Working with the Heritage: the New Rules

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The law in this area aims to strike a balance between two competing views. On the one hand, there is the view of those who could perhaps be caricatured as the enthusiasts:

> ''The historic environment is what generations of people have made of the places in which they lived. It is all about us. We are the trustees of that inheritance. It is, in every sense, a common wealth. Most of our towns and cities, and all of our countryside, are made up of layer upon layer of human activity. Each generation has made its mark. And each makes its decisions about the future in the context of what it has inherited. That context is irreplaceable. Once gone, it is gone forever.''[1]

On the other hand, there are the disrespectful:

> ''Had we more faith in ourselves, and were more sure of our values, we would have less need to rely on the images and monuments of the past. We would also find that, far from being useless except as a diversion from the present, the past is indeed a cultural resource, that the ideas and values of the past—as in the Renaissance—can be the inspiration for fresh creation. But because we have abandoned our critical faculty for understanding the past, and have turned history into heritage, we no longer know what to do with it, except obsessively preserve it. The more dead the past becomes, the more we wish to enshrine its relics.''[2]

There is of course a degree of truth in both.

The difficulty is that everyone is in principle in favour of preserving the best bits of the built heritage; but they do seem to get in the way of decent modern development. Thus there are now some 500,000 listed buildings in England alone, and well over a million unlisted buildings in conservation areas, many in the centres of cities and towns, where the pressure for regeneration is greatest. There is therefore bound to be an ongoing debate about, first, what is to be preserved, and, secondly, what ''preservation'' should actually involve.

This is not just of academic interest. The increasing impact of conservation controls over the development process has led to a major rise in the amount of litigation—in 1984, there were around 14 reported decisions of the courts relating directly to the built heritage; twenty years later, there are probably several hundred. And of course a large number of appeals and inquiries will have a heritage element, even where it is not the most important issue.

In this paper, I consider firstly the question of identifying what is to be preserved; and, secondly, the extent of the protection afforded under the current law. I then turn to look at what needs to be taken into account in the consideration of development proposals affecting historic buildings and areas and, briefly, other categories of protected items. I finally look at how the law should perhaps be reformed.

[1] *Power of Place: the Future of the Historic Environment*, English Heritage, December 2000, para.02.
[2] Robert Hewitson, *The Heritage Industry*, 1987.

Identifying what to preserve

General principles

It would be possible, theoretically, for each development control officer (and each local authority member or inspector), when confronted with any proposal to carry out development, to consider from first principles the value, if any, of the site concerned, its immediate surroundings and the wider area. The assessment of their value in conservation terms—that is, their special architectural or historic interest—would thus be part of that overall evaluation exercise. After all, every parcel of land, and every existing building, has particular characteristics, and they may be of some value to someone for something. Even a wholly unbuilt-on patch may be important, perhaps because it is the habitat of a rare insect, or affords a view through to something else beyond.

It would then be possible for all of the individual impacts—beneficial or adverse—of the proposal to be identified, and the overall impact to be assessed, in order to decide whether it should be allowed, possibly subject to conditions, or refused.

In other words, the value of each aspect of the existing environment—including each building and each area—would be assessed at the time of each proposal. It might even be possible to expect developers to carry out such assessments themselves.[3] But the important point is that there is nothing special or different about the historic environment.

However, a number of problems would arise if that were to be the only approach. The first, and most obvious, is that there would be an unavoidable risk that some of the key parts of the existing environment would be prematurely lost—accidentally or otherwise. That, incidentally, indicates why there is a criminal sanction for the unauthorised removal of significant trees or historic buildings, since there is no possibility of their replacement.

But a system of case-by-case assessment would also be hugely ponderous and administratively inefficient. There would be a real difficulty in assuring any degree of consistency of standards, since a plethora of decisions by individual officers in different areas would inevitably be made according to very different standards. There would doubtless have to be some form of appeal—against either inclusion or exclusion—and presumably the proposed development would have to be held up until the assessment process had been completed.

So it is perhaps inevitable that there has grown up a system of selection of what are now known as ''heritage assets'' on a national basis, in advance of any particular development proposals, by a procedure that is, at least in theory, consistent—and based on England-wide, rather than local, standards. That was operated at first largely on a geographical basis, but more recently on a topic basis—although in either case there has always been the possibility of occasional spot-listing.[4] It is better to identify what is important before there is any proposal immediately affecting it.

Hence the emergence of the parallel systems of scheduling monuments and listing buildings. The process of identifying the assets to be protected is bound to be arbitrary—but, as Osbert Lancaster pointed out:

> ''No yardstick of aesthetic judgment is of universal validity; time and distance both produce the strangest reversals. No educated person would today contemplate the destruction of Chartres

[3] As is of course currently done with environmental statements.

[4] It may be that spot-listing is unlawful, at least in Scotland, in the light of Historic Scotland's policy; certainly in two cases the Scottish Ministers have consented to judgment in the face of challenges to listing on that basis.

> with equanimity, but in the eighteenth century many would have regarded it as welcome deliverance too long delayed. And can we be certain that the obvious necessity for preserving Paestum would be self-evident to one brought up in the shadow of Angkor Wat? However, the consciousness that all judgments on such matters are relative does not absolve us from making them.''[5]

The exercise thus has to be done—and at least there is a chance for it to be reviewed at the stage when, or if, an actual proposal emerges. Changing standards can then be taken into account—both as to whether a building should be preserved at all, and as to the value of particular features of it. After all, it must presumably be assumed by the legislature (if only implicitly) that the present system will last for ever—and maybe even the destruction of an Oxford college will one day seem to be ''welcome deliverance too long delayed''.

The one thing that is clear is that any system of selection will be to some extent arbitrary—and even if it is based rigorously on clearly defined criteria, the selection of those criteria will itself be arbitrary. And as standards, and tastes, differ with time, it will not be possible to update instantly all lists throughout the country. So when a developer complains that a particular listed building has no merit, what he is in fact saying is only that he has different taste or different standards to those of ''the Secretary of State'' (that is, in practice, English Heritage)—although, curiously, it is rare to find a developer who considers that too few buildings have been selected.

It is perhaps interesting to note that a somewhat similar approach might seem to have been adopted in relation to the identification of important trees. However, the identifying is done by local authority officers, with all the potential for inconsistency noted above—both as to the merit of the trees ''preserved'', and indeed the number of them. Local distinctiveness may have some merits, but in these fields consistency would seem to be more important.

The results

As a result of the selection process operated so far, the 26 prehistoric structures in England[6] listed in the Schedule to the Ancient Monuments Protection Act 1882 (hence the name) have grown to almost 20,000 ''scheduled monuments'' under the Ancient Monuments and Archaeological Areas Act 1979.[7]

Probably of much greater significance in practice, the handful of buildings that were subject to building preservation orders under the Town and Country Planning Act 1944 have now grown to around 500,000 listed buildings in England—of which about 2.5 per cent are Grade I and 5.6 per cent Grade II* (together, some 40,500 buildings), and the remaining 91.9 per cent are Grade II.[8] The precise number in each case depends on what is meant by ''listed building''—since the published statistics all relate to list entries, some of which relate to groups of buildings (notably terraces of houses).

The criteria for listing change as the years go by, but not hugely.[9] And new, more detailed criteria have been put forward in a draft revision to the relevant part of PPG15, expected at the start of 2007. However, in reality, all of the important historic buildings have now been listed, and indeed the

[5] Sir Osbert Lancaster, in *The Future of the Past*, 1976.
[6] In addition to 22 in Scotland, 3 in Wales, and 18 in Ireland (north and south).
[7] Plus 8,000 in Scotland, 3,200 in Wales, and 1,700 in Northern Ireland
[8] There are around another 50,000 listed buildings (of all grades) in Scotland, 30,000 in Wales, and 9,000 in Northern Ireland.
[9] See Delafons, *The Politics of Preservation*, E. & F.N. Spon, 1997, especially App.C.

great bulk of the not-so-important buildings. So adjusting the criteria, while not a complete waste of time, may be of limited utility.

