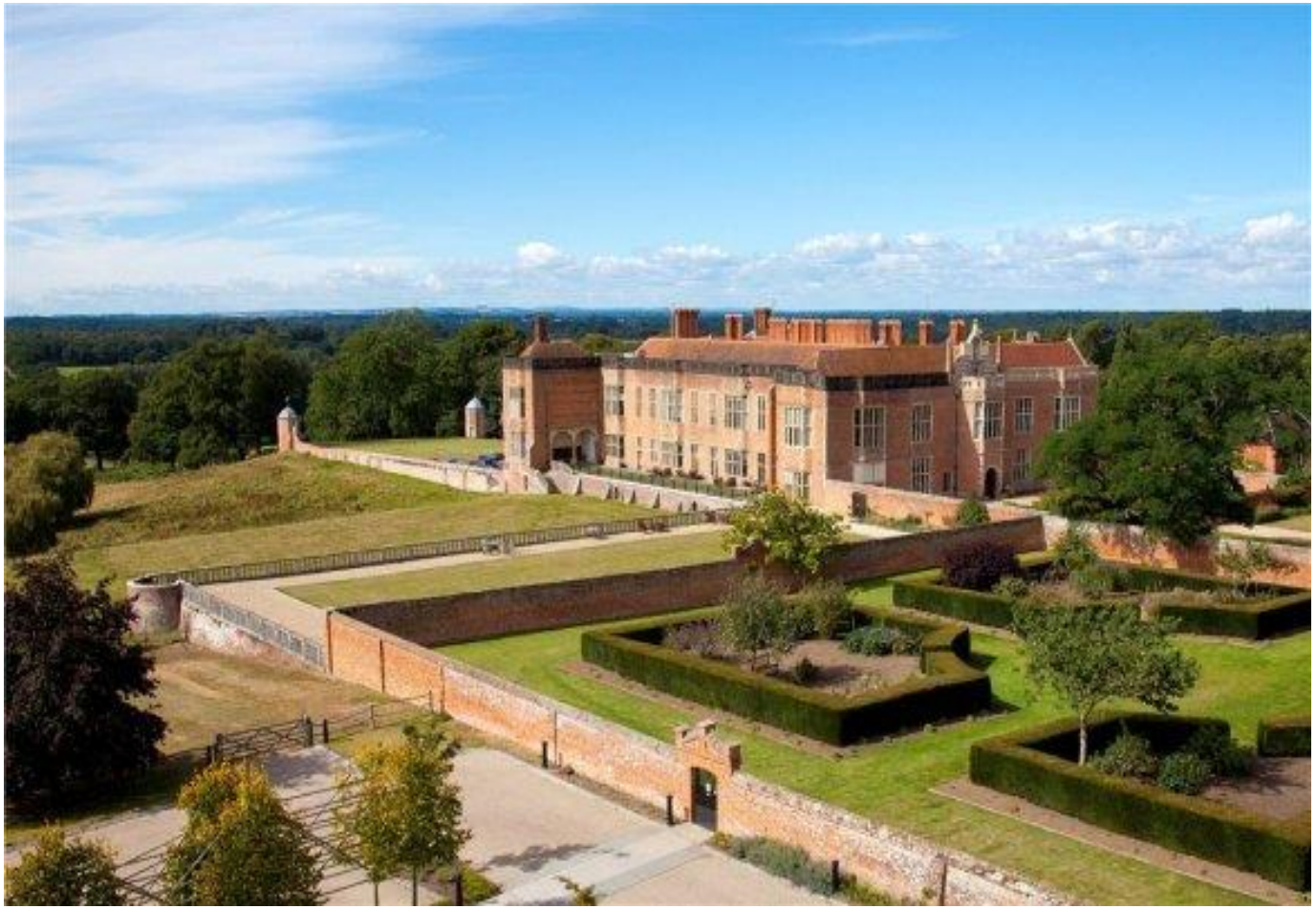

City & Country Bramshill Limited v Secretary of State (Court of Appeal, 9 March 2021)

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- This case deals with the assessment, required by the NPPF, as to whether development proposals would cause harm to listed buildings and other heritage assets
- Also considers the issue of "isolated homes in the countryside"
- Case arose out of 33 appeals against refusals of planning permission and enforcement notices issued by Hart District Council at Bramshill Park, Hampshire. Historic England and the National Trust were objectors

Key dispute

- Historic England and the National Trust provided evidence on the basis that paragraphs 195 and 196 of the NPPF would always be engaged where any element of harm was identified
- By contrast, the Appellant argued that an "internal heritage balance" should be carried out where elements of heritage harm and heritage benefit are first weighed to establish whether there is any "overall heritage harm" to the asset. Paragraphs 195 and 196 would only be engaged where there is residual heritage harm to be weighed against the public benefits of the scheme

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- Put another way, only if "overall heritage harm", that is net harm emerges from the weighing of "heritage harms" against "heritage benefits" should "other public benefits" of the development be weighed against such "overall heritage harm".

