

STATEMENT A5 – Karen Howe

Dear Committee Members,

Application by We the Curious to construct a moving observational tower (the Bristol Arc) in Millennium Square (20/04474/F and 20/04475/LA)

As a planning solicitor instructed by Arc Global Limited to advise in relation to this application, I have provided advice to the applicant including in relation to the question of the Council's legal position should committee members overturn the officer's recommendation and approve these applications.

Attached to this brief letter is my legal opinion. Can I please draw your attention in particular to two points:

1. Given Bristol City Council officers and Historic England have assessed the harm as less than substantial you must decide if the public benefits outweigh the harm (please see my points 9 & 10);
2. If you agree with the applicant that the benefits do outweigh the harm, your decision will hold. The application cannot be referred to the Secretary of State, nor would that be a reason to allow your decision to be successfully challenged through judicial review (please see my point 15).

Yours faithfully,
Karen Howe
Legal Director
of DAC Beachcroft

Note on Balancing impact on Heritage Assets and Public Benefits

The Approach to Harm

1. Any planning application for development which will affect a listed building or its setting must be assessed in accordance with the requirements of section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990. This requires a local planning authority to have special regard to the desirability of preserving the building or its setting or any feature of special architectural or historic interest which it possesses.
2. A similar duty exists where the proposed development will be within a conservation area where section 72 of the same Act requires that special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
3. The courts have considered these duties many times and have held that the duty to preserve a building or its setting and the duty to preserve the character or appearance of a conservation area are subject to the same tests.
4. The term preserving, used in both section 66 and section 72, has been defined as doing no harm. This does not mean that there are no circumstances where development may be permitted where it is agreed that some harm will be caused. A further guidance on this is given in section 16 of the NPPF and also in the Historic Environment chapter of the Planning Practice Guidance (PPG).

5. Paragraph 193 of the NPPF emphasises that when considering the impact of proposed development on what the PPG calls “heritage assets”, great weight should be given to the conservation (or preservation) of those assets. and the more important an asset (i.e. the higher its listing grade) then the greater the weight that should be attached to its conservation.
6. Paragraph 194 states that any harm to the significance of a designated heritage asset whether from its alteration, destruction or from development within its setting, should require clear and convincing justification.
7. The NPPF identifies two levels of harm: substantial harm and less than substantial harm. The courts have made it clear that there is no spectrum of degree of harm within the less than substantial harm category but, as explained above, the more important a heritage asset is, the greater the weight to be attached to its preservation or the preservation of its setting, irrespective of whether the harm caused is substantial or less than substantial.
8. The NPPF gives separate guidance on the approach that should be taken when determining an application where the harm is assessed as substantial and where it is assessed as less than substantial. In this case, the degree of harm to the setting of listed buildings, including the Grade I Cathedral and Grade II* former Abbey Buildings, the works to the Grade II listed Engine Shed and the effect on the identified Conservation Areas has been assessed as less than substantial.
8. Paragraph 196 of the NPPF applies where the harm is assessed as less than substantial. This requires that in determining the planning application the less than substantial harm must be weighed against the public benefits of the proposal.

Public Benefits

9. The NPPF itself does not define what public benefits are for this purpose. Further guidance is given in the Historic Environment Chapter of the PPG. This refers to anything which delivers the economic, social or environmental objectives of sustainable development described in paragraph 8 of the NPPF. Those objectives are defined in paragraph 8 of the NPPF as follows:-
- (a) Economic - to help build a strong, responsive and competitive economy
 - (b) Social - to support, vibrant and healthy communities
 - (c) Environmental - to contribute to protecting and enhancing the natural, built and historic environment.
10. The PPG makes clear that the public benefits must flow from the development and must be of a nature or scale that would benefit the public at large but these benefits do not always have to be visible or accessible to the public or to all sections of the public to be genuine public benefits.

The Balancing Exercise Between Harm and Public Benefit

11. The courts have held that the duty imposed by section 66, referred to above, is complied with if the harm caused to the listed buildings or their setting or to a conservation area is assessed as being not as significant as the benefits which the proposed development will bring. This is the balancing exercise which paragraph 196 of the NPPF requires is carried out when deciding whether or not planning permission should be granted.

12. Where, as here, the harm has been assessed as less than substantial, it is Committee's duty to consider whether the public benefits of the development would be sufficient to outweigh the less than substantial harm identified. Those public benefits include the economic, educational and socio economic benefits identified in the documents supporting the planning application and to be secured by a planning condition requiring the submission of a Social Innovation and Inclusion Plan to be approved by the local planning authority before the development opens for public use. Only if the Committee considers that those benefits are substantial enough to outweigh the identified less than substantial harm should planning permission be granted.

13. The balancing exercise described above is a matter of planning judgement to be made by the local planning authority, in this case the Development Control Committee. Provided that the Committee considers that the public benefits are of such weight that they would outweigh the presumption against development which causes harm and that balancing exercise has clearly been carried out, then the courts will not intervene to quash the decision because it is a matter of planning judgement for the decision-maker, not for the courts.

The Role of Historic England

14. There was a duty to consult with Historic England on this application because the proposed development had the potential to affect the setting of Grade I and Grade II* listed buildings. However, although its assessment of the effect of the proposed development and the degree of harm caused is important (and in this case it also assessed the harm as less than substantial), the final decision whether planning permission should be granted or refused is one for the Development Control Committee. Provided that the Committee carries out the balancing exercise properly, as described above, it is entitled to reach a different conclusion from both Historic England and to its officers on the weight to be attached to the public benefits and when exercising its planning judgement.

15. The development proposals do not involve works to a grade I or a grade II(*) building nor do they involve any demolition of a grade II building. Therefore, Historic England cannot ask that the application is referred to the Secretary of State (for a full explanation see footnote below). This means that the only way that Historic England could challenge the decision would be the same method by which any other person or group would challenge the decision, namely by judicial review. Provided that the balancing exercise is carried out correctly, then, as explained above, the courts will not interfere with the exercise of that planning judgement.

Karen Howe
DAC Beachcroft LLP
12 April 2021

Footnote to paragraph 15

* PPG Historic Environment Table 5 Paragraph: 069 Reference ID: 18a-069-20190723 sets out the circumstances when an application must be referred to the Secretary of State. Section 13 Planning (Listed Buildings and Conservation Areas) Act 1990 requires applications for listed building consent which a local planning authority intends to grant to be referred to the Secretary of State in accordance with directions he may issue under section 15. Listed building consent is only required where works are to be carried out to a listed building (i.e. works of demolition, alteration or extension see sections 7 and 8 Planning (Listed Buildings

and Conservation Areas) Act 1990).

The current directions issued by the Secretary of State are the Arrangements for handling heritage applications – notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015.

In this case no works are proposed to the Grade I and II* buildings. Historic England was a consultee on the application in respect of the Grade I and II* buildings because the development would affect the setting of grade I and II* buildings (Regulation 5A(1)(a) and 5A(3) of the Planning (Listed Buildings and Conservation Areas) Regulations 1990). Listed building consent is not required for works which affecting the setting of a listed building.

The only works requiring listed building consent are those to the Grade II listed Engine Shed. Article 5 of the Arrangements for handling heritage applications – notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015 removes the requirement to refer applications for listed building consent to the Secretary of State where the works are “excluded works”, as defined by Article 2, even if Historic England has objected. “Excluded works” are any works to Grade II buildings which do not involve demolition. No demolition is proposed in this case. The works to the Engine Shed are therefore excluded works.