Listed building consent is granted for the loss of no more than 100 buildings in England in a typical year, so we would have enough to last for around 5,000 years or more, assuming that no more are listed. In fact, of course, significantly more than 100 buildings are listed each year, so that (happily or otherwise) we have enough listed buildings to last for ever. In theory. But such statistics suggest that, sooner or later, something will have to change—even if not, perhaps, just yet.

The fact that there have been for some fifty years two systems of designation does not seem to be a major problem. The nature of the structures and sites involved is somewhat different, and the degree of selectivity is quite different—the Secretary of State has indicated that scheduled monuments rank in importance with listed buildings of Grade I and II*. It is also not surprising that decisions on the few applications for scheduled monument consent are dealt with on a national basis—although that could with advantage be incorporated more closely into the mainstream planning system.

Wider still and wider. . .

But of course it is not as simple as just identifying particular buildings and monuments in isolation. For one thing, most buildings are composed of a multitude of component parts—some fixed, some less so. Are they all equally protected? Then there is the problem of groups of buildings—do they all have to be separately identified? Secondly, the common phenomenon of new development dominating and completely ruining a neighbouring historic building has to be addressed. And, finally, there is the desire of the public to protect areas that are attractive, or at least familiar, but composed of buildings each of which is nothing special.

These problems have each been dealt with by somewhat different legal mechanisms. And the Court of Appeal and the House of Lords (the latter on four occasions, in *Debenhams*[10], *Shimizu*[11], *Edinburgh*[12] and, most recently, *Zieleinski Baker*[13]) have intervened from time to time—not always helpfully and, indeed, arguably, sometimes laying down a statement of the law that seems, to be polite, somewhat surprising.

The extent of the protection

Scheduled monuments

A scheduled monument is a ''monument'' that has been scheduled. So far, so simple. But a ''monument'' is defined in s.61 of the Ancient Monuments and Archaeological Areas Act 1979, which provides that it is (amongst other things) ''any building, structure or work, whether above or below the surface of the land, and any cave or excavation; or the remains of any such building [etc]''. And a monument includes:

- ''any machinery attached to it if it could not be detached without being dismantled''; and
- its site, including the land on which it stands, and any adjacent land which (in the opinion of the Secretary of State or English Heritage or a local authority) is essential for its support or preservation.

[10] *Debenhams PLC v Westminster CC* [1987] A.C. 396, HL.
[11] *Shimizu (UK) Ltd v Westminster CC* [1997] 1 W.L.R. 168, HL.
[12] *Edinburgh CC v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, HL.
[13] *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] 1 W.L.R. 707, HL.

These provisions have apparently only been considered twice—in two unreported decisions of the Court of the Appeal (Criminal Division), both on May 6, 1994 (*R. v Bovis Construction* and *R. v Jackson*). Those decisions make it clear that, where the Secretary of State has issued a map accompanying the entry in the schedule, that is definitive. But what about a case where she has not? The provision as to ''adjacent land'' is particularly vague.

Listed buildings

The extent of protection afforded to a listed building and the objects and structures associated with it has always been a problem in practice.

The starting point is the well-known statutory provision (in s.1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990). This (and its predecessor in the 1971 Act, before and after it was amended by the Housing and Planning Act 1986) has of course been the subject of many decisions of the courts, including in particular *Calderdale*[14], *Debenhams*, *Watts*[15], *Ex p. Bellamy*[16], *Watson-Smyth*[17], *Richardson*[18], *Skerritts*[19], *Morris*[20], and *Hammerton*[21]. And a number of other decisions have explored the meaning of ''curtilage'' in the context of permitted development rights (*Collins*[22], *James*[23], *McAlpine*[24] and *Lowe*[25]) and other, non-planning legislation (*Sinclair-Lockhart*[26], *Dyer*[27], and many others).

Nolan L.J. (in *Ex p. Bellamy*[28]) expressed the view that the legal position was as a result ''by no means simple''—and it has not become any simpler with the passage of time. However, in short, it now seems to be as follows.

(1) The building that is itself included in the list (''the principal building'') must first be identified from the list—the description should only be referred to where the identification of the building is ambiguous.[29]
(2) The whole of the principal building, including its interior, will then be covered by the listing—as will any extension to it, whether before or after the date of listing (unless it is so large as not to be subordinate to the original building (*Richardson*)).
(3) Any object (such as a sundial or panelling) fixed to the principal building at the date of listing will be included, provided that it is a ''fixture'' according to the normal rules of land law (Lord Mackay in *Debenhams*).

[14] *Att.-Gen., Ex rel Sutcliffe v Calderdale MBC* (1983) 46 P. & C.R. 399, CA.
[15] *Watts v Secretary of State* [1991] 1 P.L.R. 61.
[16] *R v Camden LBC, Ex p. Bellamy* [1991] J.P.L. 255.
[17] *Watson-Smyth v Secretary of State* [1992] J.P.L. 451.
[18] *Richardson Developments Ltd v Birmingham CC* [1999] J.P.L. 1001.
[19] *Skerritts of Nottingham Ltd v Secretary of State* [2000] 2 P.L.R. 84; [2001] Q.B. 59.
[20] *Morris v Secretary of State for Wales and Wrexham CBC* [2002] 2 P. & C.R. 7.
[21] *R. (on the application of Hammerton) v London Underground Ltd* [2003] J.P.L. 984.
[22] *Collins v Secretary of State* [1989] E.G.C.S. 15.
[23] *James v Secretary of State* [1991] 1 P.L.R. 58.
[24] *McAlpine v Secretary of State* [1995] 1 P.L.R. 16.
[25] *Lowe v the First Secretary of State* [2003] 1 P.L.R. 81.
[26] *Sinclair-Lockhart's Trustees v Central Land Board* (1951) 1 P. & C.R. 195.
[27] *Dyer v Dorset CC* [1989] Q.B. 346, CA.
[28] *R v Camden LBC, Ex p. Bellamy* [1991] J.P.L. 255, at p.262.
[29] *City of Edinburgh* (*per* Lord Hope).

(4) Any structure fixed to the principal building at the date of listing will be included, provided that, if it is itself a building, it was ''ancillary'' to the principal building at the date of listing (Lord Keith in *Debenhams*).
(5) The curtilage of the principal building must then be identified, which will be ''quintessentially a matter of fact'' (*James*). Relevant matters will be the physical layout of the principal building and any other buildings that might or might not be within its curtilage; their ownership, past and present; and their function, past and present. Not all the land in the same ownership as the principal building will necessarily be included (*Collins*, *James* and *Lowe*); some land in separate ownership may be included (*Calderdale*). Not every structure has a curtilage (*Hammerton*). And the curtilage may not necessarily be small (*Skerritts*).
(6) Any pre-1948 structure that was in the curtilage of the principal building at the date of listing (or possibly January 1, 1969) will be included in the listing, provided that it is a fixture, and is ancillary to the principal building.

The extent of listing is particularly significant in the light of the decision of the House of Lords in *Shimizu*[30] that the phrase ''listed building'' effectively means the whole of the building—including, presumably, all the objects and structures referred to in s.1(5). And it may be that the same principle would apply to scheduling.

Problems

But the provision that is now s.1(5) is not without difficulties.

First, it was only introduced on January 1, 1969.[31] Indeed, prior to that, the phrase ''listed building'' did not exist—at least on the face of the statute book. Thus, from 1948 to 1969, the Minister simply had power to include a building in a list of buildings of special architectural or historic interest, and the requirements as to the authorisation of works referred merely to works to ''the building''—with no reference to fixtures or structures in the curtilage. It is far from clear what was the effect of the introduction of the new rules, particularly in relation to buildings listed prior to the beginning of 1969.

It may be, therefore, that the true rule is to consider the position as it was at the date of listing or, if later, January 1, 1969. But even that does not deal with the position where the listing entry for a building is amended some while after its initial inclusion in the list.

Secondly, where a list entry refers to a whole terrace (such as Nos 1–30 Royal Crescent, Bath), what is ''the building included in the list''?