- Lindblom LJ in the Court of Appeal held

"Like the judge, I cannot accept those submissions. It is not stipulated, or implied, in section 66(1), or suggested in the relevant case law, that a decision-maker must undertake a "net" or "internal" balance of heritage-related benefits and harm as a self-contained exercise preceding a wider assessment of the kind envisaged in paragraph 196 of the NPPF. Nor is there any justification for reading such a requirement into NPPF policy. The separate balancing exercise for which Mr Strachan contended may have been an exercise the inspector could have chosen to undertake when performing the section 66(1) duty and complying with the corresponding policies of the NPPF, but it was not required as a matter of law. And I cannot see how this approach could ever make a difference to the ultimate outcome of an application or appeal."

Section 66(1)

- Section 66 does not state how the decision-maker must go about discharging the duty to "have special regard to the desirability of preserving the building or its setting …"
- The courts have considered the nature of that duty and the parallel duty for conservation areas in section 72 of the Listed Buildings Act and the concept of giving "considerable importance and weight" to any finding of likely harm to a listed building and its setting. They have not prescribed any single, correct approach to the balancing of such harm against any likely benefits or other material considerations weighing in favour of a proposal
- In *Jones v Mordue,* the Court of Appeal accepted that if the approach in paragraphs 193 to 196 of the NPPF (as published in 2018 and 2019) is followed, the section 66(1) duty is likely to be properly performed

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Interaction with the overall planning balance and statutory duties

- The balancing exercise under the policies in paragraphs 195 and 196 of the NPPF is not the whole decision-making process on an application for planning permission, only part of it
- The whole process must be carried out within the parameters set by the statutory scheme, including those under section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") and section 70(2) of the 1990 Act, as well as the duty under section 66(1) of the Listed Buildings Act
- In that broader balancing exercise, every element of harm and benefit must be given due weight by the decision-maker as material considerations and the decision made in accordance with the development plan unless material considerations indicate otherwise
- Within that statutory process, and under NPPF policy, the decision-maker must adopt a sensible approach to assessing likely harm to a listed building and weighing that harm against benefits."

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Paragraph 193

- The concept in paragraph 193 that “great weight” should be given to the “conservation” of the “designated heritage asset” and that “the more important the asset the greater the weight should be” does not predetermine the appropriate amount of weight to be given to the “conservation” of the heritage asset in a particular case
- Resolving that question is left to the decision-maker as a matter of planning judgment on the facts of the case, bearing in mind the relevant case law, including Sullivan L.J.’s observations about “considerable importance and weight” in Barnwell Manor.

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Substantial and less than substantial harm

- The same can be said of the policies in paragraphs 195 and 196 of the NPPF which refer to the concepts of “substantial harm” and “less than substantial harm” to a “designated heritage asset”.
- What amounts to “substantial harm” or “less than substantial harm” in a particular case will always depend on the circumstances. Whether there will be such “harm”, and, if so, whether it will be “substantial”, are matters of fact and planning judgment
- The NPPF does not direct the decision-maker to adopt any specific approach to identifying “harm” or gauging its extent. It distinguishes the approach required in cases of “substantial harm … (or total loss of significance …)” (paragraph 195) from that required in cases of “less than substantial harm” (paragraph 196). But the decision-maker is not told how to assess what the “harm” to the heritage asset will be, or what should be taken into account in that exercise or excluded. The policy is in general terms. There is no one approach, suitable for every proposal affecting a “designated heritage asset” or its setting.

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Identifying benefits

- Identifying and assessing any “benefits” to weigh against harm to a heritage asset are also matters for the decision-maker. Paragraph 195 refers to the concept of “substantial public benefits” outweighing “substantial harm” or “total loss of significance”; paragraph 196 refers to “less than substantial harm” being weighed against “the public benefits of the proposal”
- What amounts to a relevant “public benefit” in a particular case is, again, a matter for the decision-maker. So is the weight to be given to such benefits as material considerations
- The Government did not enlarge on this concept in the NPPF, though in paragraph 196 it gave the example of a proposal “securing [the heritage asset’s] optimum viable use”.