Thirdly, Lord Mackay in *Debenhams* simply assumed that the test to determine what were ''objects fixed to the building in the list'' for the purposes of s.1(5) was ''the ordinary rule of the common law''. That comment was arguably only *obiter*, since the case concerned primarily the relationship between principal and ancillary buildings, rather than fixtures and fittings. In addition, the ''ordinary rule of the common law'' to which he referred depends, amongst other things, on whether a building is held freehold or leasehold, whether or not it is subject to a mortgage, whether it is

[30] *Shimizu (UK) Ltd v Westminster CC* [1997] 1 W.L.R. 168 at p.182.
[31] Town and Country Planning Act 1968, ss.40(3) and 54.

occupied for domestic, trade or other purposes, and whether the item in question is utilitarian or ornamental—matters which are mostly irrelevant in the context of historic buildings.

An alternative view would thus be that the phrase ''the building that is included in the list'' itself includes any thing that is part of the building by the operation of the ordinary rule, and thus any item which is a ''fixture''. An ''object affixed to the building'' therefore means something over and above that, and would thus include any item screwed or otherwise attached to the building as thus defined—including some items that might be rightly classified as fittings under the ordinary common law rule. That interpretation would be very unpopular with property owners, but would provide some degree of protection for objects such as mirrors, chandeliers, and tapestries that have been historically associated with a building, possibly for centuries, but which can at present be removed with impunity.

A fourth difficulty relates to the not uncommon situation where there are a number of buildings within a single curtilage—for example, in the case of universities, schools, hospitals, farms, and factories—of which some are listed in their own right, and many are not. It is sometimes not obvious what is the extent of the protection afforded—one of the unlisted buildings (A) is not in the curtilage of one of the listed buildings (B); rather, they are both in the same curtilage.

Grading can also be problematic in such cases. The whole system of grading is non-statutory, but where a building is listed (Grade II) in its own right, and is in the curtilage of a building listed Grade I, where does that leave a third structure half way between them?

Finally, once ''a listed building'' has been defined, the consideration of what is within its curtilage for the purposes of either permitted development rights or development plan policies is to be undertaken by reference to its curtilage now, not as it was at the date of listing (or the date of the most recent amendment to the list).[32]

Most if not all of these problems arise because the phrases ''a scheduled monument'' and ''a listed building'', as defined by the Act, do not refer simply to an actual physical monument or building that happens to be of special interest and has been recognised as such. Rather, each is a legal concept, and may extend so as to encompass a whole range of objects and structures, of which some may themselves be buildings (and, in the case of a monument, a parcel of land). And the site of a monument (as defined in the Act) and the curtilage of a building (whatever that phrase may mean) may be small, but they may be quite extensive.[33]

The Lords in *Shimizu* were confident that there is no provision (at least in the Listed Buildings Act) where a ''listed building'' meant anything other than the whole ''notional'' building as defined by s.1(5).[34] However, it is not helpful to have a series of statutory provisions that certainly seem to proceed on the basis that a listed building is a type of building. See, for example, the enforcement provisions in the Listed Buildings Act 1990, which to my mind clearly presuppose a ''a listed building'' being ''a [single] building'' in the conventional sense.[35]

[32] *Collins, Lowe, James*

[33] As explicitly recognized in *Skerritt's of Nottingham v Secretary of State* [2001] Q.B. 59, CA.

[34] [1997] 1 W.L.R. 168, HL, at p.182.

[35] For example, s.38(2)(a) (''steps . . . for restoring the building to its former state''). And many others.

Non-planning statutes

It gets worse. The statutory definition of "a listed building" starts with the words "in this Act"—that is, the Listed Buildings Act. It seems that the phrase does not occur in the Town and Country Planning Act 1990. But it does occur elsewhere. And the House of Lords have insisted that, once the extent of a listed building has been determined for the purposes of the Planning Acts, that will also apply in considering its extent for the purposes of any other statutory code that refers to listed buildings.[36]

That is not helpful since, unfortunately, the full implications of s.1(5) do not seem to have filtered through to those who drafted other (non-planning) statutes—see, for example,

- the definition in the VAT Act 1994[37] of "protected building", the alteration of which may attract zero-rating ("a building which is designed to remain as or become a dwelling . . . and which is (a) a listed building, within the meaning of the [Listed Buildings Act]");
- the scope of the exemption from non-domestic rates in the 1989 Rating Regulations[38] ("a hereditament that is included in [the list] or [the schedule]"); and
- the category of buildings to which special provisions apply in relation to dangerous structures notices under the Building Act 1984 ("a building that is a listed building").

And each of those statutes also refer to scheduled monuments, as defined in the 1979 Act, which may similarly cause difficulties.

Thus, in relation to the VAT exemption, this was considered by the House of Lords in *Customs & Excise Commissioners v Zielinski Baker and Partners*.[39] This concerned a listed house in Northamptonshire. Near the main house, and connected to it by an ornamental wall, was an outbuilding built at around the same time as it, initially a stable and carriage shed and latterly a garage and laundry. The outbuilding was not listed in its own right, but was undoubtedly in the curtilage of the listed house, and thus part of a listed building within the meaning of s.1(5). Listed building consent was given for the conversion of the outbuilding into changing and games facilities; the question was whether the cost of those works could be zero-rated for VAT.

The VAT and Duties Tribunal had initially held that it could[40]; that was overturned by Etherton J.[41]; his decision was in turn reversed (but only by a majority) by the Court of Appeal.[42] That was then overturned in the House of Lords, who held—albeit, again, only by a majority—that the works were not zero-rated.[43] That, if nothing else, indicates that the law is not altogether straightforward. The Lords held that a "protected building", for the purposes of the VAT legislation, means:

(1) a building
(2) which is designed to remain as or become a dwelling [or relevant charitable building], and

[36] *Debenhams* [1987] A.C. 396, HL, per Lord Keith at 404E and Lord Ackner at p.412E.
[37] VAT Act 1984, Sch.8, Group 6, Note (1).
[38] Non-Domestic Rating (Unoccupied Property) Regulations 1989 (SI 1989/2261), reg.2(2)(a) and (e). See *Debenhams*; *Providence Properties Ltd v Liverpool CC* [1980] R.A. 189.
[39] [2004] 1 W.L.R. 707, HL.
[40] Birmingham VAT Tribunal (July 4, 2000, unreported; available on Lawtel).
[41] [2001] STC 585.
[42] [2002] STC 829, CA.
[43] The only consolation for the tax payer being that his costs in the Lords were paid by the Customs & Excise.

(3) which is a listed building within the meaning of the Listed Buildings Act [or a scheduled monument within the meaning of the 1979 Act].[44]

The outbuilding in the instant case was accepted by all to be a separate building, and it was (as Lord Hoffman accurately summarised it) ''a listed building, or more accurately part of a notional listed building''.[45] But it was not itself to remain or become a dwelling; and it therefore failed the second test. It was thus not a protected building within the meaning of the VAT Act; and works for its alteration would therefore not qualify for the exemption.

It is to be hoped that the forthcoming review of the legislation addresses this problem, taking into account the fact that listed buildings occur in other, non-planning legislation.

Conclusion

In the meanwhile, in the light of the somewhat confused state of the law, we have to do the best we can. It therefore now seems as though s.1(5) should be interpreted as if it said (the material effectively added by the courts being in italics):

> ''In this Act, *and (at least in theory) in any other Act,* ''listed building'' means *the whole of* a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act:
>
> (a) any object or structure fixed to the building *in the list, whether before or after the date of listing, so as to constitute either*
>
> (i) *part of that building, or*
> (ii) *a fixture according to the normal rules of property law,*
>
> and
> (b) any object or structure
>
> (i) *which was, on the date the building was included within the list (or, if later, on January 1, 1969)* within the curtilage of the building *in the list, and*
> (ii) which, although not fixed to the building, *now* forms part of the land and has done so since before July 1, 1948
>
> shall be treated as part of the building.'' [46]

Works affecting listed buildings and monuments

The need for permission and consent

Works and other proposals directly affecting a listed building are not usually too controversial.

All such proposals need planning permission, unless they are entirely internal, and involve no material change of use. In the light of the decision in *Burroughs Day*, almost all external works to a listed

[44] [2004] 1 W.L.R. 707, HL, per Lord Walker of Gestingthorpe at para.40.
[45] [2004] 1 W.L.R. 707, HL, at para.10.
[46] Section 1(4) of the Scottish Listed Buildings Act is in identical terms. Article 42(7) of the Northern Ireland Order is similar, save that the date in para.(b) is October 1, 1973.

building are likely to be considered to ''materially affect'' its external appearance (within the terms of s.55 of the Planning Act). And the great bulk of alterations that would otherwise be permitted by the General Permitted Development Order will not be in the case of listed buildings—since the changes made to the Order in 1988. I suspect that those changes were not meant to operate in that way, but they were not undone when the 1988 Order was replaced in 1995.

The only oddity is in respect of demolition. Since *Shimizu*, what would have been referred to as partial demolition is now properly categorised as ''alteration'', which therefore requires planning permission. Total demolition, on the other hand, does not.

Planning permission is also needed for works and changes of use not directly affecting a listed building itself, but which may well affect its setting. And again, where works are actually in what is now the curtilage of a listed building, there will be few if any permitted development rights.

Listed building consent, by contrast, is not required for changes of use, nor for works affecting the setting of a listed building but not actually the building itself.[47] But it is required for all external alterations to the building itself, in addition to planning permission—and the two applications will generally be the subject of the same drawings, the same supporting material, and the same committee report; and they will be decided the same way, leading to two decisions, and two appeals. Indeed the only category or works that require listed building consent but not planning permission are internal works—which are generally not particularly controversial—and demolition, which is almost always followed by a new building requiring planning permission.

It follows that the key issues are those that arise in respect of planning applications. Listed building consent is, for almost all purposes, irrelevant—not least because the statutory requirements as to the matters to be considered are virtually identical.

The matters to be taken into account: statutory requirements

As for the tests that should be applied in considering applications for planning permission, the Court of Appeal in the *Bath Society* case[48] pointed out that where a statute explicitly refers to a particular issue that would otherwise be merely one ''other material consideration'' (in that case, as it happened, the duty to consider the conservation area), that issue should be the first consideration for the decision maker. That decision preceded the arrival of s.54A of the 1990 Act (now of course s.38(6) of the 2004 Act).

The order of precedence would thus now seem to be as follows:

(1) to make the decision in accordance with the development plan, so far as material;[49]
(2) to have special regard to the desirability of preserving the listed building, its setting, and any features of special architectural or historic interest that it possesses;[50]
(3) if the building is situated in a conservation area (but not if it is just outside one), to pay special attention to the desirability of preserving or enhancing the character of that area;[51]

[47] *Cotswold*
[48] [1991] 2 P.L.R. 51, CA, per Glidewell L.J. at p.64H.
[49] TCPA 1990, s.70; TCPA 2004, s.38(6).
[50] Listed Buildings Act, s.66.
[51] Listed Buildings Act, s.72.

(4) (as from December 6, 2006) to have due regard to the need to eliminate unlawful discrimination against disabled people;[52]
(5) to take into account representations made by owners of the land or in response to publicity given to the application on site and in the press (including those arising from publicity because the works affect the setting of a listed building);[53]
(6) to have regard to the desirability of conserving the natural beauty and amenity of the countryside;[54] and
(7) to have regard to any other material considerations.[55]

The order of precedence as between the various statutory duties (2)–(6) is not defined. But the wording of the relevant statutory provisions does suggest—albeit probably entirely by accident—a certain order of priority. Further, where a proposal requires listed building consent as well as planning permission, the only specific statutory requirement is to have special regard to the desirability of preserving the listed building, its setting, and its special features,[56] which tends to give that test greater priority. And there is no statutory test as to the consideration of applications for works affecting either scheduled monuments themselves or their setting—which is surprising, given their importance.

But that all slightly begs the question as to why only some duties are given statutory recognition—why, for example, is the duty to promote sustainable development not applied to the determination of applications and appeals? And why is there no duty at all to seek to achieve full employment or to enhance bio-diversity? Why, in other words, are the built heritage and the needs of disabled people given special prominence? But at least the latter only refers to ''due regard'', which perhaps is a more proper approach.

Policy tests

Graham Eyre, sitting as deputy judge in *Bristol Meeting Room Trust v Secretary of State and Bristol CC*[57], stated that it was ''clear that the legislation required that the preservation of a listed building had to operate as a paramount consideration.'' Actually, the legislation does not (as is commonly thought) require that a listed building must be preserved, but merely that the decision-maker must consider whether or not it is desirable that it should be. This is emphasised by the use of the word ''or'' between ''the building'', ''its setting'' and ''any features [etc]'', which itself necessarily implies that it might not be desirable to preserve one or more of those items.

However, at least as important as the law is the relevant policy, local and national.

As noted above, the first matter to be considered in determining a planning application or appeal is the development plan. This will usually contain benign platitudes about listed buildings—very much in line with the statutory duty in section 66 of the Listed Buildings Act. But it will often extend that duty to taking into account the effect of development affecting the setting.

[52] Disability Discrimination Act 195, s.49A, to be inserted by DDA 2005, s.3 (and see SI 2005/2774).
[53] TCP (General Development Procedure) Order 1995, Art.19, Planning (Listed Buildings and Conservation Areas) Regulations 1990, reg.6(3).
[54] Countryside Act 1968, s.11.
[55] TCPA 1990, s.70(2).
[56] Planning (Listed Buildings and Conservation Areas) Act 1990, s.66.
[57] [1991] J.P.L. 152. This echoes the comment of Glidewell LJ in *Bath Society v Secretary of State* [1991] 2 P.L.R. 51 that the corresponding duty under s.72 should be ''the first consideration for the decision maker''.

The second source of policy will be that of central Government—in England, in PPG 15. The policies relating to planning applications are at paras 2.11–2.19.[58] This contains some procedural guidance but—curiously—relatively little policy. However, since most proposals affecting listed buildings will also require listed building consent, the policies in the PPG relating to listed building consent applications, at paras 3.1–3.19, will be just as relevant.[59]

The starting point is thus para.3.3 of PPG15, which requires that:

> ''3. 3 . . . Once lost, listed buildings cannot be replaced; and they can be robbed of their special interest as surely by unsuitable alteration as by outright demolition. They represent a finite resource and an irreplaceable asset. There should be a general presumption in favour of the preservation of listed buildings, except where a convincing case can be made out, against the criteria set out in this section, for alteration or demolition. . . . This reflects the great importance to society of protecting listed buildings from unnecessary demolition and from unsuitable and insensitive alteration and should be the prime consideration for authorities in determining an application for consent.
>
> 3.4 Applicants for listed building consent must be able to justify their proposals. They will need to show why works which would affect the character of a listed building are desirable or necessary.''

So what works are ''desirable'' or ''necessary''? Paragraph 3.5 of the PPG highlights the following issues as being particularly relevant to any application for listed building consent (and, by extension, to any planning application):

(1) the importance of the building, its intrinsic architectural and historic interest and rarity;
(2) the particular physical features of the building (which may include its design, plan, materials or location) which justify its inclusion in the list;
(3) the building's setting and its contribution to the local scene;
(4) the extent to which the proposed works would bring substantial benefits for the community.

Paragraphs 3.12–3.15 then set out in more detail the approach to determining applications for alterations and extensions to listed buildings; and paras 3.16–3.19 those relating to demolition. I consider the latter later in this paper, as it is in practice often applied to the demolition of unlisted buildings in conservation areas.

These provisions in the PPG—echoed in probably every local plan in the country—make it abundantly clear that, whatever the statute requires, policy means that it is in practice going to be very difficult to carry out works that are considered to be ''unsuitable''; and obtaining listed building consent for demolition is virtually impossible. And what is unsuitable will be heavily influenced by the judgment of both local authority and English Heritage conservation officers, who will always be enthusiasts, if not fanatics. But whilst it is arguable that it is perfectly proper for enthusiasts to have an opportunity to argue their corner, it is noticeable that planning inspectors, who are of course the ultimate arbiters, are not perhaps always quite as balanced in their outlook as they might be.

[58] See also WO Circ 60/96, paras 66–71; Historic Scotland *Memorandum of Guidance* paras 2.15–2.22; and Planning Service (NI) PPS 6, paras 6.1–6.18.

[59] See also WO Circ 60/96, paras 93–98; HS *Memorandum of Guidance* paras 2.15–2.22; and (NI) PPS6, paras 6.28–6.32.