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Identifying benefits

- A potentially relevant "public benefit", which either on its own or with others might be decisive in the balance can include a heritage-related benefit as well as one that has nothing to do with heritage. The relevant guidance in the PPG applies a broad meaning to the concept of "public benefits". While these "may include heritage benefits", the guidance confirms that "all types of public benefits can be taken together and weighed against harm"

- Cases will vary. There may be benefits to the heritage asset itself which exceed any adverse effects to it. In such cases, there would be no "harm" of the kind envisaged in paragraph 196. There might be benefits to other heritage assets that would not prevent "harm" being sustained by the heritage asset in question but are enough to outweigh that "harm" when the balance is struck. And there might be planning benefits of a quite different kind, which have no implications for any heritage asset but are weighty enough to outbalance the harm to the heritage asset the decision-maker is dealing with

Dill (Appellant) v Secretary of State for Housing, Communities and Local Government and another (Respondents) [2020] UKSC 20

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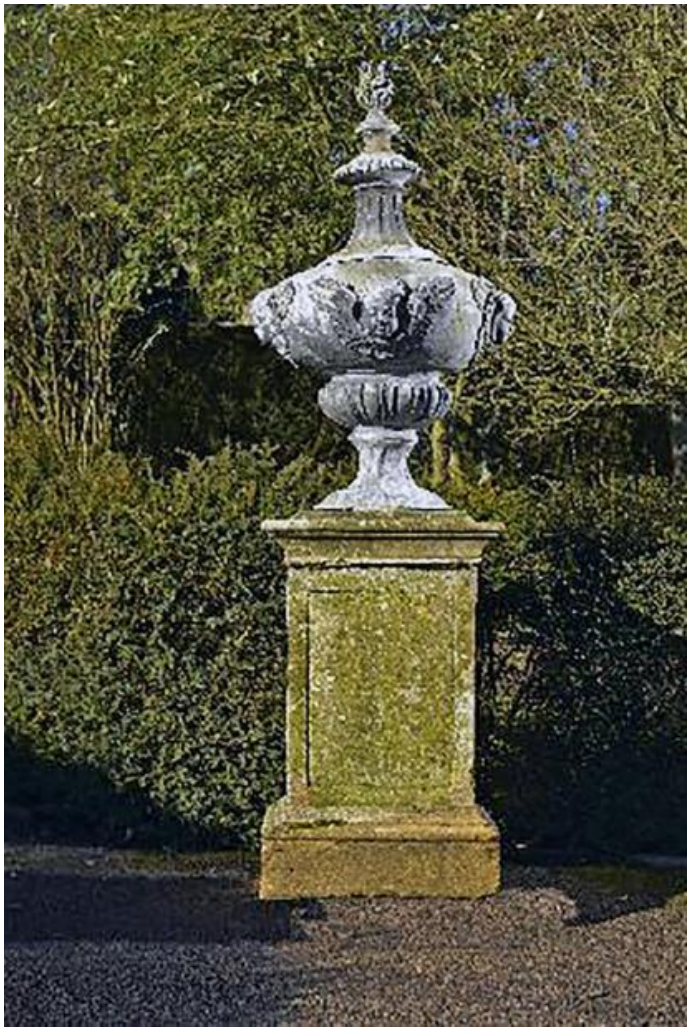

Dill (Appellant) v Secretary of State for Housing, Communities and Local Government and another (Respondents) [2020] UKSC 20

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- The Supreme Court ruled and upheld an appeal against a Court of Appeal and High Court decision in respect of two urns on piers at Idlicote House and their status as "Listed buildings"
- The Court had two important questions to consider in relation to the interpretation and application of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") regarding the definition of a Listed building

Whether listing is conclusive of the items being "buildings" for the purposes of the Listed Buildings Act

- Inclusion on the list as a "Listing Building" does not definitively make an item a building and it should be open to challenge. This goes to the heart of whether the listing should have been made in the first place. The Listed Building Act has always allowed challenge to enforcement action on the grounds that the building does not have special architectural or historic interest which are fundamental to the building's presence on the list. If Historic England can be challenged as to having got that part wrong, the question of whether it is a building must also be capable of being raised

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Relevant test for what constitutes a 'building'

- The test set out in *Skerritts of Nottingham v Secretary of State for the Environment Transport and Regions* [2000] JPL 1025 (a three-fold test considering size, permanence and degree of physical attachment) should be applied in the assessment of whether a feature could be considered part of a Building
- In this case, the method of affixation and the ease of removal compared with other cases of a similar type suggested there was a question to be answered. Each case turned on its facts and the Supreme Court sent the matter back for reconsideration against this criteria

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