Enabling development

One topic that excites much discussion in certain quarters is that of enabling development. This relates to the situation where development is proposed that is said to be necessary to enable the preservation of some "heritage asset" (that is, listed building, historic landscape or whatever).

So for example the owner of a decaying historic mansion in the green belt or in open countryside may enter into an arrangement whereby a developer proposes to erect new housing in the grounds, raising funds that can be used to restore the mansion. The problem, obviously, is firstly that the erection of the new housing is against national and local policy; and, secondly, that it would spoil the setting of the mansion that it is supposed to preserve. A classic example arose in relation to Downe Hall in Dorset, considered by the Court of Appeal in *R. v West Dorset DC, Ex p. Searle*.[60] The Court upheld the approach of the Council in that case, which had accepted the developer's financial appraisal, and allowed the new development, in spite of the numerous objections. It was saying, in effect, either that no other suitable developer would be found, or that no other scheme would be produced, or simply that—in view of the state of the Hall—it was not prepared to take a chance.

Since that decision, English Heritage has produced a policy statement on the issue in 1999, entitled *Enabling Development and the Conservation of Heritage Assets*, and two years later a *Practical Guide to Assessment*. This set out in detail the balancing exercise to be undertaken in such cases. The Court of Appeal has subsequently considered the issue again, in *R. (on the application of Young) v Oxford CC*,[61] explaining that the decision-making process now potentially involves two stages: first, is the alleged enabling development acceptable, in planning terms, on its merits? If so, permission should be granted anyway. If not, the principles in the English Heritage guide should be considered and applied to the facts of the case.

This all seems to be very straightforward; but at least the principles have now been explored in greater detail. Needless to say, it is vital to ensure that the benefits of enabling development are in fact delivered—usually by means of an appropriate section 106 agreement.

Adjustments to buildings to facilitate access by disabled people

Finally, one particular category of alteration that is likely to be more frequent in coming years is the carrying out of alterations to a listed building to make it more accessible by the less mobile, as a result of the duties imposed by the Disability Discrimination Act 1995 (which only came fully into force in October 2004). As a result of that Act, providers of services to the public must not discriminate against disabled people, but must:

> "where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, . . . to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to—
>
> (a) remove that feature;
> (b) alter it so that it no longer has that effect;
> (c) provide a reasonable means of avoiding the feature; or

[60] [1999] J.P.L. 331.
[61] [2002] 3 P.L.R. 86, CA.

(d) provide a reasonable alternative method of making the service in question available to disabled persons.''[62]

It will be noted that there is no order of priorities as between the different limbs of that duty; which, if any, of the steps specified must be taken will depend simply on what is ''reasonable, in all the circumstances of the case''. This is amplified in the *Code of Practice* issued by the Disability Rights Commission.[63] As to what is a ''physical feature'', this is the subject of regulations that provide that more or less anything is capable of being a feature attracting the duty under the Act, including any feature arising from the design or construction or any fixtures or fittings in a building occupied by the service provider.[64]

There is at present no statutory or other duty on planning authorities to have special regard to disability issues. However, as from December 4, 2006, all public authorities in carrying out their functions are to have due regard to ''the need to eliminate discrimination that is unlawful under the 1995 Act'' (note, not the desirability of eliminating such discrimination).[65] This new duty will have to be balanced against the existing duties to have special regard to the preservation of historic buildings and areas. In any event, it is perhaps wise for authorities (and for applicants) to reflect on the guidance of the Secretary of State in PPG15:

> ''It is important in principle that disabled people should have dignified easy access to and within historic buildings. If it is treated as part of an integrated review of access arrangements for all visitors or users, and a flexible and pragmatic approach is taken, it should normally be possible to plan suitable access for disabled people without compromising a building's special interest. Alternative routes or re-organising the use of spaces may achieve the desired result, without the need for damaging alterations.''[66]

This is all elaborated in a comprehensive *Good Practice Guide* issued relatively recently by the ODPM, which also provides a list of useful contacts.[67]

Conclusion

As a result of the above legislative and policy matrix, the position in relation to listed buildings appears to be that owners and decision makers should seek, in order of priority:

(1) the continuation of its existing use (especially where that is the original use), provided that that does not require the carrying out of any damaging alterations;
(2) a change to a new use, if that is better for the building in terms of requiring no alterations;
(3) the continuation of the existing use, with minimum alterations;
(4) a new use, with minimum alterations;
(5) more substantial alterations, if necessary to retain the building at all in any use;

[62] 1995 Act, s.21(2).

[63] *Disability Discrimination Act 1995: Code of Practice: Goods, Facilities, Service and Premises* (produced by Disability Rights Commission, under s.53A(1) of the 1995 Act; brought into force on May 27, 2002, by SI 2002/720—available from TSO, £13.95).

[64] Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005 (SI 2005/2901), reg.9 (replacing Disability Discrimination (Services and Premises) Regulations 1999 (SI 1999/1191), reg.3, from December 4, 2006).

[65] Disability Discrimination Act 1995, s.49A, inserted by Disability Discrimination Act 2005, s.3 (and see 2005/2774).

[66] PPG15, *Planning and the Historic Environment*, para.3.28.

[67] *Planning and Access for Disabled People: a Good Practice Guide*. See particularly Ch.10.

and only then

(6) demolition and replacement.

As for ancient monuments, whether scheduled or otherwise, it is less clear what the objective is. On the one hand, archaeologists want to explore what is there, and a development scheme provides both the opportunity and, potentially, the funding to achieve that. On the other hand, they want to retain everything wholly untouched for ever—possibly to enable exploration to be carried out in the future, perhaps when it can be done less destructively.

But of course these considerations will always be subject to other, possibly overriding considerations. These will include points raised either by national and local amenity societies or by third parties—which will tend to range from between erudite comment, based on wide technical or local knowledge, to unthinking objection to all change—which should in any event be given careful consideration. However, it should be remembered—both by planning authorities and by objectors—that it is the cogency of an objection that is critical, rather than the number of people by whom it is raised.

Further, those who make representations often perfectly properly put forward views on a particular proposal based solely on the heritage issues at stake. But it may be that there are other considerations involved, such as highways, or economic impact, and these may be more or less significant than conservation. This was highlighted recently in *Georgiou v Enfield LBC*.[68] As it happens, in that case, the conservation issues militated in favour of permission being granted, whereas highways and other issues indicated a refusal. Often it is the other way round. But whichever way the various considerations point, they must be given appropriate weight, and then considered as a whole, when an application is being finally determined by the planning authority or the Secretary of State.

Conservation areas

The significance of designation

Conservation areas have now, arguably, become the Cinderella of the planning process. They are easy to designate; and as a result every authority (even Canvey Island) now has at least one—many have a large number. But the impact of designation has been somewhat degraded through over use.

It would probably be desirable for all authorities to review the past exercise of their powers to designate such areas, and to consider whether those that have been selected are in truth ''special'', as opposed to merely ''pleasant''. There is in fact a duty on them to carry out such a review from time to time (under s.69(2) of the Listed Buildings Act), but largely with the aim of further designations. However, there is an implied power to cancel designations[69]; and it would be good for it to be used occasionally.

The statutory definition of a conservation area is of course ''an area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance''. Note the difference between that and listing—the listing of a building does not carry with it any presumption as to the desirability or otherwise of its preservation (let alone enhancement), whereas the designation of an area as a conservation area signals that it is as a matter of principle desirable to preserve or

[68] [2005] J.P.L. 62.

[69] See s.70.

enhance its character and appearance—although not necessarily that of each part of it, let alone each building.

Unfortunately, however, whilst there is a duty on planning authorities (under s.69(1)) from time to time to designate areas of special architectural or historic interest as conservation areas, and a duty on them to pay attention to the desirability of preserving or enhancing the character or appearance of those areas (s.72), there is no duty on them to define what is special about that character or appearance, and in what way it is to be preserved or enhanced. There is a duty to prepare proposals[70], but that is not the same thing—and it is widely ignored anyway.

In truth, there is not much statutory control over an area once it has been designated.

First, conservation area consent is required for the demolition of all or most of an unlisted building. I consider below the impact of that requirement. However, since the decision of the House of Lords in *Shimizu*[71], it applies only to cases where the demolition works are on a sufficient scale to result in a site for redevelopment. Lesser works, such as the removal of a particular element of a building (such as a window or a door) or a part of one (such as the partial removal of a wall separating the front garden of a house from the street), are properly considered ''alteration'', and thus do not require conservation area consent. Such works may require planning permission, and thus remain controllable by the planning authority, but they may be permitted development (especially in the case of dwellinghouses) and thus controllable only by the use of an Article 4 direction.

Secondly, the carrying out of any works to a tree in a conservation area needs to be notified to the local planning authority. But the procedure is cumbersome, since the authority has to impose a tree preservation order if it wishes to prevent the works; and this too is probably widely ignored in practice.

And, thirdly, there a few other consequences—such as slightly different limits to development that is automatically permitted by the TCP (General Permitted Development) Order and advertisements that are granted deemed consent by the TCP (Control of Advertisements) Regulations, and the requirement for greater publicity to be given to applications for planning permission.

In practice, therefore, the most significant consequence of conservation area designation is the greater attention to be given to planning applications for new development or the alteration of existing buildings. It is significantly more difficult to obtain permission in such cases than it is elsewhere.

Matters to be taken into account: demolition

The carrying out in a conservation area of any major development proposal—whether the replacement of a single house or the redevelopment of an entire town centre—will almost certainly involve some demolition. As noted above, the removal of all or almost all of an unlisted building in a conservation area does still at present require conservation area consent.

An application for consent falls to be determined in the light of s.72 of the Listed Buildings Act, which provides that

[70] P(LBCA)A 1990, s.71(1).
[71] [1997] 1 W.L.R. 168, HL.

> "In the exercise, with respect to any buildings or other land in a conservation area, of any functions under [the Planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area."

However, it should be noted that, as a matter of law, the focus is to be on the character and appearance of the area as a whole, not on that of any particular building or other feature within the area. And Sullivan J., in the relatively recent *Waveney* case, has rightly pointed out that works that may harm the character of a particular unlisted building in a conservation area may nevertheless have a neutral effect on the character of the area as a whole, where that character has already been eroded by numerous examples of similar works.[72]

In the determination of the application for conservation area consent, the development plan is strictly speaking irrelevant, although it will of course dominate the consideration of any planning application for a replacement building. In practice, of course, development plan policies in this area tend to mirror the statutory test set out above and the policies of central Government considered below.

In addition, the High Court has confirmed that the desirability or otherwise of any replacement building will also be a factor in the determination of any application for conservation area consent (see *Richmond*[73] and *Kent*[74]).

Central Government policy

As with listed buildings, here too Government policy is at least as important as the statutory tests. Particularly relevant is the policy in para.4.27 of PPG15, which provides as follows (emphasis added):

> "*The general presumption should be in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area*. The Secretary of State expects that proposals to demolish such buildings should be assessed against the same broad criteria as proposals to demolish listed buildings (paragraphs 3.16–3.19 above). In less clear-cut cases—for instance, where a building makes little or no such contribution—the local planning authority will need to have full information about what is proposed for the site after demolition. Consent for demolition should not be given unless there are acceptable and detailed plans for any redevelopment. It has been held that the decision-maker is entitled to consider the merits of any proposed development in determining whether consent should be given for the demolition of an unlisted building in a conservation area."

The meaning of the italicised phrase has been considered by the High Court in *Fulford v Secretary of State*[75], in which Mr Stephen Richards, sitting as deputy judge, held as follows:

> "It is evident from these passages that, within the terms of PPG15, it is very important to determine whether a building proposed for demolition makes a positive contribution to the character or appearance of the conservation area. If it does, then there is a general presumption in favour of retaining it, and the exacting standards applicable to listed buildings are triggered. If it does not, then consent can be given to demolition, provided that there are acceptable

[72] *R. (on the application of Waveney DC) v Secretary of State* [2003] J.P.L. 1058.
[73] *Richmond-upon-Thames LBC v Secretary of State* [(1978) 37 P. & C.R. 151.
[74] *Kent CC v Secretary of State* [1995] J.P.L. 610
[75] March 26, 1997, unreported (available on Lawtel).

> and detailed plans for any redevelopment. PPG 15 does not seek to define what is meant by 'a positive contribution' to the character and appearance of the conservation area. Nor, in my judgment, does the expression require further definition. It is for the decision-maker, giving the words their ordinary English meaning, to form a view on whether a building makes a positive contribution or not. The only qualification is that a certain degree of positive contribution appears to be envisaged, namely something more than a 'little': thus the contrast drawn in paragraph 4.27 between, on the one hand, buildings which make 'a positive contribution' and, on the other hand, less clear-cut cases where a building makes ''little or no such contribution.''

The ''exacting standards applicable to listed buildings'' there referred to are those at paras 3.16–3.19 of PPG15; and those in para.3.5 to which they refer. I have already considered those earlier in this paper.

This decision rightly underlines that, just as it is important not to treat all listed buildings as being equally important—there are after all some 500,000 in England alone—unlisted buildings must similarly be assessed. Thus, in principle, any unlisted building is less important than any listed building; and some unlisted buildings will obviously be less important than others.

Paragraph 3.19 then refers to the need for the decision-maker to address:

> ''(i) the condition of the building, the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use; . . .
> (ii) the adequacy of efforts made to retain the building in use. The Secretaries of State would not expect listed building consent to be granted for demolition unless the authority (or where appropriate the Secretary of State himself) is satisfied that real efforts have been made without success to continue the present use or to find compatible alternative uses for the building. This should include the offer of the unrestricted freehold of the building on the open market at a realistic price reflecting the building's condition . . .;
> (iii) the merits of alternative proposals for the site. . . .''

This may at first sight seem to require anyone seeking to demolish any unlisted building in a conservation area to show that there is no market at all for it. That would be listing by the back door.

However, it may be noted that the guidance only requires these points to be ''addressed''. And these points are in any event not absolute tests. So, for example, in addressing the condition of a building, and the cost of repairing it, that is to be done in relation to its importance—which, it has already been pointed out, will inevitably be not great. And the adequacy of efforts to retain the building in use must be judged on the same basis; it would be surprising if it was necessary to try just as hard to maintain an unlisted building as a Grade I listed building.

But it is essential not to lose sight of the fact that some buildings are listed, and some are not; and that statute requires decision makers, in considering proposals affecting an unlisted building in a conservation area, to have regard to their effect on the character of a conservation area as a whole, not on that of each building within it. The policy of the Secretary of State cannot therefore have the effect of upgrading unlisted buildings to become listed in all but name.

Having said all of that, it is in practice not easy to obtain consent for demolition of any but the most unremarkable building in a conservation area.

English Heritage criteria

Notwithstanding all of the above caveats, there is still a need to assess which buildings make a positive contribution to the character of the conservation area in which they stand. It is thus simply not good enough to assert, as did one English Heritage case officer in a case in which I was involved, that ''at the time of designation, this building and its neighbours must have been deemed positive contributors or they would not have been designated''. That is obviously wholly incorrect.

For one thing, as pointed out in the *Fulford* judgment (in the extract quoted above), para.4.27 of PPG15 makes it clear that some buildings in a conservation area make ''a positive contribution'', whereas others make ''little or no such contribution''. And a casual glance around any conservation area makes it abundantly clear that many buildings are included that manifestly do not make a positive contribution to the character of the area.

It is therefore helpful that English Heritage has now provided guidance on the questions to be asked when considering the contribution made by unlisted buildings to the special architectural or historic interest of a conservation area. The checklist, at App.1 to its August 2005 publication *Guidance on Conservation Area Appraisals*, refers to ten questions. That provides a sensible basis for analysis. However, it must be applied bearing in mind the point made above, that not all buildings make a positive contribution. That is, enthusiasts are prone to analyse any building, and explain why it is of great interest and value. But the purpose of that check list—and of any such guidance—is to enable buildings to be assessed and prioritised, not simply to justify all buildings being kept.

Matters to be taken into account: alterations and new buildings

In considering proposals for new development (or alterations to an existing building) in conservation areas, there are the statutory duties, as listed already; in particular, s.72 of the Listed Buildings Act. And it must not be forgotten that a proposal for works affecting a listed building in a conservation area must take into account their effect both on the building itself (and of course on the setting of any other listed building nearby) and on the area in which it stands.[76]

As for the application of s.72 in practice—what, in other words, it means to ''pay special attention to the desirability of preserving or enhancing the character or appearance of an area''—that has of course been the subject of numerous decisions in the courts since *Steinberg*. The approach to be adopted would now seem to be as follows.

First, the duty under s.72 must be the first consideration for the decision-maker—first, that is, after the development plan.[77] Secondly, both the character and the appearance of the area must be considered[78]—but as it is, not as it might be.[79] Thirdly, where development in a conservation area neither enhances the character or appearance of the area nor harms it—where its effect is, in other words, neutral—it may be said to preserve that character or appearance.[80] Fourthly, development that would not affect physical structures may nevertheless affect the character of an area.[81]

[76] See, for example, *Heatherington UK Ltd v Secretary of State* [1995] J.P.L. 228 and *R. v Camden LBC, Ex p. Bellamy* [1991] J.P.L. 255.
[77] *Bath Society v Secretary of State* [1991] 2 P.L.R. 51 at p.64.
[78] *Chorley and James v Secretary of State* [1993] J.P.L. 927.
[79] *Historic Buildings and Monuments Commission v Secretary of State* [1997] J.P.L. 424.
[80] *per* Mann L.J. in *South Lakeland* [1991] 2 P.L.R. 97at 101E.
[81] *Archer and Thompson* v *Secretary of State* [1991] J.P.L. 1027, *Wansdyke DC v Secretary of State* [1992] J.P.L. 1168.

In thus considering the effect of a proposal on the character or appearance of a conservation area, the decision-maker must reach one of three possible conclusions:

(1) the development will either enhance or preserve (that is, in the light of *South Lakeland*, if it will not harm) the character or appearance of the area;
(2) the development will simultaneously enhance the character or appearance of the area and cause some detriment[82] or it may enhance one conservation area and harm another[83]; or
(3) the development will neither enhance nor even preserve the character or appearance of the area.

The first conclusion must be a major point in favour of allowing the development. In the second situation, the detriment identified is a material consideration, and the decision-maker should weigh up the enhancement against the detriment.

If the decision-maker reached the third conclusion, then it is almost inevitable that the development will have some detrimental, or harmful, effect on that character or appearance. Such a conclusion will be a consideration of considerable importance and weight; and in such a situation the presumption in favour of development is rebutted. That does not necessarily mean that the application should be refused; but it should be permitted only if there is some advantage or benefit out-weighing the failure to satisfy the test in s.72 and such detriment as may inevitably follow from that.

The House of Lords in *South Lakeland* summarised it thus:

> "There is no dispute that the intention of [section 72] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest."[84]

That formulation is, unsurprisingly, adopted in PPG15.[85]

The Act also makes it clear that the character and the appearance of a conservation area must each be considered separately—although they may in some cases effectively mean the same thing. This has been in recent years the subject of a number of High Court challenges to decisions of planning authorities and inspectors. Most of these have failed, on the basis that the assessment of the character and appearance of a conservation area is entirely a matter for the decision-taker, as is the effect of a particular proposal on that character and appearance.

See, for example, *Trafford MBC v Secretary of State*[86] (development in rear garden); *Kids Co v Secretary of State*[87] (after-school club in South London); *Swindon BC v Secretary of State*[88] (road-rail interchange minerals adjoining conservation area in Swindon); *Ludlum v Secretary of State*[89] (alterations to stable

[82] As in *Harrow LBC v Secretary of State* [1990] 2 P.L.R. 62.
[83] As in *Wansdyke*.
[84] [1992] 2 A.C. 141 *per* Lord Bridge at 146F.
[85] PPG15, para.4.19; *Planning Guidance (Wales); Planning Policy*, para.126.
[86] [2001] J.P.L. 115.
[87] July 26, 2002, unreported (transcript available from Lawtel), para.33.
[88] April 2, 2003, unreported (transcript available on Lawtel).
[89] January 23, 2004, unreported (transcript available on Lawtel).

block in rural village); and *R. (on the application of University College London) v Secretary of State*[90] (new student accommodation block in Bloomsbury)—which incidentally illustrate well the huge range of circumstances in which conservation area issues can arise. Each of these decisions was specific to its own facts, and in each the Court refused to intervene.

Finally, it has been argued that the application of conservation area policies, and the duty under s.72 of the Act, is a breach of the Human Rights Act 1998 insofar as it restricts private householders from doing what they wish with their own property, such as erecting gates and fences for security purposes. This argument was rejected in *Sabi v Secretary of State*, where a householder living in Hampstead Garden Suburb had erected gates and fences after a spate of burglaries and other incidents; the court held that the protection of the environment—including the preservation of the character of the conservation area—was appropriate and legitimate aim to be pursued in the public interest, and thus not in breach of the 1998 Act.[91]

Other designations

World heritage sites

World heritage sites are "parts of the cultural or natural heritage [that] are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."[92] There are now 27 sites inscribed on the list in the United Kingdom[93]—22 cultural, 4 natural and 1 mixed. And a further 16 sites are on the tentative list, to be considered for inclusion in the future.

Perhaps oddly, in spite of the pre-eminent status accorded to world heritage sites in theory, they do not feature in UK domestic primary legislation at all. And they only occur in secondary legislation in relation to the need to prepare environmental statements. Most sites are protected by other legislation, considered earlier in this paper. But that will not be true in every case; the most recent UK site, Cornwall and West Devon Mining Landscape, recognised this year, is probably almost entirely unprotected.

However, the fact that land is within a world heritage site will clearly be a material consideration in the consideration of planning applications for development affecting it. Thus, in the *Bath Society* case, the Court of Appeal held that:

> "...the special attention which the inspector is bound to give to the provisions of [P(LBCA)A 1990, s. 72 (the duty to pay special attention to the desirability of preserving or enhancing a conservation area)] is of particular importance where the site concerned is of "such universal value that protecting it is the concern of all mankind". This fact ... requires at least that it must be manifest from the terms of the inspector's report that very close consideration has been given to the provisions of this section, and it is insufficient that it is possible to spell out from the terms of the report that the inspector has, in some way, the terms of the section in mind."[94]

[90] [2005] J.P.L. 975.
[91] June 18, 2002 (Forbes J) (leave to appeal refused, October 8, 2002, CA).
[92] Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO, 1972; preamble.
[93] Including Henderson Island, Gough Island and Bermuda ...
[94] *Bath Society v. Secretary of State* [1991] 2 P.L.R. 51 *per* Stocker L.J. at p.66.

But it will be noted that this is stating that the fact that a property is within a world heritage site emphasises the importance of the conservation area duty; it does not introduce a free-standing duty of itself.

And world heritage sites are given enhanced protection under the Hague Convention of 1954—ratified by the UK Government in 2005—which means that in time of armed conflict, they must not be used for military purposes and must not be the subject of any hostile act—even in circumstances that might amount to imperative military necessity. That will no doubt provide great comfort in these troubled times to those in the Palace of Westminster.

Registered gardens

English Heritage was first required to produce a register of historic parks and gardens under the National Heritage Act 1983. Planning applications affecting registered sites must be notified to the Garden History Society;[95] and those affecting sites of Grade I or II* must also be notified to English Heritage.[96]

Otherwise, as with world heritage sites, no statutory protection is afforded. Yet again, however, the existence of such a designation will clearly be a material consideration in the consideration of planning applications; and many local plans include relevant policies requiring special protection to be given.

Proposed reforms

The single register

The Government's proposed reforms, branded the Heritage Protection Review, were trailed in a paper issued by the DCMS in June 2004, and are now expected to be the subject of a white paper expected at the start of 2007.

In the 2004 paper, the central plank of the reforms appeared to be the creation of a single register of all heritage assets. This would replace the present systems of listed buildings, scheduled monuments, registered parks and gardens, and conservation areas. It would allegedly simplify the position in the case of groups of assets, such as occurs at country houses, universities, hospitals and other institutional buildings. And it would avoid a single structure being both listed and scheduled. However, given that almost all significant heritage assets have already been recorded, and that most of them are either listed or scheduled—depending on the nature of the building or object concerned—it is difficult to see that much benefit will be gained. The number of groups of assets is not great; the number of overlapping designations small (and the overlap does not cause great problems in practice anyway).

It is also proposed to merge Grades I and II* into a single grade. That on its own is not particularly controversial, as they have for many years been treated in practice identically—both as to procedural requirements and in terms of policy. The much greater need is to introduce some form of selectivity amongst the 500,000 buildings of Grade II—which surely cannot all be of equal merit. But that would of course be controversial, as it would inevitably involve downgrading half of them. It would in any event be good for the grading system to be statutory.

[95] TCP (Consultation with Garden History Society) Direction 1995; see Circular 9/95.
[96] TCP (General Development Procedure) Order, Art.10(1)(o).

Responsibility for listing in England would be formally transferred to English Heritage; but that is a purely cosmetic change. And the process would, of course, be more open—whilst ensuring that buildings were not demolished pre-emptively.

The extent of listing

The June 2004 paper also indicated that, in order to make the listing decision more transparent and to remove uncertainty, English Heritage will now issue with every listing (from April 2005) a ''summary of importance'', to show the owner of the building in question what is included and why it has been listed.[97] There is the perhaps inevitable caveat that it must be understood that such a summary must not be taken as a definitive list of all the features of interest in a building—as impressions of a building's merit change over the years. It is therefore difficult to see how this new ''summary'' differs significantly from a traditional list description (at least one of the more recent ones).

Perhaps more helpfully, it is suggested that such summaries of importance should be accompanied by a map indicating the extent of designation. This will presumably lessen the scope for the somewhat arid arguments that not infrequently arise as to what is or is not the ''curtilage'' of a listed building—as evidenced by the extensive case law touched on above. The old curtilage rule will presumably still apply to all pre-2004 listings, so the effectiveness of this change will only be gradual. However, it is undoubtedly a step in the right direction—and it is to be hoped that the resulting maps will be available on the web.[98] In the light of the decision of the Court of Appeal that the extent of a scheduled monument is as shown on the map accompanying the entry in the schedule,[99] the courts may take the same line in relation to the new maps; although it would be greatly preferable for the matter to be placed beyond doubt by legislation.

The practical effect of the inclusion in the listing of ancillary structures is anyway limited by the requirement that listed building consent is only needed for works to the ''listed building'' (to include the building in the list and all the ancillary items) where they affect the special character of the listed building as a whole.[1] And, of course, if an ancillary structure has been erected since 1948, it would now only be included within the listing if it was actually (directly or indirectly) ''fixed'' to the principal building. But there is clearly still a need for reform.

Works affecting listed buildings and conservation areas

No major changes are proposed in relation to the control of works to historic buildings; but that is hardly surprising, given that the Review was initiated by the DCMS rather than the ODPM/DCLG. It has been proposed that listed building consent and scheduled monument consent could be merged into a single ''heritage consent''; but that would still need to be obtained in addition to planning permission, so there is no real simplification there.

And the need for conservation area consent might be done away with—which would be sensible, since (post-*Shimizu*) it is not often needed, and the extension of planning permission to cover demolition could be achieved simply by amending the relevant Ministerial direction.

[97] *Review of Heritage Protection: The Way Forward*, DCMS, June 2004.
[98] As with the photographs on the excellent site *www.imagesofengland.org.uk*.
[99] *R. v Bovis Construction Ltd* [1994] Crim. L.R. 938, CA.
[1] P(LBCA)A 1990, s.7.

Conclusion

Overall, the package outlined in 2004 seems to be somewhat pointless. It must also be questioned whether there is much political will to produce the necessary legislation.

Unfortunately, heritage consents were explicitly excluded from the *Householder Development Consents Review*, which reported to DCLG in 2006, on the basis that they were being dealt with by the Heritage Protection Review, although as I have pointed out that actually dealt with the identification of heritage assets rather than the controls over works affecting them.

However, those controls were the subject of a report commissioned by the ODPM from Halcrow and Partners, looking at the overlap of the various consents required in this area.[2] That report suggested merging them into one; which was also supported by the House of Commons ODPM Housing [etc] Committee, in its July 2004 report on *The Role of Historic Buildings in Urban Regeneration*:

> ''Too many consents and permissions are required before a historic building can be altered or adapted. The listing system is important in obliging developers to recognise the value of historic buildings and to adopt a more creative approach. However, the listing system lacks transparency and appears haphazard, and so can delay regeneration schemes.''

I consider this idea in slightly more detail at the close of this paper.

Rumour has it that the Government may now be planning a programme of reform in the White Paper expected in October this year that will be more ambitious than indicated in the 2004 review. So we shall have to wait and see what is actually included; but I am not optimistic.

More radical reform

Definition of protected buildings and monuments

The first stage should be to get away from the idea of listed buildings and scheduled monuments being defined to include a group of structures. Besides the contradictions and complexity inherent in the present system, if the concern is to protect the country house and its setting, then the house should be listed, and the setting of the house given protection through the normal planning regime.

Accordingly, the first step would be to insert, in place of the existing s.1(5) of the Listed Buildings Act, a new definition along the following lines:

> ''(5) In any statute, ''listed building'' means a building included in a list prepared or included by the Secretary of State under this section, and includes:
>
> (a) the building in the list;
> (b) any extension to that building, whether built before or after the date of listing, so as to form part of it; and
> (c) any object, including any plant or machinery, attached to the building at the relevant date so as to constitute a fixture under the normal rules of law.
>
> (6) In subsection (5), the relevant date is the date on which that subsection falls to be applied.''

[2] *Unification of Consent Regimes*, Halcrow & Partners, 2003. See also article at [1998] J.P.L. 101.

That would eliminate the problems about dates of listing, and determination of historic curtilage. It would not altogether solve the problems of fixtures, but it would at least put the matter beyond doubt. And it would deal with the other, non-planning statutes. Perhaps most importantly, it would make the substance of the law accord with what most people probably feel it ought to be.

A similar revision would be needed to the definition of a scheduled monument—if indeed the two systems were not simply unified.

Works requiring planning permission

The second step would be to ensure that the definition of development picks up all works to listed buildings and scheduled monuments, and most works indirectly affecting them, so that their heritage implications can be considered alongside all of the other planning factors. To achieve that, all that would be necessary would be to add to the definition of ''building operations'' in s.55 of the Town and Country Planning Act 1990 two further groups of operations that would constitute ''building operations''.

The first group would be in essence those operations that currently require scheduled monument consent.[3] And the second would be works for:

''(a) the alteration or extension of a listed building in any manner so as to affect its character as a building of special architectural or historic interest,

(b) the demolition of any object or structure in the curtilage of a listed building which, although not fixed to the building, forms part of the land and has done so since before July 1, 1948, or

(c) the alteration or extension of such an object or structure so as to materially affect the setting of the listed building.''

That would ensure that some extra protection, but not full listing, was give to structures now in the curtilage of the building that had actually been listed in its own right.

It would also be necessary to eliminate from the list of operations that do not constitute development (in s.55(2)) the carrying out of internal or other minor works to a listed building or a scheduled monument (para.(a)), and the carrying out of demolition (para.(g)). And criminal liability would have to be imposed for the carrying out of any works to a scheduled monument or the demolition of any listed building (or possibly any building).

Taken together, that would all ensure that planning permission was still required for minor works to buildings listed in their own right, but not to ancillary structures, and would at a stroke simplify the law (at present absurdly complicated) as to the need for consent for demolition.

Once that had been done, the whole of the existing codes relating to listed building and scheduled monument consent could be scrapped without further ado.

Matters to be taken into account

The third step is to consider what duties really should apply to the determination of planning applications. And this is not just a heritage point.

[3] See AMAAA 1979, s.2(2).

I have already outlined above some of the duties that currently do exist, and one or two that do not. If they were all made explicit on the face of the statute, that would be helpful for all concerned. On the other hand, given that such an exercise would inevitably attract the attention of all the lobby groups, it would be necessary for Parliament to consider just what should or should not be included. And that would highlight the need to consider just what is the purpose of the whole exercise. Or is it just to preserve in aspic what we have inherited, so as to pass it on, untouched, to our children?